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1933

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N.B.—Column No. 1 denotes pages of OTHER JOURNALS.

Column No. 2 denotes corresponding references of ALL INDIA REPORTER.

I. L. R. 14 Lahore=All India Reporter

ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R			ILR	A. I. R.		
1	1932	*L*	468	165	1933	*L*	426	345	1933	*L*	70	507	1933	*L*	321	672	1933	*L*	630
6	,,	,,	534	168	1932	,,	412	353	,,	,,	201	518	,,	,,	759	675	,,	,,	695
11	1933	,,	94	176	,,	,,	385	361	,,	,,	152	526	,,	,,	936	682	,,	*PC*	198
14	,,	,,	12	178	1933	,,	544	365	,,	,,	593	532	,,	,,	577	696	,,	*L*	380
19	1932	,,	620	182	1932	,,	390	369	,,	,,	551	543	,,	,,	356	703	,,	,,	442
22	1933	,,	253	188	1933	,,	417	380	,,	,,	109	553	,,	,,	612	708	1934	,,	228
31	,,	,,	271	194	1932	,,	579	389	,,	,,	492	558	,,	,,	905	712	1933	,,	636
42	,,	,,	11	201	1933	,,	96	396	,,	,,	273	580	,,	,,	341	715	,,	,,	692
46	,,	,,	263	203	1931	,,	705	399	,,	,,	116	584	,,	,,	343	724	,,	,,	477
48	,,	,,	336	206	1933	,,	541	404	,,	,,	466	587	,,	,,	345	730	,,	,,	688
51	,,	,,	317	212	,,	,,	655	409	,,	,,	594	591	,,	,,	352	733	,,	,,	633
55	,,	,,	226	218	,,	,,	179	414	,,	,,	195	596	,,	,,	503	744	,,	,,	638
58	1932	,,	649	230	,,	,,	41	421	,,	,,	481	600	,,	,,	339	749	,,	,,	771
63	,,	,,	471	234	1932	,,	624	426	,,	,,	953	606	,,	,,	326	759	,,	,,	747
68	1933	,,	437	240	1933	,,	558	431	,,	,,	501	609	,,	,,	690	765	,,	,,	669
78	1932	,,	426	243	,,	,,	48	437	,,	,,	646	615	,,	,,	409	770	,,	,,	969
92	,,	,,	480	249	,,	,,	44	442	,,	,,	325	624	,,	,,	725	779	,,	,,	671
95	,,	,,	546	255	,,	,,	284	446	,,	,,	900	630	,,	,,	553	794	,,	,,	784
102	,,	,,	535	267	,,	,,	705	449	,,	,,	331	635	,,	,,	648	800	1934	,,	36
106	,,	,,	531	284	,,	,,	89	453	,,	,,	476	640	,,	,,	676	804	1933	,,	881
111	,,	,,	621	290	,,	,,	716	457	,,	,,	687	646	,,	,,	793	807	,,	,,	774
117	,,	,,	643	302	,,	,,	721	461	,,	,,	435	651	,,	,,	640	810	,,	,,	774
134	,,	,,	575	306	,,	,,	712	466	,,	*PC*	178	656	,,	,,	681	814	,,	,,	819
137	1933	,,	61	312	,,	,,	593	473	,,	*L*	601	659	,,	,,	755	820	,,	,,	852
152	,,	,,	547	315	,,	,,	197	485	,,	,,	365	664	1934	,,	84	827	,,	,,	833
156	1932	,,	513	325	,,	,,	102	496	,,	,,	428	668	1933	,,	806				
162	,,	,,	420	330	,,	,,	203												

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PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.		
1	1933	*L*	351	88	1933	*L*	169	171	1939	*L*	329	235	1933	*L*	712	311	1932	*L*	649
2	,,	*Notes*	*5e*	92	1932	,,	582	173	,,	,,	513	239	,,	,,	91	313	1933	,,	274
5	,,	*L*	712	96	1933	,,	581	175	,,	*PC*	28	242	,,	,,	195	319	,,	,,	488
8	,,	,,	324	99	,,	,,	328	176	,,	*L*	307	245	,,	,,	151	324	,,	,,	428
9	,,	,,	154	100	,,	,,	306	177	,,	,,	214	247	,,	*Notes*	10*b*	330	,,	,,	664
11	,,	,,	356	101	,,	,,	481	179	,,	,,	341	249	,,	*L*	448	331	,,	,,	379
17	,,	,,	220	104	,,	,,	83	181	,,	,,	323	252	,,	,,	47	332	*Too old*		
19	,,	,,	66	105	,,	,,	189	183	,,	,,	628	254	,,	,,	223	333	1934	*L*	232
24	,,	,,	80	110	,,	,,	337	185	,,	,,	333	255	,,	,,	434	335	1933	*PC*	68
28	,,	,,	95	113	,,	,,	343	187	,,	,,	217	258	,,	,,	443	338	,,	*L*	239
31	,,	,,	65	115	,,	,,	412	189	,,	,,	269	259	,,	,,	167	340	,,	,,	746
32	1932	,,	613	123	,,	,,	605	190	,,	,,	472	261	,,	,,	680	342	,,	,,	339
34	1933	,,	139	125	,,	,,	117	192	,,	,,	178	262	,,	,,	509	345	,,	,,	289
37	,,	,,	84	126	,,	*Notes*	6*b*	194	,,	,,	574	266	,,	,,	453	346	,,	*Notes*	6*e*
39	,,	,,	77	127	,,	*L*	211	196	,,	,,	551	270	,,	,,	135	349	,,	*L*	232
41	,,	,,	192	129	,,	,,	466	199	,,	,,	332	273	,,	,,	226	351	,,	,,	473
43	,,	,,	113	132	,,	,,	89	201	,,	,,	368	274	,,	,,	598	354	1932	,,	655
46	,,	,,	384	135	,,	,,	187	205	,,	,,	550	276	,,	,,	481	356	1933	,,	347
51	,,	,,	73	137	,,	,,	187	207	,,	,,	585	277	,,	,,	492	360	,,	,,	500
55	1932	*PC*	228	140	,,	,,	487	212	1932	,,	21	281	,,	,,	263	363	,,	,,	537
63	,,	,,	235	142	,,	,,	94	214	,,	,,	280	282	,,	,,	532	365	,,	,,	143
68	1933	*L*	311	143	,,	,,	76	215	1933	,,	423	283	1934	,,	77	368	,,	,,	409
69	,,	,,	330	145	,,	,,	548	218	,,	,,	317	285	1932	,,	621	373	,,	,,	261
70	,,	,,	99	148	,,	,,	166	219	,,	,,	124	289	1933	,,	317	376	1932	,,	534
73	,,	,,	365	149	,,	,,	179	221	,,	,,	152	291	,,	,,	116	378	1933	,,	547
79	1932	,,	648	156	,,	,,	109	223	,,	,,	158	293	,,	,,	588	381	,,	,,	12
81	1933	,,	27	161	,,	,,	388	225	,,	,,	218	294	,,	,,	496	384	,,	,,	479
82	,,	,,	119	162	,,	,,	134	227	,,	,,	213	297	,,	,,	458	388	,,	,,	437
84	,,	,,	208	163	,,	,,	105	229	,,	,,	130	301	,,	,,	505	393	,,	,,	426
86	,,	,,	191	166	,,	,,	68	230	,,	,,	612	304	,,	,,	451	394	,,	,,	417
87	,,	,,	221	168	,,	,,	593	288	,,	,,	210	306	,,	,,	253	397	,,	,,	588

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PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.		
399	1933	*L*	125	540	1933	*L*	558	694	1933	*L*	308	854	1933	*L*	403	968	1933	*L*	497
400	"	"	476	541	"	"	498	699	"	"	313	856	"	"	307	969	1934	"	102
402	"	"	599	544	"	"	402	702	"	"	311	857	"	"	268	970	1933	*Notes*	5*b*
403	"	"	140	546	"	"	41	704	"	"	358	858	"	"	406	972	"	*L*	501
405	1932	"	488	549	"	"	484	712	"	"	515	859	"	"	352	975	"	"	203
409	1933	"	468	550	1931	"	706	714	"	"	262	862	"	"	345	983	"	"	150
412	"	"	599	552	1933	*Notes*	8*b*	717	"	"	442	864	"	"	1000	986	"	"	813
414	"	"	229	554	"	*L*	541	719	"	"	561	866	1934	"	23	987	"	"	725
417	"	"	271	557	1934	"	231	734	"	"	793	868	1933	"	905	988	"	"	102
421	"	"	321	560	1933	"	284	736	"	"	892	880	"	"	763	991	"	"	812
427	"	"	623	567*a*	"	"	765	739	"	"	350	883	"	"	235	993	"	"	851
429	"	"	394	567*b*	"	"	465	741	"	"	648	884	"	"	577	994	"	"	714
430	"	"	509	570	"	"	197	743	"	"	555	886	"	"	144	997	"	"	508
432	"	*Notes*	12*c*	576	"	"	148	746	"	"	461	887	"	"	806	998	"	"	859
433	1932	*L*	615	577	"	"	385	749	"	"	425	889	"	"	126	999	"	"	795
435	1933	"	610	579	"	"	790	753	"	"	553	890	"	"	596	1000	"	"	899
436	"	"	354	580	1932	"	599	756	"	"	419	891	"	"	640	1003	"	"	819
439	"	"	326	583	1933	"	363	758	"	"	455	893	"	"	255	1007	"	"	752
440	"	"	335	584	"	"	648	761	"	"	900	895	"	"	42	1008	"	"	756
442	"	"	545	587	"	"	836	763	"	"	342	896	"	"	513	1010	"	"	871
443	"	"	449	588	"	"	529	765	"	"	331	899	"	"	165	1018	"	"	776
445	1932	"	584	591	"	"	136	767	"	"	676	900	"	"	882	1020	"	"	884
448	1933	"	356	592	"	"	657	771	"	"	940	902	"	"	373	1022	"	"	591
449	1932	"	367	593	1932	"	592	772	"	"	780	903	"	"	147	1025	"	"	796
452	1933	"	225	598	1933	"	270	775	"	"	702	905	"	"	542	1027	1934	"	56
454	"	"	732	601	"	"	695	778	"	"	765	906	"	"	433	1029	1933	"	697
455	1931	*I C*	1	605	"	"	913	780	"	"	589	908	"	"	120	1030	"	"	784
462	1932	*L*	623	608	"	"	749	781	"	"	259	910	"	"	115	1032	"	"	651
464	1933	"	688	612	"	"	716	783	"	"	761	911	"	"	114	1033	"	"	194
468	"	"	10	618	"	"	705	786	"	"	880	912	"	"	596	1035	"	"	654
469	"	"	534	627	"	"	792	787	1934	"	178	914	"	"	620	1037	"	"	193
470	"	"	456	629	"	"	757	788*a*	1933	"	790	917	"	*Notes*	11*d*	1039	"	"	102
477	"	"	416	633	"	"	630	788*b*	"	"	885	919	"	"	711	1042	"	"	106
480	1934	"	228	634	"	"	611	798	"	"	1002	921	"	"	924	1043	1934	"	46
482	1933	"	745	636	"	"	935	801	"	"	927	923	"	"	287	1044	1933	"	123
486	"	"	280	637	"	"	516	802	"	*Notes*	9*b*	925	"	"	279	1046	"	"	129
487	"	"	636	639	"	"	946	804	"	*L*	133	929	"	"	945	1049	"	"	184
489	"	"	647	642	"	"	738	805	"	"	943	931	"	"	735	1051	"	"	126
496	"	"	415	645	*Too old*			809	"	"	936	933	"	"	883	1052	"	"	148
497	"	"	540	647	1933	*L*	691	810	"	"	273	935	"	"	869	1053	"	"	183
498	"	"	512	651	"	"	692	812	"	"	953	937	"	"	681	1055	"	"	174
501	"	"	240	656	"	"	770	815	"	"	687	938	"	"	455	1057	"	"	954
502	"	"	503	657	"	"	782	817	"	"	646	942	"	"	755	1059	"	"	763
505	"	"	176	658	"	"	851	820	"	"	601	944	1934	"	84	1061	"	"	737
508	1932	"	652	660	"	"	838	826	"	"	774	946	1933	"	600	1063	"	"	789
511	1933	"	880	663	"	"	121	827	"	"	642	950*a*	1934	"	88	1065	1934	"	113
514	"	"	241	665	"	"	201	831	"	"	842	950*b*	1933	"	808	1066	1933	"	638
516	"	"	256	668	"	"	128	832	"	"	1002	953	"	"	734	1068	"	"	925
518	"	"	284	669	"	"	197	833	"	*Notes*	7*c*	955	"	"	804	1071	"	"	727
520	"	"	463	671	"	*Notes*	12*a*	836	"	"	12*a*	956	"	*Notes*	11*a*	1072	"	"	959
523	"	"	397	672	"	*L*	852	839	"	*L*	427	960	"	*L*	634	1073	"	"	961
527	1932	"	643	676	"	"	891	840	"	"	658	961	"	"	733	1076	"	"	477
528	1933	"	594	677	"	"	501	841	"	"	491	963	"	"	797	1079	"	"	633
531	"	"	171	680	"	"	373	844	"	"	682	964	"	"	777	1082	"	"	747
532	"	"	374	682	"	"	319	849	"	"	680	965	"	"	869	1085	"	"	615
535	"	"	56	685	"	"	3	851	"	"	889	966*a*	"	"	783	1090	"	*PC*	198
536	"	"	607	689	"	"	809	852	"	"	597	966*b*	"	"	922	1096	"	*L*	759
539	"	"	103	691	"	"	205	853	"	"	685	967	"	"	1018				

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CrLJ	A. I. R.			CrLJ	A. I. R.			CrLJ	A. I. R.			CrLJ	A. I. R.			CrLJ	A. I. R.		
1	1932	*P*	293	18*b*	1932	*A*	189	33	1932	*B*	551	56	1932	*C*	786	81	1932	*P*	335
8*a*	"	*R*	154	21	"	*C*	112	36	1933	*C*	36	58	"	*O*	298	82	"	*L*	349
8*b*	"	*P*	300	22	1933	*A*	95	39*a*	"	*L*	39	66	"	*N*	173	83	"	*P*	302
9	1933	*S*	8	23	"	*C*	6	39*b*	1932	*C*	545	67	"	*S*	211	87	"	*L*	613
10	1932	*P*	334	24	1932	*S*	59	42	"	*A*	670	70	"	*N*	133	88	1933	*M*	245
11	"	*S*	175	25	"	*L*	115	44	1933	*O*	37	72	"	*L*	578	89	1932	*L*	440
12	1933	*M*	98	26	1933	*M*	148	45	"	*L*	35	73	"	*B*	553	90	1933	*M*	123
14	1932	*S*	157	31	1932	*N*	172	46	"	*O*	21	77	1933	*L*	88	92	"	"	125
16	1933	*M*	99	32*a*	1933	*M*	104	47	1932	*B*	596	78	1932	*C*	760	94	1932	*L*	438
18*a*	1932	*PC*	234	32*b*	1932	*N*	85	51	"	*S*	169	80	"	*L*	554	96*a*	1933	*M*	147

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CrLJ	A. I. R.			CrLJ	A. I. R.			CrLJ	A. I. R.			CrLJ	A. I. R.			CrLJ	A. I. R.		
96*b*	1933	*L*	37	252	1933	*L*	234	402	1933	*L*	512	564	1933	*B*	158	701	1933	*A*	355
99	1932	*O*	279	253	1932	*O*	308	407	"	*P*	179	568	"	*O*	305	703	"	"	40
100	"	*A*	500	256	1933	*S*	158	408	"	*N*	68	572	"	*P*	193	704	"	"	286
101	1933	*O*	53	259	1932	*P*	185	410	"	*P*	179	574	"	*A*	356	705	"	*N*	277
105	1932	*A*	674	262	1933	*R*	4	414	"	*A*	264	576	"	*P*	94	711	"	*L*	434
107*a*	"	*C*	867	263	1932	*P*	276	419	"	*P*	26	578	"	*L*	659	712	"	"	311
107*b*	1933	*A*	178	266	1933	*Pesh*	9	420	"	*S*	44	579	"	*C*	401	714	"	"	308
108	1932	*C*	866	269	1932	*P*	315	421	"	*P*	96	581	1934	*L*	247	717	"	*P*	185
109	"	*A*	442	271	"	*Notes*	19*b*	425	1932	*A*	681	582	1933	*M*	372	718	"	*L*	323
111	"	*C*	867	273	1933	*M*	338	427	1933	*P*	100	584	"	*L*	605	720	"	"	365
112*a*	"	*A*	582	275	"	*P*	40	430	"	*C*	190	586	"	*M*	434	721	"	*N*	199
112*b*	"	*R*	180	277	"	*M*	337	432	"	*A*	94	587	"	*L*	233	723	"	*L*	809
115	"	*P*	306	278	"	"	247	433*a*	1932	"	504	590	"	*C*	406	724	"	"	313
117	1933	*M*	251	283	"	*C*	65	433*b*	"	*C*	609	591	"	*S*	49	726*a*	"	*P*	144
118	"	*P*	38	284	"	*M*	278	439	"	*A*	449	595	"	*O*	263	726*b*	"	*O*	118
119	1932	*N*	86	285	"	"	461	441	1933	"	128	598	"	*L*	388	728	"	*P*	194
121	"	*R*	190	286	"	*R*	57	443	"	*L*	131	603	"	*C*	456	729	"	*O*	56
123	1933	*N*	3	290	"	*C*	144	445	"	*A*	80	604*a*	"	*L*	148	731	"	*P*	273
124	"	*O*	86	291*a*	"	*M*	372	447	"	*R*	23	604*b*	"	*C*	447	732	"	*O*	276
127	"	*N*	4	291*b*	"	*C*	280	448	"	*A*	114	606	"	*L*	667	735	"	*L*	561
129	1932	*S*	149	294	"	"	135	449	"	"	96	608	"	*C*	404	744	"	*O*	119
135	1933	*B*	24	297	1932	*P*	175	450	1933	*Notes*	15*b*	609	"	*O*	123	747	"	*R*	95
137*a*	"	*M*	15	299	1933	*C*	131	452	1933		85	611	"	*C*	354	748	"	*O*	279
137*b*	"	*B*	79	303	"	*P*	50	455	1932	*A*	692	614	"	*O*	281	749	"	*S*	191
139	1932	*S*	214	305*a*	"	*C*	139	457	1933	"	47	616	"	*L*	145	750	"	*A*	370
140	1933	*B*	21	305*b*	"	*S*	37	458	1932	*L*	615	618	"	*S*	87	751	"	*S*	193
141	1932	*B*	636	308	"	*C*	142	459	1933	*A*	115	619	"	*C*	458	754	"	*A*	394
142	"	"	637	309	"	"	140	460	"	*L*	162	620	"	*A*	465	760	"	*S*	138
143	1933	*S*	9	310	"	"	141	462	1932	"	606	622	"	*C*	5	761	"	*A*	399
145	"	*N*	3	311	1932	*N*	174	464	1933	"	448	623	"	*A*	513	763	"	*S*	136
147	1932	*S*	201	314	1933	*L*	500	466	"	*R*	34	628	"	*C*	192	765	"	*A*	401
154	"	*N*	153	316	"	*C*	278	467	"	*Notes*	12*c*	630	"	*L*	385	767	"	*S*	225
155	"	*A*	446	318	"	*L*	232	468	"	*R*	29	631	"	*C*	145	768	"	"	142
158	1933	*R*	1	320	"	*C*	334	469	"	*L*	321	632	"	*L*	128	770	"	*P*	152
160	"	*O*	58	322	"	*PC*	194	473	1932	"	99	633	"	*C*	124	771	"	*B*	148
161	1932	*S*	165	334	"	*C*	348	476	1933	*P*	112	637	"	*L*	231	776	"	*L*	435
162	1933	*B*	58	340	"	*N*	192	478	1932	*L*	101	638	"	*C*	146	778	"	*O*	196
163	1932	*S*	180	341	"	*C*	362	480	"	*A*	683	640*a*	"	*L*	148	779	"	*L*	393
164	1933	*C*	47	342	"	*L*	409	481	1933	*M*	223	640*b*	"	*C*	433	781	"	*R*	119
166	1932	*S*	166	345	"	*C*	186	489	"	*A*	31	641	"	*A*	438	782	"	*L*	235
167	1933	*C*	8	346	1932	*P*	155	496	"	*O*	163	643	"	*P*	189	783	"	*R*	142
171	1932	*S*	177	347	1933	*C*	109	498*a*	"	*C*	258	647	"	*A*	593	785	"	*O*	215
173	1933	*C*	11	349	"	*P*	149	498*b*	"	*O*	148	649*a*	"	*O*	117	791	"	*R*	144
174	"	*L*	513	354	"	*S*	43	503	"	*C*	402	649*b*	"	*N*	179	793	"	*O*	195
175	"	*M*	367	355	1932	*P*	344	505	"	*N*	136	652	"	*R*	116	794	"	*R*	117
177	1932	*C*	723	356	1933	*S*	49	517	"	*A*	112	653	"	*O*	192	795	"	*O*	181
180	1933	*Notes*	8*b*	357	1932	*B*	545	518	"	*C*	332	660	"	*B*	144	797	"	*N*	226
181	1932	*C*	871	362	1933	*S*	93	519	"	*N*	78	661	"	*O*	257	800	"	*M*	413
187	"	*R*	193	363	"	*C*	219	521	"	*C*	311	662	"	*C*	108	802	"	*S*	139
188	"	*A*	583	364	"	*S*	88	524*a*	"	*M*	279	665	"	*S*	403	804	"	*Pesh*	38
189	"	*R*	192	366	"	"	97	524*b*	"	*C*	94	668	"	*C*	242	808	"	*S*	166
190	1933	*L*	166	367	"	"	91	526*a*	"	*M*	270	670	"	*Pesh*	19	810	"	*C*	424
191	"	*S*	161	369*a*	"	*L*	394	526*b*	"	*C*	481	671	"	*C*	210	812	"	"	515
195	"	*C*	3	369*b*	"	*C*	177	528	"	*M*	268	673	"	*N*	327	813	"	*P*	276
197	1932	*O*	287	371	"	*L*	433	530	"	*C*	308	675	"	*C*	148	814	"	*C*	361
199	1933	*B*	1	372	"	"	623	532	"	"	318	676*a*	"	*M*	502	815	"	*R*	138
212	"	*Pesh*	3	373	"	*O*	63	533*a*	"	*L*	515	676*b*	"	*C*	149	819	"	*S*	165
215	"	*P*	91	375	"	*L*	279	533*b*	"	*C*	426	677	"	*M*	306	821	"	*N*	100
216	1932	*S*	145	377*a*	"	*Notes*	6*b*	535	1932	*L*	3	679*a*	"	*C*	150	823	"	*M*	309
220	1933	*O*	45	377*b*	"	*O*	62	538	1933	*O*	340	679*b*	"	*L*	159	825	"	*C*	469
224*a*	"	*N*	883	379	1932	*L*	493	545*a*	"	*M*	461	682	"	*C*	563	828	"	*P*	481
225	"	*B*	68	382	1933	*O*	49	545*b*	"	*O*	85	683	"	*L*	516	832	"	*R*	89
227	1932	*Notes*	5*b*	383	"	*L*	93	547	"	"	50	684*a*	"	*C*	117	833	"	*C*	606
231	1933	*B*	65	384	"	*Pesh*	27	548	1932	*S*	210	684*b*	"	"	551	835	"	*R*	134
237	"	*P*	87	385	"	*O*	162	549	1933	*C*	347	687	"	*A*	318	837	"	*C*	598
238	"	*O*	122	386	"	*Pesh*	29	550	"	*PC*	7	688	"	*C*	353	838	"	*O*	99
239	"	*B*	59	387	"	*O*	41	554	"	*C*	433	689	"	*A*	314	841	"	*C*	509
243	"	*O*	69	391	"	*P*	187	555	"	*B*	105	693	"	*C*	243	843*a*	"	*L*	481
245	1932	*C*	758	393	"	*O*	19	558	"	*R*	73	695	"	*R*	98	843*b*	"	*PC*	208
250*a*	1933	*O*	51	395	"	*P*	180	559	"	*B*	102	699	"	"	61	846	"	*P*	495
250*b*	"	*C*	117	398	"	*N*	808	564	"	*S*	47	700	"	"	68	847	"	*A*	135

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848	1933	*S*	220	932	1933	*P*	295	1046	1933	*S*	171	1140	1933	*P*	499	1185	1933	*R*	271
852	,,	*O*	251	934*a*	,,	*O*	253	1048	,,	*A*	283	1141	,,	*N*	249	1187	,,	*C*	644
854	,,	*A*	617	934*b*	,,	*N*	216	1049	,,	*S*	169	1144	,,	*S*	307	1189	,,	,,	333
858	,,	*O*	254	935	,,	*O*	226	1050	,,	*A*	640	1145	,,	*P*	116	1191	,,	*A*	486
859	,,	*A*	609	938	,,	*P*	273	1051	,,	*L*	315	1146	,,	*O*	269	1192	,,	*C*	724
861	,,	*S*	205	940	,,	,,	617	1053	,,	*A*	612	1147	,,	*S*	174	1194	,,	,,	752
863	,,	*A*	354	942	,,	,,	297	1055	,,	*O*	436	1149	,,	*O*	374	1195	,,	*R*	165
865*a*	,,	*B*	229	947*a*	1934	*M*	202	1056	,,	*A*	525	1151	,,	*S*	134	1196	,,	*Notes*	7*b*
865*b*	,,	*C*	185	947*b*	1933	*P*	305	1059	,,	*C*	532	1152	,,	*O*	381	1197	,,	*R*	215
867	,,	*L*	814	948*a*	,,	*M*	230	1052	,,	*A*	614	1153	,,	*L*	147	1198	,,	*P*	242
868	,,	*C*	184	948*b*	,,	*P*	440	1063	,,	*C*	552	1154	,,	*O*	391	1201	,,	*A*	482
869	,,	*A*	433	950*a*	,,	*M*	688	1064	,,	*A*	565	1156	,,	*L*	596	1203	,,	*P*	494
870	,,	*B*	266	950*b*	,,	*R*	164	1068	,,	*C*	553	1157	,,	*S*	299	1205	,,	*A*	495
875	,,	*A*	410	951	,,	*M*	688	1069	,,	*A*	160	1158*a*	,,	*L*	42	1207	,,	*L*	660
878	,,	*B*	233	952*a*	,,	*L*	678	1070	,,	*C*	776	1158*b*	,,	*M*	416	1208	,,	*A*	543
879	,,	*C*	516	952*b*	,,	*A*	210	1071	,,	*P*	147	1159*a*	,,	*L*	126	1210	,,	*L*	865
882	,,	*A*	213	954	,,	*L*	575	1072	,,	*C*	639	1159*b*	,,	*M*	791	1211	,,	*A*	759
883	,,	*M*	503	956	,,	*A*	211	1073	,,	,,	603	1160	,,	*L*	144	1213	,,	*L*	511
884	,,	*S*	196	957	,,	*L*	596	1075	,,	*P*	431	1161*a*	,,	*C*	606	1215	,,	*A*	665
886	,,	*PC*	218	958	,,	*C*	582	1077	,,	*C*	614	1161*b*	,,	*L*	165	1216	,,	*P*	555
890	,,	*P*	493	963	1934	*S*	52	1078	,,	,,	656	1162	1934	*N*	35	1217	,,	*A*	657
891	,,	*S*	254	965	1933	*C*	472	1080	,,	*M*	765	1163*a*	1933	*L*	235	1119	,,	*C*	676
892	,,	*P*	488	967	,,	*A*	690	1081	,,	*C*	619	1163*b*	,,	*N*	295	1222	,,	,,	747
896	,,	*B*	230	1009	,,	*O*	265	1083	,,	*R*	214	1164	,,	*L*	513	1227	,,	*A*	626
900*a*	,,	*L*	914	1013	,,	*A*	232	1084	,,	*C*	640	1166	,,	*N*	315	1228	,,	*C*	732
900*b*	,,	*B*	307	1014	,,	*O*	179	1085	,,	*R*	258	1167	,,	*L*	497	1230	,,	,,	752
902	,,	*L*	559	1015	,,	*C*	599	1087	,,	*C*	885	1168	,,	*N*	307	1231	,,	,,	722
905	,,	*B*	234	1016	,,	*Notes*	6*d*	1092	,,	,,	880	1170	,,	*L*	227	1232	,,	*A*	574
909	,,	*L*	123	1017	,,	*P*	160	1093	,,	*O*	351	1171	,,	,,	387	1234	,,	,,	528
911	,,	,,	927	1018	,,	*A*	461	1095	,,	*C*	754	1172	,,	*N*	269	1239	,,	*B*	417
912	,,	*P*	513	1020	,,	*P*	183	1098	,,	,,	638	1173	,,	*L*	664	1244	,,	*A*	554
914	,,	*O*	362	1023	,,	*C*	537	1099	,,	*A*	819	1174	,,	,,	807	1245	,,	*R*	278
915	,,	*P*	554	1024	,,	*Notes*	7*d*	1100	,,	*C*	870	1175*a*	,,	*N*	368	1248	,,	,,	273
916	,,	*C*	495	1025*a*	,,	*P*	597	1105	,,	*A*	281	1175*b*	,,	*L*	167	1251	,,	*L*	718
917	1934	*P*	133	1025*b*	,,	*L*	716	1107	,,	*C*	194	1177	,,	,,	392	1253*a*	,,	*R*	74
918	1933	*C*	665	1029	,,	*A*	820	1109	,,	*M*	798	1178	,,	,,	387	1253*b*	,,	*L*	228
922	,,	*R*	114	1030	,,	,,	669	1115	,,	*A*	678	1179	,,	*R*	325	1255	,,	*R*	199
923	,,	*Notes*	5*f*	1035	,,	*N*	201	1128*a*	,,	*L*	597	1180	,,	,,	343	1256	,,	*L*	314
925*a*	,,	*P*	585	1036	,,	*A*	660	1128*b*	,,	*A*	482	1181	,,	*L*	433	1257	,,	*B*	412
925*b*	,,	*C*	695	1038	,,	*N*	33	1129	,,	*L*	838	1182	,,	*R*	270	1258	,,	*Notes*	11*a*
926	,,	*A*	434	1040	,,	*R*	70												
929	,,	*R*	116	1044	,,	*S*	173	1131	,,	*P*	571	1183	,,	*M*	434	1260	,,	*N*	177
930	,,	*A*	437	1045	,,	*M*	728	1138	,,	*Pesh*	88	1184	,,	*R*	193	1263	,,	,,	248

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1	1933	*PC*	20	58	1933	*N*	29	115	1933	*N*	3	157	1933	*P*	6	209	1933	*PC*	29
9	,,	,,	1	61	1932	*P*	323	116	,,	*A*	178	167	,,	*M*	263	214	1932	*C*	828
15	,,	*A*	113	62	1933	*L*	113	118	1932	,,	678	168	1932	*L*	648	215	,,	*S*	149
17	,,	*B*	15	64	,,	,,	44	120	1933	*M*	320	169*a*	1933	*M*	251	221	1933	*Pesh*	13
23	,,	*Pesh*	16	66	,,	,,	37	121	1932	*A*	609	169*b*	,,	*L*	27	223	,,	*P*	43
25	,,	*A*	298	68	,,	,,	95	122	1933	*M*	158	170	,,	*N*	62	225	,,	*C*	204
27	,,	*O*	4	70	,,	*M*	61	127	1932	*A*	580	174	,,	*M*	251	231	,,	*N*	23
29	,,	*M*	101	72	,,	*L*	139	128	,,	,,	468	175*a*	,,	*L*	208	234	,,	*L*	105
31	1932	*A*	582	73	,,	*N*	16	129	,,	,,	403	175*b*	,,	*M*	276	236	1932	*N*	180
32	1933	*C*	128	80	,,	*M*	430	130	1933	*P*	31	177*a*	,,	*L*	191	239	,,	*Notes*	5*c*
33	1932	*L*	613	81	,,	*R*	1	131	1932	*A*	446	177*b*	,,	*M*	129	241	,,	*M*	779
34	1933	*N*	13	83	,,	*Pesh*	18	133	1933	*P*	35	179*a*	1932	*S*	214	246	1933	*O*	70
36	,,	*L*	242	87	,,	*A*	291	135	,,	*C*	238	179*b*	1933	*L*	119	248	,,	*C*	178
37	1932	*P*	349	89	1932	*R*	190	136	,,	*M*	300	181	,,	*M*	259	251	,,	*O*	58
40	,,	*L*	438	91*a*	,,	*A*	383	141	1932	*A*	413	182	1932	*N*	162	252	,,	*L*	75
42	1933	*N*	22	91*b*	1933	,,	21	142	,,	,,	416	183	1933	*O*	1	253	1932	*C*	821
43	1932	*L*	440	199	,,	*C*	233	144	,,	*N*	154	186	,,	*L*	605	256	,,	*R*	193
44	1933	*N*	12	101	,,	*M*	185	146*a*	,,	*A*	382	187	,,	,,	117	257	,,	*C*	823
45	1932	*L*	641	103	,,	*B*	26	146*b*	,,	,,	674	188	,,	,,	169	259	,,	*R*	192
47	1933	,,	192	110	1932	*A*	701	148	1933	*M*	257	190	1932	,,	652	260	1933	*L*	187
48	,,	*N*	39	112	,,	,,	560	150	1932	*N*	163	192	1933	*O*	86	261	,,	*O*	67
50	1932	*C*	889	113	,,	,,	450	152	1933	*A*	372	196	,,	*L*	70	262	,,	*N*	49
54	1933	*M*	166	114*a*	1933	*C*	239	154	,,	*P*	38	199	1932	*O*	327	263	,,	*L*	166
56	1932	*C*	894	114*b*	1932	*A*	375	156	1932	*N*	137	207	,,	*C*	825	264	,,	,,	179

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268	1933 *Pesh* 1	387	1932 *B* 617	500	1933 *L* 68	620	1932 *L* 643	751	1933 *O* 50
270	,, *L* 187	389*a*	1933 *L* 158	501	,, *O* 107	621	,, *A* 597	752	1932 *M* 410
273	,, *N* 36	389*b*	1932 *B* 622	509*a*	,, *PC* 88	622	,, *C* 723	756	1933 *PC* 43
275	1932 *R* 189	392*a*	1933 *L* 130	509*b*	1932 *B* 522	625	1933 *A* 82	759	1932 *O* 326
276	1933 *M* 65	392*b*	1932 *S* 201	511	,, *O* 287	627	,, *C* 24	760	1933 *PC* 52
277*a*	1932 *R* 192	399	1933 *L* 218	513	1933 *L* 134	628	1932 *S* 145	762	,, *P* 78
277*b*	1933 *N* 127	400	,, ,, 135	514	1932 *PC* 279	632	1933 *M* 176	766	,, *O* 79
280	,, *S* 9	402	1932 *B* 634	518	1933 ,, 26	634	,, *L* 397	767	,, *P* 159
283	1932 *Notes* 19*a*	404	1933 *L* 91	520*b*	,, ,, 33	636	1932 *C* 871	768	,, *S* 93
284	1933 *S* 27	406	1932 *B* 619	523	,, *L* 189	641	,, *A* 483	775	,, *P* 70
287	,, *M* 114	409	1933 *L* 712	526	,, *PC* 39	643	1933 *Pesh* 33	780	,, *B* 65
290	,, *S* 29	411	1932 *B* 638	529	1932 *S* 165	645	1932 *A* 573	786	1932 *Notes* 5*b*
293	,, *M* 260	415	1933 *L* 284	530	,, ,, 177	647	1933 *C* 3	790	1933 *B* 63
296	,, *O* 18	420	1932 *M* 603	533*a*	1933 *M* 178	649	,, *L* 256	792	,, *P* 65
297	,, *P* 89	421	1933 *L* 210	533*b*	1932 *S* 166	650	1932 *A* 476	794	,, *B* 59
298	,, *O* 80	423	,, *P* 60	535	1933 *L* 481	652	1933 *N* 44	798	,, *O* 116
299	,, *S* 26	424	,, *L* 116	537	1932 *S* 180	653	1932 *A* 478	799	,, *M* 305
301	,, *L* 89	425	,, ,, 47	538	1933 *M* 173	655	1933 *L* 384	800	1932 *A* 252
303	1932 *C* 629	427	,, ,, 223	539	,, ,, 367	656	,, *N* 383	805	,, *O* 122
305	,, ,, 641	428	,, *O* 40	541	,, *Pesh* 35	657	1932 *B* 580	806	1933 *B* 42
306	,, ,, 632	429	,, *M* 28	543*b*	,, *L* 513	659	1933 *L* 234	809	,, *M* 299
307	1933 *M* 279	434	,, *L* 588	544	1932 *C* 791	660	1932 *M* 705	810	,, *P* 87
317	1932 *C* 638	435	,, ,, 109	567	1933 *L* 465	664	,, *B* 566	811	,, *B* 25
320	,, ,, 634	438	1932 *N* 158	569	,, ,, 240	667*a*	1933 *L* 240	813*a*	,, *N* 102
324	1933 *M* 108	440	1933 *L* 197	570*a*	,, *N* 383	667*b*	1934 *N* 47	813*b*	,, *P* 45
327	,, *B* 24	443	,, ,, 195	570*b*	1934 *L* 231	668	1933 *A* 306	817	,, *M* 152
330*a*	1932 *Notes* 17*e*	445	,, *Pesh* 6	572	1933 ,, 402	670	1932 *Notes* 15*f*	819	1932 *O* 308
330*b*	1933 *M* 14	448	,, *L* 171	573	,, ,, 466	672	,, *B* 557	822	1933 *M* 25
333	,, *P* 62	449	,, ,, 217	574	,, *B* 58	673	1933 *C* 25	824	,, *N* 80
336	,, *L* 211	450	1932 ,, 159	575*a*	1932 *A* 510	674	,, *O* 100	825*a*	,, *L* 221
337	,, ,, 152	453	1933 ,, 472	575*b*	1933 *B* 77	676	1932 *B* 539	825*b*	,, *N* 87
338*a*	1932 *B* 636	454	,, ,, 551	577	,, *L* 594	680	,, *M* 220	828	,, *PC* 55
338*b*	1933 *P* 91	456	,, *M* 48	578	,, *C* 47	682	,, *B* 559	831	,, *O* 92
339	1932 *B* 637	462	,, *L* 269	580	,, *L* 380	685	1933 *R* 4	833	,, *C* 260
340	1933 *P* 74	463	,, ,, 214	583	,, *S* 161	686	1932 *B* 574	836	,, *P* 84
346	,, *B* 79	464	,, *O* 35	586	1932 *A* 642	689	1933 *C* 27	839	,, *C* 285
347	,, ,, 24	466	1932 *B* 511	587	,, ,, 568	697	1932 *B* 537	841	,, *N* 84
348	,, ,, 21	468	1933 *O* 33	590	1933 *L* 484	700	1933 *R* 6	842	,, *C* 283
350	,, *N* 9	470	1932 *S* 197	591	1932 *A* 460	702	1932 *C* 571	843	,, *M* 86
352	,, *B* 37	471	,, *B* 558	592	1933 *Notes* 8*b*	705	1933 *R* 5	849	,, *C* 66
358	,, *C* 208	473	1933 *P* 61	593	,, *C* 8	706	1932 *O* 290	852	,, *M* 309
360	,, *B* 23	474	,, *O* 76	596	,, *L* 374	708	1933 *C* 98	858	,, *C* 69
362	,, *N* 47	477	,, *P* 41	598	,, *C* 12	711	1932 *S* 220	860	,, ,, 129
363	,, *L* 213	479	,, *N* 6	602	,, *M* 330	713	1933 *C* 96	861	1932 *Notes* 19*d*
364	,, ,, 612	481	1932 *B* 524	605	,, *C* 11	716	,, ,, 90	863	1933 *C* 115
366	1934 *M* 250	483	1933 *L* 593	606	1932 *A* 502	720	,, *B* 1	864	,, ,, 117
397	1933 *N* 123	485	1932 *B* 509	607	1933 *M* 500	732	,, *C* 94	866	1932 ,, 753
369	,, *P* 67	487	1933 *L* 574	610	1932 *A* 583	734	1932 *B* 604	870	,, *B* 428
372	,, *M* 293	488	1932 *B* 478	611	1933 *L* 341	737	1933 *O* 91	871	1933 *C* 81
377	,, *L* 151	490	1933 *L* 178	612	1932 *A* 655	738	1932 *B* 631	874	1932 *B* 651
378	,, ,, 124	492	1932 *B* 460	613	1933 *L* 463	741	1933 *O* 45	877	1933 *C* 83
379	,, ,, 176	494*a*	1933 *L* 104	615	1932 *A* 607	745	,, *Pesh* 14	879	,, *S* 198
381	,, *M* 290	494*b*	,, *N* 109	617	1933 *L* 209	747*a*	,, *O* 52	881	,, *Pesh* 3
384	,, *Pesh* 24	498	1932 *B* 480	618	1932 *C* 569	747*b*	1932 *B* 588		

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IC	A. I. R.	IC	A. I. R.	IC	A. I. R.	IC	A. I. R.	IC	A. I. R.
1	1933 *PC* 71	33	1933 *C* 49	60	1933 *C* 85	95	1933 *C* 72	143	1933 *N* 117
3	,, ,, 72	35	,, *P* 40	64	,, *O* 66	96	,, *M* 241	144	1932 *P* 276
6	,, ,, 67	36	,, *C* 51	66	,, *C* 78	97	,, *Pesh* 46	147	1933 *N* 53
7	,, ,, 68	38	,, *P* 29	68	,, *L* 379	99	1932 *M* 739	150	,, *C* 144
12	,, *R* 24	40	,, ,, 32	69	,, *C* 74	105	1333 *C* 44	151	,, *N* 5
13	,, *L* 347	42	,, *O* 99	72	,, ,, 76	108	,, *M* 242	152*a*	,, *C* 144
16	1932 *A* 590	43	,, *P* 36	74	,, *S* 37	112	,, *L* 537	152*b*	,, *M* 352
17*a*	1933 *M* 298	46	,, *O* 15	76	,, *C* 19	113	,, *P* 104	153	,, *N* 74
20	,, *L* 282	50	,, *C* 61	79	,, ,, 52	121	,, *M* 306	155	1932 *P* 309
21	,, *M* 337	52	,, *S* 84	80	,, *R* 41	123	,, *N* 50	157	,, ,, 185
25	,, ,, 321	54	,, *C* 63	81	1932 *C* 715	125	,, *C* 39	160	,, ,, 315
27	,, *N* 118	56	1932 *B* 613	83	,, *A* 454	130	1932 *B* 642	162	1933 *N* 72
29	,, *M* 251	57	1933 *C* 65	86	1933 *C* 73	137	1933 *N* 52	163	1932 *P* 824
31	,, ,, 336	58	,, *R* 15	87	,, *R* 57	138	,, *M* 247	164	,, *B* 410

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AIC	. I. R.	IC	A. I. R.	IC	A. I. R.	IC	A. I. R.	IC	A. I. R.
180	1933 *P* 50	331	1933 *A* 232	518	1933 *Pesh* 49	645	1933 *L* 140	770	1932 *A* 221
182	" *Pesh* 9	333	" *A* 273	520	" *C* 195	646	" *M* 407	775	1933 " 96
185	" *R* 93	335	" *PC* 124	522*a*	" *S* 42	649	" *L* 256	776	" *L* 321
187	" *M* 319	347	" *N* 95	522*b*	" *C* 218	652	" " 125	779	" *A* 97
189	" *Notes* 9*a*	351*a*	" *L* 79	524	" *S* 43	653	" *C* 190	781	" *PC* 122
191	" *M* 461	351*b*	" *C* 186	5 5	" *C* 199	654	" *L* 229	784	" *A* 99
192	19 2 *P* 175	353	" *B* 92	530	" *L* 137	656	" *M* 224	788	" *PC* 143
193	1933 *M* 395	358	" *N* 2 5	532	1932 *A* 681	657	" *Pesh* 56	790	1932 *A* 449
195*a*	" " 367	359	" *S* 101	534	1933 *M* 325	658	" *M* 221	792	*L* 99
195*b*	" *L* 746	360	" *R* 23	535	" *L* 271	660	" *PC* 78	794	1933 *A* 100
197	" *M* 403	361	" *S* 102	537	" *A* 264	6 5	" *O* 41	796	19 2 *L* 101
200	" *L* 500	363	" *B* 142	544	" *S* 44	673*a*	1932 *Notes* 8*b*	8 0	1933 *A* 128
201	" *M* 366	364	" *N* 208	545	" *PC* 118	673*b*	1933 *P* 52	803	" " 30
202*b*	" 372	367	" *B* 106	5 8	" *M* 184	678	" *Notes* 10*b*	805	" *L* 503
203	" *Notes* 6*e*	368	" *M* 219	549	" *PC* 120	679	" *M* 417	807	" *PC* 141
204	" *C* 280	370	" *B* 51	550	" " 106	680	1932 *L* 444	809	" *P* 96
207	" *L* 409	378	" " 105	552	" " 134	682	1933 " 539	812	" *L* 250
211	" " 595	379	" *S* 82	561	" " 91	683	" *M* 344	813	" *O* 62
214	" *PC* 75	381	" *B* 71	564	1932 *A* 492	684	" *O* 19	815	" *PC* 26
217	" " 93	383*a*	" *M* 164	566	1933 *O* 134	686	" *L* 99	818	" *O* 63
220*a*	" *B* 100	386*b*	1932 *B* 545	575	" *Notes* 6*b*	687	" " 175	820	" *L* 512
220b	" *PC* 87	392	1933 *Pesh* 28	576	" *P* 128	688	" *A* 179	821	" *O* 81
225	" *C* 278	393	" *N* 192	577	" *L* 131	689	1932 *L* 584	823	1932 *Notes* 15*b*
227	" *L* 428	394	" *B* 76	579	" *S* 112	690	1933 " 330	825	1933 *R* 33
230	" *Pesh* 22	395	" *M* 328	581	" *M* 342	691	" *A* 158	826	" *O* 83
232	" *L* 488	397	" *C* 54	582	" *C* 514	693	" *L* 253	828	" *R* 34
235	" *O* 94	403	" *A* 258	584	" *S* 90	696*a*	" " 95	829*a*	1932 *Notes* 21*a*
238	" " 75	408	" *L* 352	586	" *L* 599	696*b*	" *O* 115	829*b*	1933 *R* 35
239	" *R* 22	410	" *A* 257	587	" *S* 91	698	1932 *L* 451	831	" *O* 49
241	" *A* 3	413	" *L* 453	588	" *P* 187	699*a*	1933 *O* 127	832	" *R* 37
242*a*	" *M* 278	416	" *N* 207	590	" *S* 88	699*b*	1932 *L* 488	833	" *Pesh* 31
242*b*	" *N* 89	419	" *A* 252	591	" " 93	702	1933 *O* 162	835	" *R* 38
246	1932 *P* 145	424	1932 *L* 655	592	" *M* 460	704*a*	" *P* 26	837	" *B* 101
250	1933 *C* 130	425	1933 *A* 260	593	" *S* 45	704*b*	" *L* 108	841*a*	" *R* 39
251	1932 *A* 593	427	" *L* 648	595	" *O* 124	705	" *R* 40	841*b*	" *P* 100
253	" *B* 654	430	" " 143	597	" *M* 397	707	" *S* 6	844	" *S* 62
271	" *S* 186	435	" *R* 87	599	" *P* 134	708	" *M* 200	846	" *Notes* 12*c*
274*a*	1933 *N* 57	437	" *PC* 108	600	1932 *L* 268	711	" " 221	847	" *L* 444
274*b*	" *C* 136	446	" " 101	603	1933 *N* 104	714	" *N* 303	851*a*	1932 *A* 693
277	1932 *N* 174	452	" *C* 212	605	" *L* 412	719	" *M* 2 3	851*b*	1933 *L* 548
280	1933 *C* 132	455	" *P* 139	610	" *P* 153	720	1932 *L* 651	853	1932 *A* 504
284	" *L* 473	458	" *C* 215	613*a*	" *M* 346	721	1933 *M* 2 4	854	1933 *L* 498
286	" *M* 375	461	" *S* 40	613*b*	" *P* 180	724	" *L* 274	856	1932 *A* 712
292	" *C* 140	463	" *P* 145	616	" *O* 240	728	" *R* 29	857*a*	1933 *L* 610
293*a*	" *O* 84	465	" *C* 109	617	" *P* 81	729	1932 *L* 582	857*b*	" *N* 68
293*b*	" *C* 141	470	" *S* 32	620	" *L* 623	730	1933 *M* 181	860	" *O* 166
295	" *L* 479	472	" *C* 220	621	" *P* 179	735	" " 265	864	1932 *A* 451
297	" *C* 142	474	" *P* 149	622*a*	" *L* 433	738	" *L* 317	865	1933 *P* 161
298	1932 *P* 155	479	" *C* 189	622*b*	" *M* 456	739	" *PC* 85	869	" *L* 85
299	1933 *C* 139	481	" *B* 97	623	" *L* 324	744	" *M* 462	872	" *O* 182
300	1932 *P* 360	484	" *C* 151	624	" *P* 179	747	" *C* 234	883	" " 73
303	1933 *O* 102	487	" *N* 211	625	" *B* 164	751	" *L* 468	884	1932 *L* 615
307	" *L* 239	489	" *S* 78	628	" *P* 158	752	" *R* 29	885	1933 *O* 161
308	" *C* 362	493	" *N* 202	629	" *L* 337	754	" *L* 61	887	1932 *A* 692
309	" *L* 289	495	1932 *P* 337	630	" *B* 109	758	" *R* 30	888	" " 695
310	" *C* 364	501	1933 *S* 1	633	" *L* 351	759	" *L* 48	889	" " 500
312	" *Pesh* 27	504	1932 *P* 344	634	" *B* 137	761	" *R* 31	891	" *C* 699
313	" *L* 361	505	1933 *C* 170	639	" *C* 187	762	1934 *N* 117	896	1933 *A* 94
315	" *M* 322	510	" *A* 269	640	" *L* 476	764	1933 *L* 28	897	" *L* 162
319	" *C* 348	513	" *C* 175	641	" " 382	765	" *M* 406	900	" *A* 47
324	" *PC* 61	516	" *L* 394	643	" *M* 362	766	" *L* 437	901	1932 *L* 606
326	" " 68								
328	" " 58	517	" *C* 198	644	" *L* 101	769	" *Pesh* 37	903	1933 *M* 410

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IC	A. I. R.	IC	A. I. R.	IC	A. I. R.	IC	A. I. R.	IC	A. I. R.
1	1933 *M* 418	17	1933 *N* 136	37	1933 *C* 674	45	1933 *A* 93	61	1932 *A* 686
7	" *A* 344	30	" *C* 290	41	" *A* 701	46	" *M* 233	64	1933 *P* 195
12	1934 *L* 228	32	" *PC* 117	42	1932 " 55	54	1932 *A* 683	65*a*	1932 *A* 662
14	1933 *C* 294	33	" *A* 91	43	" *P* 207	55	1933 *O* 148	65*b*	1933 *P* 193
15	" " 481	35	1932 " 693	44	" *A* 90	59	1932 *L* 623	67	" *A* 31

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IC	A. I. R.			IC	A. I. R.			IC	A. I. R.			IC	A. I. R.			IC	A. I. R.		
73	1933	*O*	163	220	1933	*P*	94	385	1933	*A*	74	567	1933	*C*	456	723*b*	1933	*C*	407
75	1932	*A*	660	222	,,	*O*	331	388	,,	,,	452	568	,,	*O*	232	725	,,	*L*	702
77	1933	*N*	78	224	,,	*PC*	7	389	,,	*N*	42	571	,,	*A*	380	727	,,	*A*	417
79	,,	*PC*	11	228	,,	*Pesh*	63	390	,,	*A*	77	574	,,	*L*	687	737	,,	*L*	577
83	,,	*C*	358	230	1932	*A*	512	395	,,	*PC*	95	575	,,	*C*	454	741	,,	*M*	495
84	,,	*N*	107	238	1933	*C*	401	401	,,	*A*	68	577	,,	*L*	257	742	,,	*L*	749
86	,,	*L*	515	239	,,	*A*	44	402	,,	*C*	253	578	,,	*M*	411	745	,,	*N*	125
87	,,	*Pesh*	52	240	,,	*M*	253	409	,,	*A*	70	580	,,	*L*	121	747	,,	,,	179
88	,,	*N*	66	241	1932	*C*	708	412	,,	*M*	442	582	,,	*A*	465	753	,,	*L*	695
89	,,	*L*	326	245	1933	*M*	374	417	,,	*N*	[illegible]	583	,,	*L*	268	755*a*	,,	*M*	431
90*a*	,,	*M*	428	246	1932	*L*	618	418	,,	*L*	115	584	,,	*N*	176	755*b*	,,	*L*	639
90*b*	,,	*L*	325	247	,,	*A*	653	419	,,	*N*	185	585	,,	*L*	426	757	,,	*C*	488
91	,,	*PC*	16	249	,,	*L*	636	420	,,	*A*	57	586	,,	*N*	233	759	,,	*M*	436
95	1932	*A*	708	254	1933	*C*	419	422	,,	*L*	369	588	,,	*L*	249	761	,,	*PC*	191
97	1933	*C*	402	257	1932	*L*	312	423	,,	A	59	589*a*	,,	*Notes*	12*a*	762	,,	*A*	334
98	,,	*A*	86	259	,,	*A*	690	424	,,	*M*	372	589*b*	,,	*L*	417	766	,,	*C*	441
102	,,	*M*	270	261	,,	*L*	316	426	,,	*A*	60	592	,,	*C*	354	768	,,	*L*	226
103	1932	*A*	663	265	1933	*M*	74	428	,,	*L*	627	596	,,	*M*	454	769	,,	*N*	150
104	1933	*M*	264	271	,,	*P*	92	429	,,	*A*	63	600	,,	*C*	404	771	,,	*R*	148
105	1932	*A*	241	272	,,	,,	93	432	,,	*M*	455	602	,,	,,	443	772	,,	*N*	283
107*a*	1933	*M*	279	273	,,	*B*	162	433	,,	*PC*	167	605	,,	*S*	87	774	,,	*C*	145
107*b*	1932	*A*	589	275	,,	*A*	249	435	,,	*Pesh*	66	606	,,	*C*	447	775	,,	*R*	41
108	1933	*O*	97	279	,,	*C*	433	437	,,	*PC*	171	608	,,	*M*	427	779	,,	*N*	159
110	,,	*C*	284	280	,,	*B*	145	441	,,	,,	155	609	,,	*A*	431	780	,,	*M*	398
111	1932	*A*	598	284	,,	*C*	339	450	,,	*A*	15	612	,,	*C*	458	781	,,	*A*	438
113	1933	*C*	332	285	,,	,,	347	452	,,	,,	19	613	,,	*M*	345	783	,,	*N*	182
114	,,	*A*	112	286	,,	*L*	631	454	,,	*M*	399	615	,,	*L*	201	785	,,	*C*	379
115	,,	*M*	258	289	,,	*B*	158	456	,,	*A*	103	617	,,	*A*	110	787	,,	*N*	164
117	,,	*C*	321	292	,,	*R*	18	457	,,	*C*	329	618	,,	*S*	70	790	,,	*C*	118
119	,,	*N*	143	296	,,	*C*	406	460	,,	*A*	104	622	,,	*B*	148	795	,,	,,	433
120	,,	*C*	308	297	,,	*L*	415	462	,,	,,	108	627	,,	*L*	231	796	,,	*A*	593
122*a*	,,	*L*	356	298	,,	*A*	53	463	,,	*L*	148	628	,,	*S*	85	797	,,	*C*	146
122*b*	,,	*C*	341	299	,,	*R*	52	464	,,	*A*	106	630	,,	*L*	197	799	,,	*B*	87
125	1932	*L*	8	303	1932	*A*	676	465	,,	*C*	264	631	,,	*S*	65	802	,,	*C*	124
127	1933	*A*	155	304	1933	*C*	322	467	,,	*O*	305	634	,,	*L*	194	806	,,	*B*	85
129	,,	*O*	340	307	,,	*A*	118	471	,,	*C*	267	635	,,	*S*	63	808	,,	*O*	209
135	,,	*L*	301	309	,,	*L*	692	472	,,	,,	268	637	,,	*C*	409	812	,,	*Pesh*	80
139	,,	*M*	401	312	,,	*A*	4	474	,,	*L*	385	639	,,	*L*	149	815	,,	*A*	130
141*a*	,,	*L*	534	315	,,	*C*	325	475	,,	*C*	233	641	,,	*M*	207	821	,,	,,	326
141*b*	,,	*C*	293	318	,,	*A*	356	476	,,	*M*	435	649*a*	,,	*L*	128	823	,,	*C*	416
142	,,	*R*	73	321	,,	,,	11	477	,,	*L*	145	649*b*	,,	,,	123	824	,,	*R*	146
143*a*	,,	*L*	782	322	,,	*C*	337	479	,,	,,	667	650	,,	*M*	447	825	,,	*M*	420
143*b*	,,	*A*	343	324	,,	*A*	49	480	,,	*A*	18	654	,,	*C*	270	828	,,	*R*	155
145	,,	*PC*	145	326	,,	,,	116	481	,,	,,	20	655	,,	*P*	88	829*a*	,,	*S*	134
147	,,	,,	46	327	,,	*C*	271	482*a*	,,	*L*	103	656	,,	*O*	123	829*b*	,,	*R*	93
150	,,	,,	169	330	,,	*A*	117	482*b*	,,	*A*	366	657	,,	*Pesh*	61	831	,,	*O*	427
152	,,	*O*	85	331	,,	*B*	132	485	,,	*L*	56	659	,,	*PC*	178	833	,,	*M*	609
154	,,	*C*	358	334	,,	*S*	129	486	,,	*A*	321	661	,,	*A*	513	835	,,	*O*	117
156	,,	*A*	14	335	,,	*B*	179	494	,,	*L*	363	665	,,	*PC*	183	836	,,	*A*	449
158	,,	*Pesh*	59	338	,,	*O*	104	495	,,	*B*	144	673	,,	*A*	546	838	,,	*O*	129
159	1932	*C*	378	341	,,	*L*	659	496	,,	*M*	524	678	,,	*O*	131	840	,,	*A*	495
162	1933	*PC*	148	342	,,	*P*	90	497	,,	*A*	775	679	,,	*C*	251	843	,,	*O*	146
164	,,	*C*	435	343	,,	*A*	1	499	,,	*L*	388	681	,,	*M*	565	844	,,	*M*	568
170	,,	*PC*	49	345	,,	*S*	47	504	,,	*M*	153	682	,,	*C*	5	846	,,	*O*	192
173	,,	*C*	426	348	,,	*L*	456	507	,,	*C*	319	683	,,	*O*	289	852	,,	,,	257
175	,,	*L*	688	351	,,	*S*	49	508	,,	*Pesh*	69	685	,,	*L*	157	854	,,	*M*	598
178	,,	*C*	318	355	,,	*L*	248	510*a*	,,	*M*	434	686	,,	*O*	281	863	,,	*S*	151
179	,,	,,	222	356*a*	,,	,,	233	510*b*	,,	*A*	120	687	,,	*P*	189	869	,,	*P*	236
189	,,	*O*	225	356*b*	,,	*C*	343	512	,,	*C*	335	691	,,	*B*	108	872	,,	*R*	98
190	,,	*M*	461	357	,,	*L*	120	514	"	*N*	193	692	1932	*O*	336	876	,,	*A*	456
191	1932	*A*	665	358	1934	,,	247	522	,,	*A*	192	698	1933	*B*	91	879	,,	*L*	136
192	1933	*N*	228	359	1933	*C*	344	525	,,	*R*	49	699	,,	*S*	124	880	,,	*M*	390
193	,,	*C*	154	362	,,	*L*	665	526	1932	*A*	610	702	,,	,,	126	883*b*	,,	*L*	529
204	1932	*S*	207	364	,,	,,	129	532	1933	*R*	45	703	,,	*C*	192	887	,,	*O*	829
205	,,	,,	208	366	,,	*C*	314	535*b*	,,	,,	93	706	,,	*A*	180	890	,,	*A*	427
207	,,	,,	210	367	,,	,,	312	536	,,	,,	16	710	,,	*C*	274	892	,,	*C*	240
208	1933	*O*	50																
209	,,	*PC*	164	370	,,	,,	316	541	,,	,,	109	723	,,	*S*	103	894	,,	*M*	347
211	,,	,,	150	372	,,	*M*	271	542	,,	*P*	210	719	,,	*L*	730	899	,,	*C*	242
216	,,	,,	176	377	,,	*C*	165	555	,,	*O*	263	720	,,	*S*	110	900	,,	*S*	121
219	,,	*O*	339	381	,,	,,	246	559	,,	*A*	241	723*a*	,,	*L*	657	903	,,	*M*	568

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IC	A. I. R.			IC	A. I. R.			IC	A. I. R.			IC	A. I. R.			IC	A. I. R.		
1	1933	L	618	136	1933	A	39	259	1933	L	3	390	1933	L	676	557	1934	M	393
4	,,	B	135	137	,,	C	429	262a	,,	O	279	391	,,	A	388	559	,,	L	633
5	,,	L	611	141	,,	A	41	262b	,,	R	102	392	,,	R	112	561	1932	C	171
6	,,	L	102	142	,,	C	417	264	,,	L	442	394	1934	N	43	566	1933	O	215
8	,,	B	114	144	,,	A	231	265	,,	R	94	396	1933	L	648	573	,,	M	353
12	,,	L	516	146	,,	R	61	266	,,	L	338	397	,,	O	309	577	,,	O	195
13	,,	,,	650	147	,,	P	132	267	1934	N	33	400	,,	M	618	578	,,	,,	154
14	,,	Pesh	41	149	,,	A	40	270	1933	A	373	404	,,	L	425	580	,,	L	477
16	,,	M	465	150	C	L	422	271	,,	L	501	406	,,	A	389	582	,,	O	181
18	,,	L	690	152	,,	A	228	273	,,	A	370	408	,,	L	555	584	,,	M	639
20	,,	M	610	154a	,,	M	502	274	,,	R	48	409	,,	S	136	596a	,,	L	790
22a	,,	L	487	154b	,,	A	276	276	,,	L	319	411	,,	N	160	596b	,,	,,	669
22b	,,	M	544	155	,,	C	411	277	,,	B	253	412	,,	S	226	598	,,	C	393
27	,,	,,	451	157	,,	A	286	279	,,	O	237	413	,,	,,	138	601	,,	L	780
30	,,	,,	508	158	,,	L	758	282	,,	R	95	414	,,	M	225	602	,,	M	503
32	,,	A	46	159	,,	R	68	283	,,	O	295	420	,,	R	142	605	,,	L	752
33	,,	,,	138	160	,,	Pesh	38	287	,,	L	443	422	,,	M	489	606a	,,	M	549
39	,,	L	344	163	,,	R	64	288	,,	O	288	427	,,	S	139	606b	,,	L	775
41	1934	N	52	167	,,	M	540	289	,,	L	323	430	,,	R	117	607	,,	,,	765
42	1933	S	115	168	,,	L	395	290	,,	,,	809	431	,,	S	142	608	,,	M	358
44	,,	M	608	172	,,	A	145	292	,,	,,	434	433	,,	A	329	610	,,	Notes	10d
45	,,	L	601	173	,,	L	220	293	,,	A	493	437	,,	R	144	614	,,	L	780
50	,,	S	119	175	,,	R	61	294	,,	L	305	439	,,	P	288	615	,,	N	40
51	,,	O	119	177	,,	C	414	296	,,	,,	311	442	,,	B	126	616	,,	L	339
54a	,,	S	118	178	,,	P	144	298	,,	,,	284	447	,,	P	276	618	,,	,,	710
54b	,,	N	162	179a	,,	L	532	300	,,	,,	313	448	,,	B	205	620	,,	,,	678
56	,,	S	117	179b	,,	P	126	301	,,	,,	308	451	,,	L	900	621	,,	M	386
58	,,	M	438	184	,,	L	264	304	,,	A	460	452	,,	S	176	626	,,	L	963
59	,,	P	208	185	,,	C	353	306a	,,	L	332	454	,,	L	553	627	,,	,,	568
62	,,	,,	223	186	,,	R	63	306b	,,	R	50	456	,,	B	121	628	,,	B	182
63a	,,	S	403	187a	,,	L	533	308	,,	L	333	457	,,	P	293	629	,,	M	137
63b	,,	O	118	187b	,,	R	138	309	,,	P	209	459	,,	B	123	636	,,	L	905
65	,,	S	351	191	,,	N	76	310	,,	R	55	461	,,	P	278	641	,,	,,	741
66	,,	M	597	192	,,	L	630	311	,,	P	210	462	,,	C	412	643	,,	B	202
67	,,	L	159	193	,,	C	397	312	,,	N	270	465	,,	L	419	646	,,	L	702
70	,,	A	201	194	,,	A	318	314	,,	O	345	467	,,	,,	342	648	,,	B	197
72	1934	L	245	196	,,	C	398	315	,,	R	91	468	,,	A	429	651	,,	L	365
74	1933	C	148	198	,,	,,	243	316	,,	O	283	470	,,	L	331	654	,,	O	222
75	,,	,,	150	201	,,	N	187	320a	,,	P	262	471	,,	,,	350	658	,,	L	759
76	,,	A	311	202	,,	M	622	320b	,,	Pesh	44	472	,,	M	569	661	,,	O	214
78	,,	C	149	204	,,	N	1	322	,,	N	173	473	,,	O	261	662	,,	L	690
79	,,	A	308	206	,,	L	757	325	,,	P	263	475	,,	L	435	663	,,	N	73
82a	,,	Notes	11b	207	,,	A	314	326	,,	N	171	477	,,	S	165	664	,,	S	166
82b	,,	A	404	211	,,	N	70	328	,,	S	193	479	,,	M	628	667	,,	N	93
85	,,	C	525	213	,,	O	256	331	,,	L	561	482	,,	Pesh	51	669	,,	L	606
86	,,	N	149	214	,,	C	386	340a	,,	A	111	483	,,	L	898	672	,,	,,	881
88	,,	C	147	215	,,	M	326	340b	,,	L	262	484	,,	,,	470	673	,,	R	90
89	,,	M	612	216	,,	C	387	343	,,	,,	515	486	,,	M	496	674	,,	S	182
90	,,	C	551	217	,,	N	158	344	,,	PC	180	488	,,	L	697	676	,,	C	527
92	,,	,,	543	218	,,	,,	224	346	,,	,,	193	492	,,	A	218	677	,,	R	89
93	,,	C	563	220	,,	C	381	351	,,	P	142	497	,,	L	885	678	,,	S	185
94	,,	N	327	226	,,	N	186	353	,,	S	192	503	,,	M	510	681	,,	N	230
95	,,	M	516	228	,,	P	185	354	,,	P	123	505	,,	L	483	684	,,	P	234
98	,,	B	120	229	,,	N	103	357	,,	A	394	506	1934	N	48	686	,,	PC	198
99	,,	L	273	230	,,	P	203	362	,,	L	793	509	1933	L	441	690	,,	L	589
100	,,	B	112	231	,,	S	191	364	,,	A	385	510	,,	N	226	691a	,,	,,	880
102	,,	L	629	232	,,	N	277	365	,,	M	595	513	,,	M	565	691b	,,	C	361
103	,,	M	485	237	,,	M	523	368	,,	N	85	515	,,	L	259	693	,,	N	100
107	,,	L	50	239	,,	N	38	369	,,	R	119	516	,,	M	506	695	,,	L	791
108	,,	A	169	240	,,	,,	99	370	,,	N	361	518	,,	L	235	696	,,	N	112
113	,,	,,	477	241	,,	P	194	371	,,	S	144	519	,,	M	413	698	,,	L	792
115	,,	M	537	243	,,	M	439	373	,,	A	468	521	,,	N	44	699	,,	R	104
117	,,	N	324	245	,,	S	130	378	,,	L	449	524	,,	L	573	701a	,,	A	151
120	,,	A	603	246	,,	P	273	379	,,	N	360	525	,,	M	649	701b	,,	C	513
123	,,	,,	355	247	,,	S	151	380	,,	A	399	529	,,	O	197	703	,,	A	466
125	,,	C	373	248	,,	A	43	382a	,,	O	312	538	,,	L	393	704	,,	C	515
129	,,	A	261	250	,,	S	131	382b	,,	N	367	540	,,	O	196	705	,,	B	194
130	,,	A	280	252	,,	M	342	383	,,	A	401	541	,,	M	533	708	,,	C	424
131	,,	C	377	253	,,	P	146	386	,,	N	135	546	,,	O	156	710	,,	B	187
133	,,	A	294	255	,,	,,	248	387	,,	L	461	550	,,	M	424	712	,,	L	894
135	,,	N	293	256	,,	O	276	389	,,	A	391	553	,,	L	876				

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IC	A. I. R.	IC	A. I. R.	IC	A. I. R.	IC	A. I. R.	IC	A. I. R.
716	1933 *N* 190	779	1933 *C* 486	857	1933 *P* 513	919	1934 *N* 13	978	1933 *O* 207
718	" *L* 481	781	" *B* 262	860	" *O* 365	922	1933 *B* 233	980	" *R* 110
719	" *A* 463	784	" *M* 332	864	" *L* 948	922*a*	" " 229	981	" *L* 505
720	" *L* 451	788	" *P* 485	866	" *R* 131	923*b*	" *M* 627	983	" *O* 128
721	" *Pesh* 53	791	" " 495	868	" *C* 474	925	" *B* 272	985	" *B* 266
724	" *N* 244	792	" *C* 295	869	" *R* 133	929*a*	" *C* 183	990	" " 252
726	" *M* 382	804	" " 888	870	" *C* 475	929*b*	" *M* 500	991	" *L* 559
728	" *B* 183	808	" " 590	872	" *P* 481	930	" *C* 184	993	" *B* 190
729	" *L* 761	812*a*	" *L* 782	876	" *N* 134	931	" *O* 352	995	" " 118
731	" *A* 382	812*b*	" *C* 467	877	" *C* 598	935	" *C* 185	996	" *R* 147
733	" *M* 384	814	" " 464	879	" " 509	936	" *P* 488	998	" *B* 122
734	" *R* 106	817	" " 469	881	" *S* 205	940	" *M* 519	999	" " 175
736	" *N* 241	820	" *L* 770	883*a*	" *A* 135	942	" *O* 254	1002	" *A* 198
738	" *L* 329	821	" *R* 128	883*b*	" *S* 200	943	" *S* 254	1005	" " 175
740	" *C* 501	822	" *L* 774	885	" " 202	944	" *O* 251	1007	" *R* 120
741	" *L* 458	823	" *C* 891	888	" *A* 340	946	" *P* 446	1010	" *A* 213
743	" *C* 522	825	" *R* 136	889	" *C* 477	948	" *N* 120	1011	1934 *P* 133
745	" *N* 57	827	" *C* 524	892	" " 511	951	" *A* 617	1013	1933 *R* 123
751	" *R* 107	828	1934 *L* 44	894	" " 519	954*a*	" *L* 328	1014	" *A* 214
753	" *P* 259	829	1933 *R* 134	896	" *M* 503	954*b*	" *A* 609	1016	" " 163
754	" *B* 303	830	" *L* 814	897	" *B* 185	957	" *C* 516	1018	" *L* 927
756	" *O* 291	832	" *C* 560	899	" *A* 453	960	" *A* 135	1019	" *A* 135
760	" *P* 257	833	" *M* 583	901	" *B* 200	961	" *L* 496	1020	" *L* 587
762	" *L* 354	844	" *N* 188	903	" *A* 352	963	" *M* 521	1021	" " 114
764	" *C* 506	846	" *C* 606	904	" " 154	965	" *L* 492	1021	" *A* 440
765	" *M* 369	848	" *L* 936	906	" " 122	967	" *O* 191	1024	" *L* 133
768	" *C* 508	849	" *R* 185	911	" *PC* 208	969	" *N* 155	1025	" *PC* 136
769	" *O* 299	850	" *P* 493	914	" *N* 389	973	" *L* 423	1029	" *A* 348
772	" *S* 220	851	" *R* 129	916	" *B* 260	974	" *A* 354	1031	" *O* 362
776	" *O* 202	853	" *M* 511	918	" *P* 554	976	" *L* 370	1032	" *L* 106

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IC	A. I. R.	IC	A. I. R.	IC	A. I. R.	IC	A. I. R.	IC	A. I. R.
1	1933 *P* 306	177	1933 *C* 495	250	1933 *L* 960	320	1933 *R* 223	381	1939 *C* 550
113	" *L* 570	178	" *L* 93	251	" *R* 116	325	" *P* 270	382	" *P* 297
116	" *C* 462	180	" *O* 132	253	" *L* 93	326	" *R* 227	386	" *L* 383
117	" *L* 168	182	" *L* 193	254	" *S* 148	327	" *P* 617	387	" *P* 302
118	" *R* 153	183	" *C* 496	256	" *L* 69	329	" *L* 538	388	" *M* 626
119	" *L* 123	184	" *L* 118	258	" *B* 251	330	" *R* 162	390	" *P* 303
121	" *C* 460	185	" *C* 495	259	1934 *S* 52	332	" *A* 414	392	" *A* 210
122	" *L* 141	186	" *L* 581	261	1933 *N* 221	334	" *L* 614	393	" *P* 305
123	" *C* 461	188*a*	" *O* 190	262*a*	" *P* 585	335	" *M* 689	394	" *M* 179
125	" *L* 186	188*b*	" *L* 183	262*b*	" *B* 287	337	" *L* 628	396	" *A* 217
126	" *A* 484	190	" *B* 276	270	" *L* 678	338	" *C* 449	397	" *M* 745
129	" *L* 173	200	" *L* 216	271	" *P* 292	343	" *L* 491	400	" *A* 211
130	" *A* 437	202	" *S* 145	273	" *B* 270	344	" *R* 164	402	" *N* 272
131	" *L* 82	204	" *L* 184	274	" *P* 295	345	" *L* 427	403	" *A* 313
132	" *P* 219	206	" *N* 214	277	1932 *Notes* 12*c*	346	" *M* 631	404	" *M* 703
133	" *B* 230	208	" *L* 97	278	1933 *L* 575	349	" *L* 658	405	" *B* 313
136	" *S* 196	209	" *PC* 218	280	" *Notes* 5*f*	350	" *N* 285	407	" *M* 163
138	" *B* 234	213	" *P* 281	281	" *O* 401	352	" *O* 322	408	" *B* 214
142	" *S* 198	216	" *PC* 202	284	" *L* 596	357	" *N* 169	412	" *M* 145
144	" *L* 126	222	" *O* 255	285	1934 *M* 13	359	" *O* 226	413	" *R* 211
146	" *S* 158	223	" *P* 285	286	1933 *B* 244	362	" *P* 277	415	" *L* 680
147	" *A* 443	226	" *R* 113	287	" *P* 218	363	" *O* 274	416*a*	" " 685
153	" *L* 260	227	" *L* 142	289	" *M* 529	365	" *C* 472	416*b*	" *C* 582
154	" " 148	228	" *M* 710	294	" *P* 246	367	" *A* 259	421	" *P* 435
155	" " 172	229	" *R* 114	295	" *C* 482	368	" *P* 273	426*a*	" *L* 597
156	" *A* 488	230	" *M* 685	299*a*	" *L* 659	370	" *R* 156	426*b*	" *P* 440
157	" *L* 212	231	" *L* 640	299*b*	" *O* 253	371	" *M* 230	428	" " 443
158	" *R* 151	233	" *O* 259	300	" *M* 659	372*a*	" *R* 157	429	" *C* 564
159	" *L* 174	236	" *C* 665	302	" *O* 385	372*b*	" *A* 205	431	" *P* 441
161	" *B* 307	239	" *O* 273	304	" *A* 412	373	" *R* 158	432	" *L* 682
163	" *L* 291	240	" *C* 695	306	1934 *M* 202	375	" *P* 276	436	" *A* 295
164	" *B* 245	241	" *L* 58	307	1933 *P* 284	376	" *R* 160	438	" *M* 682
169	" *L* 251	243	" *C* 490	308	" *M* 457	378*a*	" *M* 688	441	" *P* 176
170	" *C* 498	245	" *L* 58	313	" *C* 502	378*b*	" *R* 161	444	" *A* 751
173	" *L* 914	246	" *N* 216	314	" *P* 279	379*a*	" *M* 688	445	" *N* 201
174	" *M* 482	247	" *L* 127	316	" *C* 731	379*b*	" *A* 216	446	" *C* 559
176	" *L* 278	248	" *C* 492	318	" " 504	380	" *M* 231	447	" *N* 114

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IC	A. I. R.	IC	A. I. R.	IC	A. I. R.	IC	A. I R.	IC	A. I. R.	IC	A. I. R.
449	1933 *M* 570	612	1933 *A* 2 2	709	1933 *L* 307	814	1933 *C* 603	921	1933 *L* 144		
461	" *A* 206	613	" *P* 269	710	" *R* [illegible]70	816	" " 639	922	" *A* 626		
464	" *L* 5[illegible]9	615	" *A* 203	713	" *L* 406	817	" *O* 369	923	" *C* 606		
465	" *S* 250	617	" *S* 169	714	" *M* 696	818	" *R* 257	924	" *L* 606		
467	" *L* 716	619	" *B* 407	715	" *L* 432	819	" *O* 374	925	" *C* 194		
470	" *O* 265	621	" *S* 171	716	" *M* 710	821	" *C* 656	926	" *L* 126		
474	" *L* 642	622	" *A* 191	719	" *L* 1000	823	" *R* 264	927	" *M* 762		
476	" *M* 704	624	" *S* 173	720	" *R* 214	824	" *Ċ* 614	929	" *P* 684		
479	" *A* [illegible]10	625	" *O* 179	721	" *M* 729	825	" *R* 258	930	" *M* 785		
481	" " 6[illegible]0	626	" " 436	725	" *L* 410	826	" *C* 625	933	" " 675		
521	" *Notes* 7*d*	627	" " 468	726	" *A* 283	828	" " 630	936	" *L* 235		
522	" *C* 578	628	" *L* 765	727	" *L* 475	829	" *S* 308	937	" *C* 870		
524*a*	" *P* 564	629	" " 774	728	" *A* 663	830	" *L* 532	941	" *M* 695		
524*b*	" " 597	630	" *B* 450	730	" *L* 421	831	" *M* 658	942	" *A* 903		
525	" *R* 239	637	" *Notes* 6*d*	731	" *A* 654	832	" *R* 287	944*a*	" *L* 832		
526	" *A* 742	638	" *C* 581	732	" " 137	833	" " 249	944*b*	" *P* 636		
527	" *P* 175	640	" *O* 241	733	" *L* 844	834	" *C* 631	946	" *M* 787		
528	" *L* 642	641	" *B* 317	735	" *A* 630	835	" *R* 268	948	" *A* 842		
529*a*	" *A* 491	647	" *O* 465	736	" " 612	836	" *C* 635	949	" *P* 596		
529*b*	" *M* 162	648	" *B* 309	738	" " 614	837	" *R* 288	951	" *A* 754		
530	" *A* 492	652*a*	" *P* 160	739	" *Pesh* 74	841	" *C* 619	953	" *M* 798		
531	" *M* 360	652*b*	" *Notes* 6*a*	741	" *L* 597	843	" *R* 201	959	" *A* 281		
534*a*	" *A* 453	654	" *M* 713	742	" *N* 218	845	" *A* 56	961	" *M* 699		
534*b*	" *M* 550	656	" *C* 537	744	" *M* 652	846	" *L* 543	962	" *C* 644		
547	" *A* 758	657	" " 538	746	" *L* 703	847	" *A* 2[illegible]4	965	" *M* 795		
548	" *P* 563	659	" *M* 728	749	" *A* 525	849	" " 565	967	" *L* 42		
549	" *A* 561	660	" *C* 532	752	" *L* 838	852	" *M* 679	968	" *M* 789		
550	" *N* 38	662	1934 *Pesh* 1	754	" *A* 302	853	" *A* 225	970*a*	" " 794		
553	" *L* 705	663	1933 *C* 534	755	" *L* 851	855	" *M* 694	970*b*	" *A* 902		
557	" *B* 381	664	" *A* 660	756	" *A* 303	856	" *C* 617	972	" *M* 768		
562	" *A* 197	666	" *C* 535	758	" *M* 169	858	" *M* 755	974*a*	" " 797		
563	" *B* 374	668	" *A* 230	760	" *N* 219	859	" *A* 374	974*b*	" *L* 255		
567	" *P* 561	669	" *O* 460	762	" *M* 171	861	" *C* 640	975	" *M* 804		
569	" *C* 599	670	" *A* 820	764	" " 168	862	" *M* 637	977	" *A* 678		
570	" *P* 552	671	" *P* 183	765	" " 218	863	" *C* 835	989	" *M* 701		
672	" *A* 233	674	" *A* 735	766	" " 217	868	" *Pesh* 88	992	" *L* 377		
573	" *R* 265	679	" *N* 221	767	" " 215	871	" *M* 7[illegible]0	993	" *M* 662		
575	" *C* 181	680	" *A* 669	769	" *B* 355	872	" *A* 292	995	" *A* 783		
577	" *A* 337	684	" *C* 571	771	" *P* 147	874*a*	" *L* 620	998	" *M* 764		
578	" *B* 296	687	" *L* 14	773*a*	" *C* 776	874*b*	" *C* 8[illegible]0	999	" " 703		
579	" *A* 339	689	" " 222	773*b*	" *B* 358	876	" *M* 653	1001	" *O* 518		
581	" *B* 297	690	" *M* 165	777	" *S* 53	878	" " 765	1002	" *L* 147		
582*a*	" *A* 410	691	" *L* 422	780	" *B* 386	880	" *A* 160	1003	" *O* 517		
582*b*	" *B* 298	692	" *C* 553	790	" *P* 428	881	" *C* 754	1004	" *M* 722		
586	" *A* 410	693	" *R* 234	792	" *B* 367	884	" *A* 54	1007	" *O* 381		
588*a*	" *B* 436	694	" *M* 175	794	" *P* 434	885	" *C* 653	1008	" *M* 725		
588*b*	" *M* 194	695	" *N* 229	795	" *S* 57	888	" *M* 636	1009	" *L* 165		
591	" *A* 157	697*a*	" *L* 318	801	" *O* 361	889	" *C* 638	1010	" " 542		
593	" *C* 182	697*b*	" *N* 217	802	" *A* 521	891	" *L* 473	1011	" *M* 691		
594	" *M* 645	698	" *P* 129	803	" *O* 351	892	" *C* 612	1013	" *L* 596		
597	" *C* 561	700	" *C* 552	804	" *A* 524	893	" *A* 789	1014	" *M* 726		
599	" *M* 187	701*a*	" *L* 268	805	" *O* 347	913	" " 819	1016	" *L* 373		
602	" *C* 549	701*b*	" *A* 662	808	" *P* 430	915*a*	" *P* 640	1017	" *P* 571		
604	" *M* 190	702	" *L* 8[illegible]5	810*a*	" *O* 345	915*b*	" *A* 756	1023	" *M* 736		
607	" *A* 517	704	" " 452	810*b*	" *P* 433	916	" *P* 611	1029	" *L* 513		
609	" " 461	705	" " 403	812	" *A* 523	917	" *M* 748	1031	" *P* 499		
611	" *P* 267	706	" *S* 179								

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IC	A. I. R	IC	A. I. R.	IC	A. I. R.	IC	A.I. R.	IC	A. I. R.
1	1933 *B* 461	15*b*	1933 *N* 315	27	1933 *L* 167	40*a*	1933 *L* 609	54	1933 *P* 494
2	" *A* 486	16	" " 272	28	" *O* 391	40*b*	" *Notes* 7*b*	55	" *C* 609
3	" *P* 576	17*a*	" *L* 497	30	" *Notes* 5*b*	41	" *R* 215	56	" *P* 196
4	" *Notes* 5*d*	17*b*	" *N* 219	31	" *O* 412	42	" *L* 392	64	" *M* 774
6	" *B* 460	20*a*	" *L* 433	34	" *L* 227	43	" *S* 174	67	" *L* 621
7	" *Pesh* 99	20*b*	" *S* 307	35	" *S* 299	45	" *L* 681	70	" *P* 242
9	" *N* 297	22	" *L* 5[illegible]0	36	" *L* 540	46	" *M* 492	72	" *M* 664
11	" *B* 457	23	" *R* 165	37	" *P* 116	49	" " 686	76	" *A* 482
14	" *N* 296	25	" *L* 387	38	" *L* 635	51	" *L* 337	77*a*	" *M* 416
15*a*	" *Notes* 8*c*	26	" *M* 655	39	" *S* 134	52	" *M* 481	77*b*	" *N* 290

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IC	AIR			IC	AIR			IC	AIR			IC	AIR			IC	AIR		
81	1934	*A*	100	232	1933	*L*	314	376	1933	*L*	819	499	1933	*M*	791	597*a*	1933	*L*	859
82	1933	*N*	115	233	,,	*R*	74	378	,,	*C*	600	502	,,	*C*	809	597*b*	,,	*C*	651
83	1934	,,	35	234	,,	*P*	555	381	,,	*O*	333	505	,,	*L*	783	599	,,	*L*	859
84	1933	*A*	861	235	,,	*N*	334	387	,,	*L*	884	506*a*	,,	*O*	562	600	,,	*M*	865
113	,,	*N*	258	236	,,	*L*	3[illegible]4	389	,,	*P*	130	506*b*	1934	*PC*	40	601	,,	*N*	267
115	,,	*P*	635	237	,,	*C*	722	391	,,	*L*	714	510	1933	*A*	363	603	,,	*C*	636
116*a*	,,	*N*	368	239	,,	*L*	416	392	,,	*R*	236	511*a*	,,	*L*	777	605	,,	*P*	6[illegible]3
116*b*	,,	*M*	6[illegible]1	240	,,	*R*	199	395	,,	*L*	279	511*b*	,,	*A*	733	607	,,	*A*	576
118	,,	*N*	307	241	,,	*L*	935	398	,,	*C*	566	513	,,	*L*	150	608	,,	*M*	756
120	,,	*L*	522	242	,,	*R*	348	402	,,	*R*	297	514	,,	*N*	163	615	,,	*R*	263
122	,,	*N*	289	244	,,	*A*	574	404	,,	*N*	313	515	,,	*L*	740	616	,,	*B*	338
123	,,	*C*	546	246	,,	*C*	610	406	,,	*P*	676	516	,,	*M*	839	620	,,	*R*	172
124	,,	*R*	75	248	,,	*B*	417	407	,,	*S*	276	517	,,	*L*	224	621	,,	*B*	342
125	,,	*L*	652	252	,,	*P*	619	408	1934	*P*	34	519*a*	,,	*P*	601	626	,,	*A*	188
127	,,	*O*	523	254	,,	*A*	657	409	1933	*C*	615	519*b*	,,	*L*	795	628*a*	,,	*L*	725
131	,,	,,	415	256	,,	*C*	547	411	,,	*P*	677	521	,,	*M*	851	628*b*	,,	*M*	854
136	,,	*L*	920	257	,,	*L*	252	412	,,	*A*	168	523*a*	,,	*Notes*	7*e*	630*a*	,,	*O*	469
138	,,	*O*	[illegible]07	258	,,	,,	327	414	,,	*C*	574	523*b*	,,	*M*	841	630*b*	,,	*L*	813
145	,,	*A*	649	259	,,	*C*	621	417	,,	*M*	858	524	,,	*C*	725	631	,,	*P*	556
148	,,	*L*	394	261	,,	*L*	228	419	,,	*S*	325	525	1934	*A*	8	6[illegible]3	,,	*L*	805
149*a*	,,	*N*	269	263	,,	*S*	339	420	,,	*L*	733	527	1933	*P*	577	634	,,	*M*	817
149*b*	,,	*A*	543	264	,,	*A*	5[illegible]8	422	,,	*R*	76	528	,,	*M*	838	638	,,	*O*	430
152	,,	*N*	310	269	,,	*M*	890	424	,,	*O*	375	530*a*	,,	*C*	727	640	,,	*R*	262
154	,,	*L*	556	291	,,	*L*	735	427	,,	*C*	539	530*b*	,,	*M*	527	641	,,	*C*	622
155	,,	*P*	640	292	1934	,,	77	431	,,	*O*	372	532	,,	*L*	812	644	,,	*R*	311
157	,,	*A*	485	293	1933	*A*	554	434	,,	*L*	1002	533	,,	*P*	558	645	,,	*C*	692
159	1934	,,	70	295	,,	*Notes*	11*a*	436	,,	*O*	380	535	,,	*M*	896	648	,,	*L*	899
160	1933	,,	482	297	,,	*L*	891	437	,,	*L*	869	536	,,	,,	821	649	,,	*S*	352
162	,,	*B*	412	298	,,	*P*	471	438	,,	*O*	370	540	,,	*C*	643	651	,,	*O*	475
163	,,	*PC*	214	300	,,	*R*	250	439	,,	*S*	295	541	,,	*L*	756	653	,,	*R*	292
165	,,	*B*	303	301	,,	*L*	485	440	,,	*R*	79	542	,,	*S*	357	658	,,	*C*	627
166	,,	*L*	807	303*a*	,,	*Notes*	11*c*	442	,,	*L*	933	543	,,	*L*	723	661	,,	*O*	387
167	,,	*C*	752	303*b*	,,	*R*	320	443	,,	*Pesh*	78	544	,,	*B*	479	665	,,	*L*	871
168	,,	*B*	347	305	,,	*C*	676	444	,,	*L*	932	545*a*	,,	*L*	611	671	,,	*C*	632
169	,,	*C*	724	307	,,	*M*	782	445	,,	*R*	174	545*b*	,,	*R*	329	674	,,	*R*	81
171	1934	*O*	17	310	,,	*O*	466	446	,,	*L*	926	547	,,	*L*	265	676	,,	*C*	704
172	1933	*L*	664	312	,,	*C*	529	447	,,	*N*	328	548	,,	*B*	479	677	,,	*L*	910
173	,,	*R*	343	315	,,	*R*	398	448	,,	*Notes*	6*c*	550*a*	,,	*L*	829	679	,,	,,	810
174	,,	*C*	333	317	,,	*M*	844	449	,,	*O*	313	550*b*	,,	*B*	478	681	,,	*Pesh*	71
176	,,	*R*	325	321	,,	*L*	808	451	,,	*A*	227	551*a*	,,	*L*	822	683	,,	*L*	892
177	,,	*C*	731	322	,,	*P*	464	452	,,	*O*	269	551*b*	,,	*P*	601	684	,,	*A*	891
179	,,	*PC*	216	326	,,	*L*	883	457	,,	*A*	481	552	,,	*L*	215	686	,,	*L*	953
180	,,	*S*	813	327	,,	*A*	615	458	,,	*P*	643	553	,,	,,	626	688	,,	*B*	4[illegible]9
183	,,	*A*	759	329	,,	*B*	377	459	,,	*M*	678	554	1934	*A*	139	691	,,	*A*	814
186	,,	*C*	747	332	,,	*N*	259	460		*P*	496	556	1933	*L*	508	693	,,	*R*	193
191	,,	*R*	270	333*a*	,,	*C*	647	461	,,	*L*	868	557	,,	*P*	584	694	,,	*S*	257
192	,,	*Notes*	11*d*	333*b*	,,	*R*	261	462	,,	*P*	498	558	,,	*C*	790	695	,,	*L*	851
193	,,	*R*	193	334	,,	*N*	336	464	,,	*C*	792	559	,,	*O*	461	696	,,	*S*	273
194	,,	*L*	536	335	,,	*C*	797	465	,,	*O*	315	560	,,	*R*	203	699	,,	*M*	917
195	,,	*M*	434	336	,,	*B*	336	471	,,	*P*	575	561	,,	*S*	367	701	,,	*N*	352
196	,,	*R*	271	339	,,	*C*	788	472	,,	*B*	438	562	,,	*L*	464	706	,,	*O*	420
198	,,	*L*	520	340	,,	*B*	350	473	,,	*A*	556	563	,,	*O*	438	707	,,	*R*	186
199	,,	*A*	665	342	1934	*P*	61	474*a*	,,	*P*	272	564	,,	*M*	888	708	,,	*O*	423
201	,,	*Pesh*	101	343	1933	*B*	364	474*b*	,,	*L*	797	565	,,	*L*	376	709	,,	,,	394
203	,,	*S*	278	346	,,	*M*	540	475	,,	*M*	843	566	,,	*M*	883	710	,,	,,	439
204	,,	*M*	471	350	,,	*L*	945	476	,,	*C*	786	568	,,	*A*	504	724	,,	*R*	198
208	,,	*N*	177	351	,,	*C*	831	477	,,	*A*	287	569	,,	,,	184	725	,,	*L*	722
210	,,	*L*	258	353	1934	*P*	82	478	,,	*M*	842	572	1934	*M*	27	726	,,	,,	776
212	,,	*R*	273	354*a*	1933	*C*	791	479	,,	*O*	429	575	1933	*A*	563	727	,,	*N*	153
215	,,	*L*	711	354*b*	,,	*O*	470	480	,,	*A*	490	577	,,	*O*	421	729	,,	*R*	[illegible]44
216	,,	*R*	278	357	,,	*L*	869	481	,,	*P*	606	579	,,	*C*	767	730	,,	*S*	210
219	,,	*M*	734	359*a*	,,	*C*	796	482	,,	*O*	542	580	,,	*P*	598	733	,,	*A*	186
221*a*	,,	*L*	865	359*b*	,,	*L*	734	487	,,	*M*	868	582	,,	*O*	547	735	,,	*N*	167
221*b*	,,	*S*	819	361	,,	*M*	778	489	,,	*A*	299	584	,,	*A*	632	736	,,	*A*	283
222	,,	*L*	660	363	,,	*Pesh*	67	490	,,	*L*	634	586	,,	*S*	361	738	,,	*R*	243
223	,,	*C*	752	364	,,	*L*	946	491	,,	*A*	189	587	,,	*B*	447	739	,,	*PC*	233
224	,,	*L*	511	366	,,	*C*	647	493	,,	*O*	540	590	,,	*C*	893	743	1934	,,	3
225	,,	*P*	155	370	,,	*P*	697	494	,,	*A*	153	594	,,	*A*	918	744	1933	*P*	708
229	,,	*L*	718	371	,,	*N*	249	496	,,	*L*	930	595*a*	,,	*R*	184	747	,,	*PC*	211
230	1934	*M*	99	372	,,	*M*	588	498*a*	,,	*P*	600	595*b*	,,	*O*	346	750	,,	*A*	589
231	1933	*A*	778	375	,,	*P*	472	498*b*	,,	*L*	804	596	,,	*A*	648				

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IC	AIR			IC	AIR			IC	AIR			IC	AIR			IC	AIR		
751	1934	*O*	57	817	1933	*O*	382	884	1933	*C*	440	954	1933	*R*	169	1026	1933	*M*	657
753	1933	*A*	572	819	,,	*A*	591	885	,,	*A*	551	957	,,	*A*	834	1027	,,	*R*	208
754	,,	*S*	310	821	,,	*O*	377	888	,,	*O*	389	961	,,	*S*	805	1030	1934	*L*	110
756	,,	*A*	274	824	,,	*C*	794	890	,,	*PC*	222	963	,,	*P*	523	1031	,,	*P*	18
758	,,	*R*	190	825	,,	*O*	285	893	,,	*S*	398	966	,,	*L*	671	1033	,,	,,	244
759	,,	*A*	541	829	,,	*L*	796	895	,,	*C*	813	971	,,	*P*	515	1034	1933	*N*	337
761	,,	*L*	784	830	,,	*O*	328	896	,,	*A*	582	973	,,	*PC*	225	1037	1934	*P*	21
762	,,	*A*	756	831*a*	,,	*Notes*	4*d*	900	,,	,,	676	977	,,	*A*	856	1040	1933	*S*	21
764	,,	,,	664	831*b*	,,	*C*	787	904	,,	,,	818	979	,,	*B*	444	1044	,,	*PC*	198
765	,,	,,	600	832	,,	*A*	559	905	,,	*O*	404	980	,,	*A*	845	1045	1934	*P*	109
766	,,	*Pesh*	73	834	,,	*C*	658	912	,,	*L*	789	981	,,	,,	829	1046	1933	*N*	330
767	,,	*C*	800	836	,,	*A*	364	914	,,	*A*	896	982	,,	*N*	265	1049	,,	*P*	608
775	,,	*A*	788	838	,,	,,	557	918*a*	,,	*Notes*	8*d*	983	,,	*A*	833	1050	1934	*L*	156
777	,,	*S*	279	840	,,	*L*	651	918*b*	,,	*P*	445	984	,,	*B*	437	1051	1933	*C*	594
789*a*	,,	*A*	115	841	,,	,,	654	919	,,	*C*	739	986	,,	*N*	329	1055	,,	*L*	959
789*b*	,,	*O*	170	843	,,	,,	852	922	,,	*R*	83	987	,,	*O*	462	1056	1934	*P*	243
790	,,	*A*	114	845	,,	,,	509	924	,,	*S*	395	990	,,	*L*	737	1057	1933	*M*	847
791*a*	,,	*C*	814	847	,,	,,	591	926	,,	*PC*	230	991	,,	*A*	844	1061	,,	*L*	956
791*b*	1934	*A*	37	848	,,	*N*	358	928	,,	*C*	660	993*a*	,,	*O*	477	1064	,,	*O*	355
792	1933	,,	753	850	,,	*S*	267	929	,,	*A*	533	993*b*	,,	*P*	517	1069	,,	*L*	686
793	1934	*P*	2	856	,,	*P*	693	931	1934	*P*	4	1001	,,	*Notes*	5*c*	1070	,,	*A*	674
795	1933	*A*	376	858	,,	*C*	745	932	1933	*L*	636	1002	,,	*A*	825	1071	,,	*L*	755
798	1934	*P*	38	860	,,	*R*	166	933	1934	*P*	41	1003	,,	*L*	954	1073	,,	*R*	361
801	1933	*A*	607	863	,,	*C*	641	934	1933	,,	112	1005	,,	*O*	482	1075	,,	*L*	961
803	,,	*C*	785	865	,,	*P*	647	936	,,	*S*	390	1009	,,	*R*	418	1076	,,	*S*	391
804	,,	*A*	455	870	,,	*A*	631	937*a*	1934	*P*	52	1009	,,	*L*	962	1078	,,	*L*	727
805	,,	*O*	564	872	,,	*L*	638	937*b*	,,	,,	48	1010	,,	*C*	812	1079	,,	*Pesh*	76
807	,,	*B*	462	873	,,	*A*	641	939	1933	*L*	615	1012	1934	*P*	246	1081	,,	*P*	566
809	,,	*L*	598	875*a*	,,	*C*	789	942	,,	,,	637	1013	1933	*L*	833	1083	,,	*L*	925
810	,,	*A*	562	875*b*	,,	*A*	674	943	1934	*M*	25	1017	,,	,,	763	1084	,,	*N*	344
811	1934	*P*	31	878	,,	*C*	793	944	,,	*L*	91	1018	,,	*P*	634	1087	,,	*P*	638
812	1933	*A*	519	879*a*	,,	*P*	677	945	1933	*Notes*	8*e*	1019	,,	*S*	376	1088	,,	*S*	393
814	1934	,,	60	879*b*	,,	*C*	815	946	,,	*R*	85	1022	1934	*L*	163	1089	,,	*A*	837
815	1933	*PC*	232	880	,,	*L*	646	949	,,	*L*	661	1023	1933	*O*	473	1093	,,	*M*	860
816	,,	*L*	697	882	,,	*A*	577	952	,,	*S*	359	1024	,,	*L*	826	1094	,,	*Pesh*	83

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TABLE No. II

Showing Seriatim the pages of ALL INDIA REPORTER 1933 LAHORE with corresponding references of OTHER REPORTS, JOURNALS AND PERIODICALS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1933 LAHORE.

Column No. 2 denotes corresponding references of OTHER REPORTS AND JOURNALS.

A. I. R. 1933 Lahore=Other Journals

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
1	140	*I C*	495	12	14	*Lah*	14	27	141	*I C*	169	36	140	*I C*	91
	33	*P L R*	1085		34	*P L R*	381	28	33	*P L R*	930		33	*Cr L J*	915
3	144	*I C*	259	14	145	*I C*	687		142	*I C*	764		1933	*Cr C*	116
	34	*P L R*	685	15	13	*Lah*	561	29	140	*I C*	238	37	33	*P L R*	1045
5	140	*I C*	503		140	*I C*	621		33	*P L R*	1015		141	*I C*	66
	33	*P L R*	1075		33	*P L R*	1051		13	*Lah*	806		1933	*Cr C*	117
8	140	*I C*	223	18		...		33	140	*I C*	177		34	*Cr L J*	93
9	140	*I C*	430	22	140	*I C*	530	34	33	*P L R*	787	39	33	*P L R*	1068
	33	*P R R*	1073		33	*P L R*	1082		139	*I C*	48		140	*I C*	539
10	140	*I C*	534	23	140	*I C*	225	35	140	*I C*	528		1933	*Cr C*	119
	34	*P L R*	468		33	*P L R*	1026		33	*P L R*	1081		34	*Cr L J*	39
11	140	*I C*	473	25	13	*Lah*	677		19	*AICr R*	92	40	140	*I C*	22
	33	*P L R*	1088		140	*I C*	604		1933	*Cr C*	115	41	140	*I C*	533
	14	*Lah*	42		33	*P L R*	1035		34	*Cr L J*	45		14	*Lah*	230
12	140	*I C*	187	27	34	*P L R*	81	36	33	*P L R*	935		34	*P L R*	546

A. I. R. 1933 Lahore=Other Journals—(*Contd.*)

AIR	Other Journals	
42	1933*Cr C*	121
	145 *I C*	967
	34 *P L R*	895
	34 *Cr L J*	1158
43	33 *P L R*	1058
	140 *I C*	598
44	33 *P L R*	1048
	141 *I C*	64
	14 *Lah*	249
46	140 *I C*	180
47	141 *I C*	425
	34 *P L R*	252
48	33 *P L R*	975
	142 *I C*	759
	14 *Lah*	243
50	144 *I C*	107
51	33 *P L R*	979
	140 *I C*	128
53	145 *I C*	241
56	143 *I C*	485
	34 *P L R*	535
57	33 *P L R*	1054
	140 *I C*	566
58	145 *I C*	245
59	33 *P L R*	1056
	140 *I C*	584
60	33 *P L R*	1074
	140 *I C*	564
61	33 *P L R*	323
	14 *Lah*	137
	142 *I C*	754
65	140 *I C*	808
	34 *P L R*	31
66	140 *I C*	796
	34 *P L R*	19
68	141 *I C*	500
	34 *P L R*	166
69	145 *I C*	256
70	33 *P L R*	1028
	141 *I C*	196
	14 *Lah*	345
73	140 *I C*	843
	34 *P L R*	51
75	33 *P L R*	1033
	141 *I C*	252
76	140 *I C*	772
	34 *P L R*	143
77	140 *I C*	870
	34 *P L R*	89
79	33 *P L R*	1020
	142 *I C*	351
80	140 *I C*	829
	34 *P L R*	24
82	145 *I C*	131
83	140 *I C*	760
	34 *P L R*	104
84	140 *I C*	855
	34 *P L R*	37
85	33 *P L R*	1041
	1933*Cr C*	161
	142 *I C*	869
	34 *Cr L J*	452
88	33 *P L R*	1062
	140 *I C*	617
	1933*Cr C*	164
	34 *Cr L J*	77
89	141 *I C*	801
SB	34 *P L R*	132
	14 *Lah*	284
91	141 *I C*	404
	34 *P L R*	239
93	145 *I C*	178
94	140 *I C*	771
	14 *Lah*	11
	34 *P L R*	142
95	141 *I C*	68
	34 *P L R*	28
96	33 *P L R*	1032
	1933*Cr C*	211
	14 *Lah*	201
	34 *Cr L J*	383
	142 *I C*	696
97	145 *I C*	208
98	145 *I C*	253
99	13 *Lah*	761
	34 *P L R*	70
	142 *I C*	686
101	142 *I C*	644
102	14 *Lah*	325
	144 *I C*	6
	34 *P L R*	988
	34 *P L R*	1039
103	143 *I C*	482
	34 *P L R*	539
104	33 *P L R*	974
	141 *I C*	494
105	141 *I C*	234
	34 *P L R*	163
106	144 *I C*	1032
	34 *P L R*	1042
107	33 *P L R*	1061
	140 *I C*	778
108	33 *P L R*	973
	142 *I C*	704
109	141 *I C*	435
	34 *P L R*	153
	14 *Lah*	380
112	140 *I C*	472
	33 *P L R*	1084
113	141 *I C*	63
	34 *P L R*	43
114	144 *I C*	1021
	34 *P L R*	911
115	143 *I C*	418
	34 *P L R*	910
116	141 *I C*	424
	34 *P L R*	291
	14 *Lah*	399
117	141 *I C*	187
	34 *P L R*	125
118	145 *I C*	184
119	141 *I C*	179
	34 *P L R*	82
120	143 *I C*	357
	34 *P L R*	908
121	143 *I C*	580
	34 *P L R*	663
123	1933*Cr C*	228
	145 *I C*	119
	34 *Cr L J*	909
	34 *P L R*	1044
124	141 *I C*	378
	34 *P L R*	219
125	142 *I C*	652
	34 *P L R*	399
126(1)	145 *I C*	144
	34 *P L R*	1051
126(2)	1933*Cr C*	221
	145 *I C*	926
	34 *P L R*	889
	34 *Cr L J*	1159
127	145 *I C*	247
128(1)	1933*Cr C*	221
	143 *I C*	649
	34 *Cr L J*	622
	34 *P L R*	668
128(2)	1933*Cr C*	242
	143 *I C*	649
	34 *Cr L J*	640
129	143 *I C*	364
	34 *P L R*	1046
130	141 *I C*	392
	34 *P L R*	229
131	1933*Cr C*	247
	142 *I C*	577
	34 *Cr L J*	443
133	144 *I C*	1024
	34 *P L R*	804
134	141 *I C*	513
	34 *P L R*	162
135	141 *I C*	400
	34 *P L R*	270
136	34 *P L R*	591
	143 *I C*	879
137	142 *I C*	530
139	141 *I C*	72
	34 *P L R*	34
140	142 *I C*	645
	34 *P L R*	403
141	145 *I C*	122
142	145 *I C*	227
143	1933*Cr C*	241
	34 *P L R*	365
	142 *I C*	430
144	1933*Cr C*	267
	145 *I C*	921
	34 *P L R*	886
	34 *Cr L J*	1160
145	1933*Cr C*	267
	143 *I C*	477
	34 *Cr L J*	616
147	1933*Cr C*	269
	145 *I C*	1002
	34 *P L R*	903
	34 *Cr L J*	1153
148 (1)	1933*Cr C*	270
	143 *I C*	463
	34 *P L R*	576
	34 *Cr L J*	604
148 (2)	145 *I C*	154
	34 *P L R*	1052
149	143 *I C*	639
150	146 *I C*	513
	34 *P L R*	983
151	141 *I C*	377
	34 *P L R*	245
152	141 *I C*	337
	34 *P L R*	221
	14 *Lah*	361
154	140 *I C*	771
	34 *P L R*	9
155	...	
157	143 *I C*	685
158	141 *I C*	389
	34 *P L R*	223
159	1933*Cr C*	304
	144 *I C*	67
	34 *Cr L J*	679
162	33 *P L R*	1065
	1933*Cr C*	307
	142 *I C*	897
	34 *Cr L J*	460
164	33 *P L R*	1060
164	1933*Cr C*	309
165	1933*Cr C*	310
	145 *I C*	1009
	34 *P L R*	899
	34 *Cr L J*	1161
166	141 *I C*	263
	34 *Cr L J*	190
	34 *P L R*	148
	1933*Cr C*	311
167	34 *P L R*	259
	1933*Cr C*	312
	146 *I C*	27
	34 *Cr L J*	1175
168	145 *I C*	117
169	141 *I C*	188
	34 *P L R*	88
171	141 *I C*	448
	34 *P L R*	531
172	145 *I C*	155
173	145 *I C*	129
174	145 *I C*	159
	34 *P L R*	1055
175	33 *P L R*	1070
	142 *I C*	687
176	141 *I C*	379
	34 *P L R*	505
178	141 *I C*	490
	34 *P L R*	192
179	141 *I C*	264
	34 *P L R*	149
	14 *Lah*	218
183	145 *I C*	188
	34 *P L R*	1053
184	145 *I C*	204
	34 *P L R*	1049
186	145 *I C*	125
187 (1)	141 *I C*	260
	34 *P L R*	135
187 (2)	141 *I C*	270
	34 *P L R*	137
189	34 *P L R*	105
	141 *I C*	523
191	141 *I C*	177
	34 *P L R*	86
192	141 *I C*	47
	34 *P L R*	41
193	145 *I C*	182
	34 *P L R*	1037
194	143 *I C*	634
	34 *P L R*	1033
195	141 *I C*	443
	34 *P L R*	242
	14 *Lah*	414
197(1)	143 *I C*	630
	34 *P L R*	669
197(2)	141 *I C*	440
	34 *P L R*	570
	14 *Lah*	315
201	143 *I C*	615
	14 *Lah*	353
	34 *P L R*	665
203	14 *Lah*	330
	34 *P L R*	975
208	141 *I C*	175
	34 *P L R*	84
209	141 *I C*	617
	34 *P L R*	430
210	141 *I C*	421
	34 *P L R*	233
211	34 *P L R*	127

A. I. R. 1933 Lahore=Other Journals—(*Contd.*)

AIR	Other Journals
211	141 *I C* 336
212	145 *I C* 157
213	34 *P L R* 247
	141 *I C* 363
214	141 *I C* 463
	34 *P L R* 177
215	1933*Cr C* 370
	35 *Cr L J* 163
	146 *I C* 552
216	145 *I C* 200
217	141 *I C* 419
	34 *P L R* 167
218	141 *I C* 399
	34 *P L R* 225
220	34 *P L R* 17
	144 *I C* 173
221	13 *Lah* 796
	34 *P L R* 87
	141 *I C* 825
222	145 *I C* 681
223	141 *I C* 427
	34 *P L R* 254
224	146 *I C* 517
226	14 *Lah* 55
	34 *P L R* 273
	143 *I C* 768
227	1933*Cr C* 347
	146 *I C* 34
	34 *Cr L J* 1170
228	1933*Cr C* 348
	146 *I C* 261
	34 *Cr L J* 1253
229	142 *I C* 654
	1933 *Cr C* 349
	34 *Cr L J* 375
	34 *P L R* 414
231	1933 *Cr C* 351
	143 *I C* 627
	34 *Cr L J* 657
232	142 *I C* 20
	1933 *Cr C* 352
	34 *Cr L J* 518
	34 *P L R* 349
	14 *A I Cr R* 362
233	1933*Cr C* 353
	143 *I C* 356
	34 *Cr L J* 587
234	141 *I C* 659
	34 *Cr L J* 252
	34 *P L R* 548
	1933*Cr C* 354
235(1)	1933*Cr C* 355
	34 *P L R* 883
	145 *I C* 936
	34 *Cr L J* 1163
235(2)	1933*Cr C* 355
	144 *I C* 548
	34 *Cr L J* 782
236	1933*Cr C* 356
	35 *P L R* 157
239	142 *I C* 307
	34 *P L R* 338
240(1)	141 *I C* 569
	34 *P L R* 501
240(2)	141 *I C* 667
	34 *P L R* 497
241	33 *P L R* 124
	139 *I C* 133
242	33 *P L R* 971
	141 *I C* 36
243	139 *I C* 712
243	33 *P L R* 906
245	33 *P L R* 694
	139 *I C* 441
246	137 *I C* 240
	33 *P L R* 488
	13 *Lah* 788
248	143 *I C* 355
249	143 *I C* 558
250	142 *I C* 812
	34 *P L R* 486
251	145 *I C* 169
252	146 *I C* 657
253	14 *Lah* 22
	34 *P L R* 306
	142 *I C* 693
255	145 *I C* 974
	34 *P L R* 893
256	141 *I C* 649
	34 *P L R* 516
257	143 *I C* 577
258	146 *I C* 210
259	144 *I C* 515
	34 *P L R* 781
260	145 *I C* 158
261	...
262	144 *I C* 340
	34 *P L R* 714
263	14 *Lah* 46
	34 *P L R* 281
	143 *I C* 583
264	141 *I C* 184
265	146 *I C* 547
266	...
267	...
268	145 *I C* 701
	34 *P L R* 857
269	141 *I C* 462
	34 *P L R* 189
270	34 *P L R* 598
	143 *I C* 725
271	142 *I C* 535
	34 *P L R* 417
273	144 *I C* 99
	14 *Lah* 396
	34 *P L R* 810
274	14 *Lah* 31
	34 *P L R* 313
	142 *I C* 724
278	145 *I C* 176
279	34 *P L R* 925
	146 *I C* 395
282	...
284	141 *I C* 415
	14 *Lah* 255
	34 *P L R* 560
288	...
289	142 *I C* 309
	34 *P L R* 345
290	...
291	145 *I C* 163
293	...
294	1933*Cr C* 394
296	1933*Cr C* 396
299	1933*Cr C* 399
301	143 *I C* 135
304	146 *I C* 149
305	1933*Cr C* 540
	144 *I C* 294
	34 *P L R* 691
	34 *Cr L J* 710
306	34 *P L R* 100
307 (1)	34 *P L R* 176
307 (2)	145 *I C* 709
	34 *P L R* 856
308	1933*Cr C* 542
	144 *I C* 301
	34 *P L R* 694
	34 *Cr L J* 714
311 (1)	34 *P L R* 68
	1933*Cr C* 545
311 (2)	1933*Cr C* 545
	144 *I C* 296
	34 *P L R* 702
	34 *Cr L J* 712
313	1933*Cr C* 547
	144 *I C* 300
	34 *P L R* 699
	34 *Cr L J* 744
314	1933 *Cr C* 548
	146 *I C* 632
	34 *Cr L J* 1256
315	1933*Cr C* 549
	145 *I C* 702
	34 *Cr L J* 1051
317 (1)	34 *P L R* 218
317 (2)	14 *Lah* 51
	34 *P L R* 289
	142 *I C* 738
318	145 *I C* 697
319	144 *I C* 276
	34 *P L R* 682
321	142 *I C* 776
	34 *Cr L J* 409
	34 *P L R* 421
	1933 *Cr C* 564
	14 *Lah* 507
323	34 *P L R* 181
	34 *P L R* 680
	1933*Cr C* 585
	144 *I C* 299
	34 *Cr L J* 718
324	34 *P L R* 8
	142 *I C* 623
325	143 *I C* 90
	34 *P L R* 452
	14 *Lah* 442
326	34 *P L R* 439
	143 *I C* 89
	14 *Lah* 606
327	146 *I C* 258
328	34 *P L R* 99
	144 *I C* 954
329	34 *P L R* 171
	144 *I C* 738
330	34 *P L R* 69
	142 *I C* 690
331	14 *Lah* 449
	144 *I C* 470
	34 *P L R* 765
332	34 *P L R* 199
	144 *I C* 306
333	34 *P L R* 185
	144 *I C* 308
334	146 *I C* 236
	34 *P L R* 901
335	34 *P L R* 440
336	14 *Lah* 48
	34 *P L R* 587
337	34 *P L R* 110
	142 *I C* 629
338	34 *P L R* 161
	144 *I C* 266
339	34 *P L R* 342
	144 *I C* 616
	14 *Lah* 600
341	141 *I C* 611
	34 *P L R* 179
	34 *P L R* 514
	14 *Lah* 580
342	144 *I C* 467
	34 *P L R* 763
343	34 *P L R* 113
	14 *Lah* 584
344	144 *I C* 89
345	14 *Lah* 587
	34 *P L R* 862
347	142 *I C* 13
	34 *P L R* 356
350	34 *P L R* 739
	144 *I C* 471
351	34 *P L R* 1
	142 *I C* 633
352	142 *I C* 408
	14 *Lah* 591
	34 *P L R* 859
354	34 *P L R* 436
	144 *I C* 762
355 (1)	143 *I C* 122
SB	34 *P L L* 448
356 (2)	34 *P L R* 11
	142 *I C* 649
	14 *Lah* 543
359	...
361	142 *I C* 313
	34 *P L R* 373
363 (1)	143 *I C* 494
	34 *P L R* 583
363 (2)	147 *I C* 3
	34 *P L R* 201
365	34 *P L R* 73
	144 *I C* 651
	14 *Lah* 485
369	143 *I C* 422
370	144 *I C* 976
372	...
373	145 *I C* 1016
	34 *P L R* 902
374	141 *I C* 596
	34 *P L R* 534
376	146 *I C* 565
377	145 *I C* 992
	34 *P L R* 884
378	147 *I C* 847
379	34 *P L R* 331
	142 *I C* 68
380	141 *I C* 580
	34 *P L R* 511
	14 *Lah* 696
382	142 *I C* 641
383	145 *I C* 386
	34 *P L R* 851
384	34 *P L R* 46
	141 *I C* 655
385	143 *I C* 474
	1933*Cr C* 639
	34 *P L R* 557
	34 *Cr L J* 630
387 (1)	1933*Cr C* 640
	146 *I C* 51
	34 *Cr L J* 1171
387 (2)	1933*Cr C* 631
	146 *I C* 25

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A I R	Other Journals	
582	...	
583	...	
585	34 *P L R*	207
	142 *I C*	211
587	144 *I C*	1020
588	141 *I C*	434
	34 *P L R*	293
589	144 *I C*	690
	34 *P L R*	780
590	1933*Cr C*	845
591	34 *P L R*	1022
	146 *I C*	847
592	...	
593	141 *I C*	483
	34 *P L R*	168
	14 *Lah*	365
594	141 *I C*	577
	34 *P L R*	528
	14 *Lah*	409
596 (1)	1933*Cr C*	881
	34 *P L R*	890
	145 *I C*	1013
	34 *Cr L J*	1156
596 (2)	1933*Cr C*	881
	145 *I C*	284
	34 *Cr L J*	957
597 (1)	1933*Cr C*	878
	145 *I C*	741
	34 *Cr L J*	1128
597 (2)	145 *I C*	426
	34 *P L R*	852
598	34 *P L R*	274
	14 *Lah*	312
	146 *I C*	809
599	145 *I C*	464
600	...	
601	144 *I C*	45
	14 *Lah*	473
	34 *P L R*	820
605	141 *I C*	186
	34 *P L R*	123
606	144 *I C*	669
609	146 *I C*	40
610	142 *I C*	857
	34 *P L R*	435
611 (1)	144 *I C*	5
	34 *P L R*	634
611 (2)	146 *I C*	545
612	141 *I C*	364
	34 *P L R*	230
	14 *Lah*	553
614	145 *I C*	334
615	146 *I C*	939
	34 *P L R*	1085
618	144 *I C*	1
620	145 *I C*	874
621	146 *I C*	67
623	142 *I C*	620
	34 *Cr L J*	372
	34 *P L R*	427
	1933*Cr C*	879
626	146 *I C*	553
627	143 *I C*	428
628	34 *P L R*	183
	145 *I C*	337
629	144 *I C*	102
630	144 *I C*	192
	34 *P L R*	633
	14 *Lah*	672
631	143 *I C*	286
	34 *P L R*	647
633	144 *I C*	559
	34 *P L R*	1079
	14 *Lah*	738
634	146 *I C*	490
	34 *P L R*	960
635	146 *I C*	38
636	34 *P L R*	487
	146 *I C*	932
	14 *Lah*	712
637	146 *I C*	942
638	34 *P L R*	1066
	14 *Lah*	744
	146 *I C*	872
639	143 *I C*	755
640	145 *I C*	231
	34 *P L R*	891
	14 *Lah*	651
642 (1)	34 *P L R*	831
	145 *I C*	528
642 (2)	34 *P L R*	827
	145 *I C*	474
645	...	
646	14 *Lah*	437
	34 *P L R*	817
	146 *I C*	880
648 (1)	142 *I C*	427
	34 *P L R*	584
648 (2)	34 *P L R*	741
	144 *I C*	396
	14 *Lah*	635
650	144 *I C*	13
651	34 *P L R*	1032
	146 *I C*	840
652	146 *I C*	125
654	34 *P L R*	1035
	146 *I C*	841
655	33 *P L R*	549
	139 *I C*	151
	14 *Lah*	212
657	143 *I C*	723
	34 *P L R*	592
658	34 *P L R*	840
	145 *I C*	349
659 (1)	145 *I C*	299
659 (2)	34 *Cr L J*	578
	143 *I C*	341
660	1933*Cr C*	882
	146 *I C*	222
	34 *Cr L J*	1207
661	1933*Cr C*	883
	146 *I C*	949
664	1933*Cr C*	886
	34 *P L R*	330
	146 *I C*	172
	34 *Cr L J*	1173
665	143 *I C*	362
	34 *Cr L J*	584
	1933*Cr C*	887
667	143 *I C*	479
	34 *P L R*	536
	34 *Cr L J*	606
	1933*Cr C*	889
669	144 *I C*	596
	35 *P L R*	112
	14 *Lah*	765
670	...	
671	146 *I C*	966
	14 *Lah*	779
	35 *P L R*	124
676	144 *I C*	390
	34 *P L R*	767
676	14 *Lah*	640
678 (1)	145 *I C*	270
	34 *Cr L J*	952
678 (2)	144 *I C*	620
680	145 *I C*	415
	34 *P L R*	849
681	146 *I C*	45
	34 *P L R*	937
	14 *Lah*	656
682	34 *P L R*	844
	145 *I C*	432
685	145 *I C*	416
	34 *P L R*	853
686	34 *P L R*	261
	146 *I C*	1069
687	143 *I C*	574
	14 *Lah*	457
	34 *P L R*	815
688	143 *I C*	175
	34 *P L R*	464
	14 *Lah*	730
690	144 *I C*	18
	14 *Lah*	609
	34 *P L R*	946
692	143 *I C*	209
	34 *P L R*	651
	14 *Lah*	715
695	143 *I C*	753
	34 *P L R*	601
	14 *Lah*	675
697 (1)	34 *P L R*	1029
	146 *I C*	816
697 (2)	34 *P L R*	489
	144 *I C*	488
702	144 *I C*	646
	34 *P L R*	775
703	145 *I C*	746
705	14 *Lah*	267
FB	34 *P L R*	618
	145 *I C*	553
710	144 *I C*	618
711	146 *I C*	215
	34 *P L R*	919
712	141 *I C*	409
	34 *P L R*	5
	34 *P L R*	235
	14 *Lah*	306
714	1933*Cr C*	900
	35 *Cr L J*	81
	34 *P L R*	994
	146 *I C*	391
716	14 *Lah*	290
FB	34 *P L R*	612
	1933*Cr C*	902
	145 *I C*	467
	34 *Cr L J*	1025
	20 *AIR CrR*	418
718	1933*Cr C*	904
	146 *I C*	228
	34 *Cr L J*	1251
720	1933*Cr C*	941
	147 *I C*	675
721	135 *I C*	680
	33 *P L R*	494
	14 *Lah*	302
722	34 *P L R*	1007
	146 *I C*	725
723	146 *I C*	543
724	...	
725 (1)	34 *P L R*	987
	146 *I C*	628
725 (2)	34 *P L R*	482
	14 *Lah*	624
727	146 *I C*	1078
	34 *P L R*	1071
728	...	
730	143 *I C*	719
732 (1)	...	
732 (2)	143 *I C*	143
	34 *P L R*	454
733	35 *Cr L J*	90
	146 *I C*	420
	34 *P L R*	961
734	35 *Cr L J*	77
	34 *P L R*	953
	146 *I C*	359
735	34 *P L R*	931
	146 *I C*	291
737	146 *I C*	990
	34 *P L R*	1061
738	34 *P L R*	642
740	146 *I C*	515
741	144 *I C*	641
742	...	
746	142 *I C*	195
	34 *P L R*	340
747	14 *Lah*	759
	34 *P L R*	1082
749	143 *I C*	742
	34 *P L R*	608
752	144 *I C*	605
753	...	
759	34 *P L R*	942
	14 *Lah*	659
	146 *I C*	1071
756	146 *I C*	541
	34 *P L R*	1008
757	144 *I C*	206
	34 *P L R*	629
758	144 *I C*	158
759	144 *I C*	658
	14 *Lah*	518
	34 *P L R*	1096
761	144 *I C*	729
	34 *P L R*	783
763 (1)	34 *P L R*	880
763 (2)	146 *I C*	1017
	34 *P L R*	1059
765 (1)	34 *P L R*	567
	145 *I C*	628
765 (2)	144 *I C*	607
	34 *P L R*	778
767	35 *P L R*	26
	147 *I C*	29
768	...	
770	34 *P L R*	656
	144 *I C*	820
771	14 *Lah*	749
774 (1)	144 *I C*	822
	35 *P L R*	96
	14 *Lah*	807
774 (2)	34 *P L R*	826
	145 *I C*	629
	14 *Lah*	810
775	144 *I C*	606
776	144 *I C*	726
	34 *P L R*	1018
777 (1)	34 *P L R*	964
	146 *I C*	511
777 (2)	147 *I C*	858
780 (1)	144 *I C*	601

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AIR	Other Journals	
780 (2)	144 *I C*	614
	34 *P L R*	772
782 (1)	34 *P L R*	657
	144 *I C*	812
782 (2)	34 *P L R*	627
	147 *I C*	803
783	34 *P L R*	966
	146 *I C*	505
784 (1)	34 *P L R*	1030
	146 *I C*	761
784(2)	14 *Lah*	794
	35 *P L R*	121
786	...	
789	34 *P L R*	1063
	146 *I C*	912
790	34 *P L R*	579
	144 *I C*	596
	34 *P L R*	788
791	144 *I C*	695
792	144 *I C*	698
793	144 *I C*	362
	34 *P L R*	734
	14 *Lah*	646
795	34 *P L R*	999
	146 *I C*	519
796	146 *I C*	829
	34 *P L R*	1025
797	146 *I C*	474
	34 *P L R*	963
798	...	
801	...	
804	34 *P L R*	955
	146 *I C*	498
805	146 *I C*	633
806	145 *I C*	924
	34 *P L R*	887
	14 *Lah*	668
807	1933*Cr C*	1040
	146 *I C*	166
	34 *Cr L J*	1174
808	1933*Cr C*	1101
	35 *Cr L J*	69
	34 *P L R*	950
	146 *I C*	821
809	144 *I C*	290
	34 *P L R*	689
	34 *Cr L J*	723
	1933*Cr C*	1026
810	146 *I C*	679
812	34 *P L R*	991
	146 *I C*	582
813	34 *P L R*	986
	146 *I C*	630
814	144 *I C*	830
	1933*Cr C*	1024
	34 *Cr L J*	867
815	35 *P L R*	71
817	35 *P L R*	30
	147 *I C*	19
	15 *Lah*	28
819	1933*Cr C*	1063
	34 *P L R*	1003
	14 *Lah*	814
	146 *I C*	876
	35 *Cr L J*	72
821	...	
822	146 *I C*	551
823	147 *I C*	190
824	...	
826	146 *I C*	1024
827	147 *I C*	862
828	15 *Lah*	55
	147 *I C*	54
829	146 *I C*	550
830	147 *I C*	762
831	147 *I C*	117
832	145 *I C*	944
	34 *P L R*	900
833	14 *Lah*	827
	35 *P L R*	11
	146 *I C*	1013
836	...	
838	34 *P L R*	660
	1933*Cr C*	1111
	145 *I C*	752
	34 *Cr L J*	1129
839	147 *I C*	584
841	...	
844	145 *I C*	733
845	35 *P L R*	85
847	...	
849 (1)	...	
849 (2)	...	
850	...	
851 (1)	34 *P L R*	658
	145 *I C*	755
851 (2)	1933*Cr C*	1107
	146 *I C*	695
	35 *Cr L J*	174
852	34 *P L R*	672
	1933*Cr C*	1108
	35 *Cr L J*	171
	14 *Lah*	820
	146 *I C*	843
855	147 *I C*	31
856	35 *P L R*	171
857	15 *Lah*	50
	35 *P L R*	80
859 (1)	146 *I C*	599
859(2)	34 *P L R*	998
	146 *I C*	597
860	15 *Lah*	35
	35 *P L R*	16
861	...	
864	147 *I C*	193
865	1933*Cr C*	1112
	146 *I C*	221
	34 *Cr L J*	1210
866	147 *I C*	399
867	35 *P L R*	69
868	1933*Cr C*	1113
	146 *I C*	461
	35 *Cr L J*	111
869(1)	1933*Cr C*	1114
	15 *Lah*	6
	34 *P L R*	965
	146 *I C*	437
869 (2)	1933*Cr C*	1114
	34 *P L R*	935
	146 *I C*	357
	35 *Cr L J*	74
871	1933*Cr C*	1116
	146 *I C*	665
	35 *Cr L J*	137
	34 *P L R*	1010
876	144 *I C*	553
880	144 *I C*	691
	34 *P L R*	786
881	14 *Lah*	804
	35 *P L R*	98
	144 *I C*	672
882	35 *P L R*	146
883	1933*Cr C*	1177
	34 *P L R*	933
	146 *I C*	326
	35 *Cr L J*	65
884	1933*Cr C*	1178
	34 *P L R*	1020
	146 *I C*	887
	35 *Cr L J*	86
885	144 *I C*	497
	34 *P L R*	788
890	144 *I C*	662
891	34 *P L R*	676
	146 *I C*	297
892	34 *P L R*	736
	146 *I C*	683
893	...	
894	144 *I C*	712
898	144 *I C*	483
899	34 *P L R*	1000
	1933*Cr C*	1287
	146 *I C*	648
	35 *Cr L J*	143
900	144 *I C*	451
	14 *Lah*	446
	34 *P L R*	761
901	15 *Lah*	9
905	144 *I C*	636
	14 *Lah*	558
	34 *P L R*	868
910	1933*Cr C*	1297
	146 *I C*	677
	35 *Cr L J*	168
913	15 *Lah*	44
	35 *P L R*	176
914	145 *I C*	173
	34 *Cr L J*	900
	1933*Cr C*	1375
915	35 *P L R*	38
	147 *I C*	208
916	...	
920	146 *I C*	136
922	...	
925	1933*Cr C*	1384
	15 *Lah*	39
	34 *P L R*	1068
	146 *I C*	1083
926	1933*Cr C*	1385
	15 *Lah*	20
	146 *I C*	446
	35 *Cr L J*	107
927	144 *I C*	1018
	34 *P L R*	801
	34 *Cr L J*	911
	1933*Cr C*	1386
928	1933*Cr C*	1387
	147 *I C*	109
930	1933*Cr C*	1389
	146 *I C*	496
	35 *Cr L J*	101
932	1933*Cr C*	1391
	34 *P L R*	966
	146 *I C*	444
	35 *Cr L J*	16
933(1)	1933*Cr C*	1392
	146 *I C*	442
933(2)	...	
935	34 *P L R*	686
	146 *I C*	241
936(1)	144 *I C*	848
	34 *P L R*	809
	15 *Lah*	26
936(2)	14 *Lah*	526
938	147 *I C*	13
940	34 *P L R*	771
941	...	
943	144 *I C*	864
	34 *P L R*	805
945	34 *P L R*	929
	146 *I C*	350
946	34 *P L R*	639
	1933*Cr C*	1409
	146 *I C*	364
	35 *Cr L J*	79
948	...	
951	147 *I C*	909
952	35 *P L R*	175
953	14 *Lah*	426
	34 *P L R*	812
	146 *I C*	686
954	34 *P L R*	1057
	146 *I C*	1003
956	1933*Cr C*	1411
	35 *P L R*	115
	146 *I C*	1061
959	1933*Cr C*	1414
	34 *P L R*	1072
	146 *I C*	1055
960	145 *I C*	250
961	34 *P L R*	1073
	146 *I C*	1075
962	35 *P L R*	4
	146 *I C*	1009
963	34 *P L R*	605
	144 *I C*	626
965	147 *I C*	785
966	...	
969	14 *Lah*	770
	1933*Cr C*	1457
	35 *P L R*	34
	147 *I C*	123
972	...	
977	35 *P L R*	51
	1933*Cr C*	1467
	147 *I C*	2
987	1933*Cr C*	1503
997	147 *I C*	695
998	1933*Cr C*	1513
	147 *I C*	692
999	147 *I C*	505
1000	145 *I C*	719
	34 *P L R*	864
1001	...	
1002(1)	34 *P L R*	832
	1933*Cr C*	1515
	147 *I C*	560
1002(2)	34 *P L R*	798
	35 *Cr L J*	104
	146 *I C*	434
	1933*Cr C*	1515
1003	147 *I C*	801
1004	147 *I C*	671
1005(1)	147 *I C*	712
1005(2)	1933*Cr C*	1516
	147 *I C*	409
1007(1)	...	
1007(2)	147 *I C*	745
1008	147 *I C*	778
1009	1933*Cr C*	1554
	147 *I C*	737
1010	35 *P L R*	143
	147 *I C*	610

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AIR	Other Journals		AIR	Other Journals		AIR	Other Journals		AIR	Other Journals	
1011	...		1020	147 *I C*	398	1035(1)	147 *I C*	674	1045	...	
1014(1)	147 *I C*	684	1021	1933*Cr C*	1558	1035(2)	147 *I C*	401	1046	...	
1014(2)	147 *I C*	679		35 *P L R*	139		1934*Cr C*	14	1048	1934*Cr C*	17
1015	35 *P L R*	153		147 *I C*	578	1038(1)	...		1050	147 *I C*	499
1016(1)	147 *I C*	521	1022	147 *I C*	634	1038(2)	35 *P L R*	167	1051	35 *P L R*	148
1016(2)	147 *I C*	575	1024	...			147 *I C*	673		147 *I C*	574
	35 *P L R*	142	1026	1934*Cr C*	12	1039	147 *I C*	683	1052	1933*Cr C*	1582
1017	147 *I C*	851		147 *I C*	719	1040	147 *I C*	626		147 *I C*	681
1018(1)	34 *P L R*	967	1029	...		1041	...		1053	147 *I C*	705
	147 *I C*	590	1031	147 *I C*	529	1043(1)	147 *I C*	698		1934*Cr C*	1
1018(2)	1933*Cr C*	1555	1032	147 *I C*	875	1043(2)	147 *I C*	636	1054	147 *I C*	696
	35 *P L R*	149	1033	147 *I C*	637	1044(1)	147 *I C*	507	1055	1934*Cr C*	19
1019	1933*Cr C*	1556	1034	147 *I C*	768	1044(2)	147 *I C*	709		147 *I C*	722
1020	1933*Cr C*	1557	1035(1)	35 *P L R*	174						

Cases not bearing Parallel references against them are not reported elsewhere.

CASE OVERRULED in A. I. R. 1933 LAHORE

Jita Singh v. Hari Singh, (1916) 97 P. R. 1916=37 I. C. 128	Overruled in A. I. R. 1933 Lah. 943.

THE

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1933

LAHORE HIGH COURT

* * A. I. R. 1933 Lahore 1

JAI LAL, J.

Thakar Singh and *others*—Defendants—Appellants.

v.

Jagat Singh—Plaintiff — Respondent.

Second Appeal No. 1066 of 1931, Decided on 13th October 1932, against decree of Dist. Judge, Montgomery, D/- 17th March 1931.

(a) Limitation Act (1908), S. 5—Mistake held bona fide and time was extended.

The District Judge dismissed suit on 17th March 1930. High Court remanded the case. The District Judge then passed a decree on 17th March 1931. On appeal a copy of the first decree of 17th March 1930 only was filed with the memorandum of appeal. A copy of the decree of 17th March 1931 against which the appeal had really been presented was not filed. The appellant's counsel discovered the mistake subsequently and filed a copy of the proper decree but then the time for presenting the appeal had already expired. The mistake was explained by the counsel and his clerk by means of an affidavit:

Held : that the mistake being a bona fide one the time should be extended. [P 2 C 1, 2]

* * **(b) Specific Relief Act (1877), S. 21 (a)—Contract to lend cannot be specifically enforced—Rule does not apply to possessory mortgage as to balance of mortgage money—Possession is not condition precedent.**

The general rule is that no suit to specifically enforce a contract to lend money is maintainable. But it does not apply to the right of a mortgagor in a possessory mortgage to recover the balance of the mortgage amount left with the mortgagee and particularly where possession has been given to the mortgagee. The giving of possession by the mortgagor to the mortgagee however is not a condition precedent to enable the former to institute a suit for the recovery of the mortgage money. In such cases no question of specific performance of a contract to lend money arises: 34 *I. C.* 367 and *A. I. R.* 1931 *All.* 95, *Rel. on*; 43 *Cal.* 59; *A. I. R.* 1919 *Mad.* 822 and *A. I. R.* 1925 *Mad.* 62, *Ref.* [P 2 C 2; P 3 C 1]

(c) Interest—Possessory mortgage—Profits in lieu of interest—Mortgage amount remaining with mortgagee—Mortgagor is entitled to interest at prevailing rate—Mortgage.

Where the mortgagees are to enjoy the profits of the property in lieu of interest presumably the interest contemplated by the parties is the prevailing rate of interest and the mortgagor is entitled from the mortgagee interest at such rate on the balance of mortgage money kept with him. [P 3 C 1]

Jai Gopal Sethi — for Appellants.

Anant Ram Khosla — for Respondent.

Judgment

The respondent Jagat Singh mortgaged his land with possession with Thakar Singh and others, appellants, for Rs. 5000. Out this amount Rupees 3000 were to be paid to previous mortgagees and possession of the land mortgaged was to be taken by the new mortgagees, Rs. 2000 were to be paid to creditors of the mortgagor who were to be brought to the mortgagees by mortgagor. The income of the property mortgaged was to be taken to be equal to the interest on the mortgaged amount, that is, Rs. 5000, and permission was given to the mortgagor to redeem the land on payment of the principal amount borrowed by him after ten years. Another mortgage for Rs. 125 was executed by the same mortgagor in favour of the same mortgagees. It appears that the terms fixed for the redemption of the previous two mortgages had not yet expired and consequently the new mortgagees who must be assumed to be fully cognizant of this state of affairs at the time when they took the mortgage, were unable to obtain possession of the land taken in mortgage by them or it may be that in the meantime the value of the property having fallen the mortgagees began to repent of their bargain. The consequence was that they paid only Rs. 1125 to the mortgagor or his creditors and declined to pay the balance of Rs. 1,000 which they had to pay. The mortgagor consequently instituted a suit for the recovery of Rupees 1,000 and interest thereof. This suit has been decreed by the District Judge, interest having been allowed at the rate of 24 per cent p. a. which the learned Judge has found on evidence to be the prevailing rate of interest between the parties. Incidentally it may be mentioned that the previous mortgagees are prepared to be redeemed irrespective of the term fixed in their mortgage deeds. The mortgagees have preferred this second appeal against the decree granted by the District Judge.

A preliminary objection has been taken on behalf of the respondent that the appeal has not been properly presented. It appears that an objection was raised in the trial Court to its jurisdiction to entertain this suit. This objection was disallowed and the suit was decreed on the merits. On appeal by the mortgagees the District Judge held that the trial Court had no jurisdiction. On a second appeal to this Court by the plaintiff, however, the case was remanded to the District Judge to decide the question of jurisdiction and also the appeal on its merits. The previous decree of the District Judge is dated 17th March 1930, which was set aside by this Court. When the case went back to the District Judge he passed a decree as already mentioned on 17th March 1931. It is a mere coincidence that both the appeals were decided on the same date of the same month but in different years. When the present appeal was instituted a copy of the first decree, that is, of the 17th March, 1930, only was filed with the memorandam of appeal. A copy of the decree of 17th March 1931, against which the appeal had really been presented, was not filed. It appears, however, that the appellant's counsel discovered the mistake subsequently and filed a copy of the proper decree but then the time for presenting the appeal had already expired. The mistake, has been explained by the counsel and his clerk by means of an affidavit, and under the circumstances mentioned above there is no doubt that there was bona fide mistake in the matter. It is conceded by the respondent's counsel that it was open to this Court to condone the omission by extending the time under S. 5, Limitation Act, but he says that the circumstances of this case are not such that the Court should show any indulgence to the appellants. I am quite unable to agree with this contention and hold that the mistake being a bona fide one the time should be extended, and I extend it accordingly. The preliminary objection is overruled. On the merits, in my opinion, the appeal must fail. Only two points have been urged before me by the learned counsel for the appellants. One is that the present suit was not maintainable, the second being that interest has been awarded to the respondent at a very high rate.

With regard to the first contention the first observation that I make is that this point was not raised by the appellant either in the trial Court or before the District Judge. On the other hand the only ground on which they contested the plaintiff suit was that possession of the mortgaged property had not been given to them and therefore they had not to pay the Rs. 1,000 the balance of the two mortgage deeds to the plaintiff and that they were prepared to pay that amount to him if possession be given to them. The learned District Judge has found that it is due to the fault of the appellants that possession has not been given to them and that in any case they knew when they entered into this transaction that the previous mortgages could not be legally redeemed at the time of the mortgages in their favour. Assuming, however, that it is open to the appellants to raise this objection on this second appeal on the ground that a point of law is involved, I consider that there is no substance in it. The contention of the learned counsel is that no suit to specifically enforce a contract to lend money is maintainable. In support of this contention he cited *Shaik Galim* v. *Sardari Jan Bibi* (1), *Meenakshi Sundaram* v. *Rathnaswami Pillai* (2), *Yadevendra* v. *Srinivas Babhu* (3), *Phul Chand* v. *Chand Mal* (4). These cases support the contention of learned counsel so far as the broad proposition is concerned. In *Sheopati Singh* v. *Jagdeo Singh* (5), however, it was held that the law laid down in these cases does not apply to the right of a mortgagor in a possessory mortgage to recover the balance of the mortgage amount left with the mortgagee and particularly where possession has been given to the mortgagee. It is true that in the present case possession has not been actually given to the mortgagees but this was not through any fault of the mortgagor. Moreover the learned Judges of the Allahabad High Court in *Sheopati Singh* v. *Jagdeo Singh* (5), do not lay down that the giving of possession by the mortgagor to the mortgagee is a condition precedent to enable the former to institute a suit for the recovery of the mortgage money. In the present case it is expressly provided in the mortgage deeds that the sum of Rupees 2000 out of which the sum of Rs. 1000 is the subject matter of the present suit was left with the mortgagees as a trust. That being so the mortgage transaction was complete and no question of specific performance of a contract to lend money arises. On the other hand the plaintiff is attempting merely to recover money which is lying with the defendant in trust for him. *Suraj Din* v. *Wajid Ali* (6) supports this view.

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(1) [1916] 43 Cal 59=29 I C 621.

(2) A I R 1919 Mad 322=49 I C 291=41 Mad 959.

(3) A I R 1925 Mad 62=80 I C 5=47 Mad 698.

(4) [1908] 30 All 252=(1908) A W N 105=5 A L J 491.

(5) A I R 1931 All 95=126 I C 361=52 All 761.

With regard to the interest, the contention of the appellants' counsel is that interest in this case could be awarded to the plaintiff only as damages and the only damages that he could have suffered under the circumstances are the difference between the rate that he would have to pay for borrowing money in order to pay his previous creditors and the rate of interest paid by him to such creditors. This again is a new point raised before me for the first time and it does not appear that the case has been presented on behalf of the defendants in the trial Court or before the District Judge in this light. The learned District Judge on the evidence produced before him has come to the conclusion that 24 p. c. p. a. is the prevaling rate between the parties.

There is another way of looking at the matter. The mortgagees are to enjoy the profits of the property in lieu of the interest and presumably the interest contemplated by the parties was the prevailing rate of interest. For this reason also the plaintiff is entitled to recover the prevailing rate of interest. The consequence is that the decree of the District Judge must be affirmed. I dismiss this appeal with costs.

R.K. *Appeal dismissed.*

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(6) [1916] 34 I C 267.

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* * A. I. R. 1933 Lahore 3

DALIP SINGH, J.

Kidar Nath — Appellant.

v.

Taj Mohammad Khan—Respondent.

Misc. First Appeal No. 71 of 1932, Decided on 1st November 1932.

(a) Execution— Application claiming different reliefs cannot be held to be revival or continuation of old application.

Where the appellate Court has ordered that execution do proceed, there is no need for a fresh application but if, as a matter of fact a fresh application is put in claiming different reliefs from the old application, the latter application cannot be held to be revival of the old application. For determining whether an execution application is a continuation of the old application, the test is always whether in substance the execution application claims the same reliefs as claimed in the old application. [P 4 C 1, 2]

* * **(b) Civil P. C. (1908), S. 11, Expl. 4— Expl. 4 applies to execution proceedings— Objection as to power of attorney not raised in previous application cannot be raised in subsequent applications.**

Explanation 4 does apply to execution proceedings. The question as to power of a person to execute the decree is not in any way different in principle from the question whether the decree is executable or not or whether the execution application is barred by limitation or not. A judgment-debtor is therefore debarred from raising the objection about the power of an agent to file an execution when the same objection was not raised by him in previous execution applications by the same agent under the same power of attorney: *A. I. R.* 1915 *All.* 344; *A. I. R.* 1922 *All.* 247 and *A. I. R.* 1931 *All.* 689, *Dist.*; *A. I. R.* 1922 *Pat.* 289, *Diss. from.* [P 5 C 1]

(c) Waiver—Principle of.

A man may very well waive an objection once. But it does not follow from that that he has waived it for all time: 105 *P. R.* 1882, *Dist.* [P 5 C 2]

J. N. Aggarwal and *Govind Das*—for Appellant.

Badri Das and *Mehr Chand Sud*—for Respondent.

Judgment

On 9th December, 1918, a decree was passed by the Judicial Commissioner in favour of the present respondent. On 6th May, 1925, there was an application for execution. The relief claimed was by attachment of houses and shop goods of the judgment-debtor Kidar Nath and attachment of half the salary of the other judgment-debtor Rai Chand. The warrant of attachment issued. The decree had been transferred for execution to the Lahore Court. Various objections were taken by the judgment-debtor, including limitation and a compromise with the Muktar of the decree-holder. The case was remanded by the High Court for redecision. The Subordinate Judge then held that the decree had been adjusted by compromise and dismissed the execution application. There was an appeal to the High Court which was accepted and it was held that the compromise was not proved. On 6th December, 1930 there was an application for execution put in on the old power of attorney in favour of the old Mukhtar and the relief claimed was by attachment of the property of the judgment debtors and arrest of judgment-debtors. So far I can discover there was not specification of the property to be attached. On 19th June, 1931 the judgment-debtor objected that the execution was not competent because the power of attorney was defective and the application was barred by limitation. The decree-holder replied on 31st July, 1931 and he put in a fresh power of attorney. The Court held that the execution was competent and the date of the execution application must be taken to be 31st July, 1931 when the fresh power of attorney had been put in. It also held that the application was not barred by limitation. The judgment-debtor has come in appeal and his learned counsel contends that the decree having been given on the 9th December, 1918, the application was barred not only by the three years' period but by the bar of twelve years from date of decree.

The learned counsel for the respondent in reply raised several points. The first point is that, admitting that the power of attorney given to the Mukhtar or agent of the decree-holder was only operative in the North West Frontier Province, yet as the High Court in Lahore had concurrent powers under S. 42, Civil P. C., therefore the agent had power to execute the decree here. This contention can be repelled at once as the fact that this Court has concurrent powers seems to me to have nothing to do with the question whether the agent was authorised to execute in Lahore or not and, therefore, this contention seems to me to have no force. The second contention raised by him is that as in the appeal this Court had ordered that execution do proceed there was no need for a fresh application at all and the Court was bound to proceed suo motu. This may be so, and doubtless if the Court had been moved by a proper application to revive the old application for execution, it might have been bound to do so, but as a matter of fact no such application was put in and the present application which claims different reliefs from the old application cannot be held to be revival of the old application nor can it be held as the learned counsel contended in the alternative to be a continuation of the old application. The test is always whether in substance the execution application claims the same reliefs, and obviously the present application does not claim the same reliefs. I, therefore, hold that there is no force in either of these contentions of the learned counsel for the respondent.

Further the learned counsel contends that as there was fraud and misrepresentation on the part of the judgment-debtor in alleging a compromise which was false therefore the time that was taken in disposing of that allegation should be deducted from the period of limitation. The short answer to this is that the Court did not find in appeal that the alleged compromise was proved never to have taken place. It merely held that it was not proved and there was considerable doubt as to whether it had or had not taken place. Roughly at the time of the alleged compromise the judgment-debtors owed about Rs. 6,000 to the decree-holder. The allegation of the present appellant judgment-debtor was that his share of the decree, namely, Rs. 3,000, had been compromised with the agent of the decree-holder for Rs. 2,500. I see nothing inherently improbable in this allegation and this contention also of the learned counsel fails.

The learned counsel for the respondent has further contended and this was his main plea: that the objection raised by the present judgment-debtor as to the powers of the agent cannot be raised now because there is estoppel by record on the point. The argument is that as this objection would have been a complete bar to the previous execution application proceeding at all and as it was not raised or decided but might and ought to have been raised and decided in the previous application, the judgment-debtor is barred from raising it now. A number of rulings have been cited by the learned counsel on the point. The reply of the learned counsel for the appellant on this is that the Privy Council have no doubt held that the principles of res judicta applied to execution proceedings but he contends that Expl. 4, S. 11, Civil P. C., has nowhere been held by the Privy Council to apply to execution proceedings and, according to him, explanation 4 goes beyond the general principles of res judicata. He has endeavoured to distinguish the various rulings cited by the learned counsel for the respondent on the grounds (1) that there was either an express adjudication on the point in those cases or (2) there was a decision by necessary implication. It seems to me, however, that the rulings have decided that

Explanation 4 does apply to execution proceedings. I do not see how the question as to power of a person to execute the decree is any different in principle from the question whether the decree is executable or not or whether the execution application is barred by limitation or not. No doubt Expl. 4 must be applied with great care to execution proceedings, but, in the circumstances of the present case after considering the rulings cited by the learned counsel for respondent, I am of opinion that the judgment-debtor is debarred from raising the present objection. The matter is not entirely free from difficulty and there are some rulings cited by the learned counsel for the appellant which might be said to go against the view that Expl. 4 applies. *Kalyan Singh* v. *Jagan Prasad* (1), can, I think, be distinguished on the facts. The question there was whether a notice to certain pesons being the legal representatives of the judgment-debtor having been decided against them should be held also impliedly to decide that the properties which were sought to be attached belonged to the judgment-debtor. It was held that this was not so and this decision does not decide the point at all. In *Phul Chand* v. *Kanhaiya Lal* (2) the two Judges differed and the weight of that authority is, therefore, considerably lessened. In *A. I. R.* 1931 *All.* 689 it was only laid down that in order to constitute any point as res judicata it must be either expressly decided or by necessary implication. In *Prithi Mahton* v. *Jamshed Khan* (3), it was held that Expl. 4 went beyond the principles of res judicata, but no authority is cited for this proposition and I do not think this one ruling can outweigh the rulings of all the other High Courts. I, therefore, hold though with some hesitation that the present objection is res judicata against the judgment-debtor and he was not entitled to raise it. It follows from this that the present application was within time having been brought on 6th of December, 1930.

There is another contention of the learned counsel for the decree-holder which it is necessary to notice for the case may go in Letters Patent. He contended that besides the estoppel by record there is also estoppel in Pais and he cited certain rulings in support of this contention, namely, *Parbati Bai* v. *Vinayak* (4), *Ganpati Nanna* v. *Jivana Bai* (5), *Gopal Singh* v. *Bhaga* (6) *Lakmi Das* v. *Gobind* (7). I find, however, that these rulings really proceed not on the question of estoppel but on implied waiver. So far as estoppel is concerned it may be disposed of on the short point that there was no misrepresentation of facts by the judgment-debtor. The power of attorney which is in dispute had been drawn up by the decree-holder himself and he must have known its contents. So far as waiver is concerned I do not see how waiver should apply to a second application in execution. A man may very well waive an objection once. It does not follow from that that he has waived it for all time. The case most in favour of the learned counsel for the respondent decree-holder is *Lakhmi Das* v. *Gobind* (7) where the learned Judge seem to consider that the fact that no objection has been taken to the power of the agent in the suit also affected the question whether the objection was open in execution application. But in that case the objection was raised for the first time in appeal from the execution application and the circumstances might well be held to show waiver in that particular execution application. I therefore do not think that there is any force in the contention of the learned counsel for the decree-holder on this point. Holding however as I have done, that there was an implied decision that the power of attorney was good in the previous execution application, I consider that the objection was not open to the judgment-debtor in the present execution application and must be taken to have been decided against him. The appeal therefore fails and is dismissed with costs.

R.K. *Appeal dismissed.*

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(1) A I R 1915 All 344=30 I C 523=37 All 589.

(2) A I R 1922 All 247=65 I C 295 =44 All 130.

(3) A I R 1922 Pat 289=67 I C 656 = 1 Pat 598.

(4) [1888] 12 Bom 68.

(5) A I R 1923 Bom 44=76 I C 34 = 47 Bom 227.

(6) A I R 1924 Lah 296=69 I C 365.

(7) [1882] 105 P R 1882.

** A. I. R. 1933 Lahore 5

JAI LAL, J.

Mrs. P. Nagle — Petitioner.

v.

Mr. M. E. Nagle — Respondent.

Misc. Petn. No. 489 of 1932, Decided on 26th October 1932.

**** (a) Divorce Act (1869), S. 36—Petition by wife dismissed—Appeal by her—Appellate Court can continue order of alimony.**

The matter of the alimony, when the application for dissolution of marriage is dismissed

is not expressly dealt with by the proviso. Neither the proviso does expressly state that an order of alimony cannot be continued after the dismissal of the petition when an appeal has been presented by the petitioner. Where therefore a petition by the wife for dissolution of her marriage has been dismissed the appellate Court has power to continue the order of alimony on the presentation of an appeal by her till the disposal of the appeal and till such time as the Court directs unless the appellate Court considers that the conduct of the wife has been such as to disentitle her to an order of continuance: *Butler* v. *Butler*, 62 *L. T.* 123, and *Jones* v. *Jones*, 26 *L. T.* 106. *Foll.* [P 7 C 1]

(b) Divorce Act (1869), S. 36—Appellate Court cannot ordinarily increase alimony.

Appellate Court is not justified in increasing the amount of alimony even if it has the legal power to increase the amount unless any circumstances have been shown which would justify such an increase. [P 7 C 1]

(c) Divorce Act (1869), S. 7 —Appellate Court can order costs for prosecuting appeal.

Although ordinarily no costs can be ordered to be paid to an unsuccessful petitioner when she has presented an appeal to the superior Court, still on the same principles which underlay the continuance of the order of alimony the appellate Court has jurisdiction to make an order for costs for prosecuting the appeal. [P 7 C 2]

Osborne — for Petitioner.

Nihal Singh — for Respondent.

Order

The petitioner, Promise Nagle, made a petition for the dissolution of her marriage with her husband, Mervyn Edward Nagle, on the ground of cruelty and his adultery. This petition was made in the Court of the District Judge of Lahore and was ultimately dismissed on 4th March 1932; it was presented on 21st January, 1930. During the pendency of the petition an order was made by the District Judge for the payment by the respondent of Rs 50 per mensem as alimony to the petitioner, and apparently this order has been complied with. On the dismissal of the petition however compliance with the order ceased. On 13th April, 1932, the petitioner presented an appeal to this Court against the decree dismissing her petition and this appeal has been admitted to a hearing by a Division Bench of this Court. The petitioner has now made an application that she may be granted Rs. 75 per month as alimony pending the appeal and that the respondent, her husband, be ordered to pay the amount monthly accordingly. She has also prayed that the respondent be ordered to pay her at least Rs. 500 for counsel's fee and costs of the appeal.

Notice of this petition having been issued to the respondent he has appeared through Mr. Nihal Singh and has filed an affidavit stating that his monthly salary of Rs. 400 is now subject to a deduction of Rs. 171 and in addition to it there is an order of attachment of half of his salary at the instance of the petitioner who has obtained it from the District Judge in satisfaction of the decree for costs and that his own necessary expenses amount to Rs. 200 a month and consequently he is unable to pay anything by way of alimony to the petitioner. Mr. Nihal Singh however has raised another objection that this Court has no jurisdiction to pass an order such as is prayed for by the petitioner. With regard to the costs he says that all the costs incurred in the Court of the District Judge have been awarded to the petitioner against her husband and there is no occasion now to give her any further costs in order to enable her to prosecute this appeal. Both counsel relied upon S. 36, Divorce Act, 1869, which says that in any suit under this Act, whether it be instituted by husband or a wife and whether or not she has obtained an order of protection, the wife may present a petition for alimony pending the suit, such petition shall be served on the husband, and the Court on being satisfied of the statements therein contained may make such order on the husband for payment to the wife alimony pending the suit as it may deem just, provided that alimony pending the suit shall in no case exceed one fifth of the husband's average net income for the three years next preceding the date of the order and shall continue in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed as the case may be. The petitioner's counsel contends relying upon this section that the expression 'suit' as used in it includes proceedings in appeal.

Though there is no direct authority under the Divorce Act on this matter, there is, however, authority that in several sections of the Civil P. C., the expression 'suit includes an appeal, and in fact proceedings in execution of the decree. Mr. Nihal Singh, on the other hand, contends that section 36 has no application to appeals and particularly relies upon the proviso to the section which says that the alimony pending the suit shall continue in case of a decree for dissolution or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be, and therefore that the case of an appeal is not contemplated by S. 36.

The matter of the alimony, when the application for dissolution of marriage is dismissed is not, however, expressly dealt with by the proviso, the reason being that ordinarily it ceases on the dismissal of the petition. At the same time the proviso does not support the contention of the learned counsel for the respondent that an order of alimony cannot be continued after the dismissal of the petition when an appeal has been presented by the petitioner. Mr. Osborne on behalf of the petitoner relied upon *Butler* v. *Butler* (1) and *Jones* v. *Jones* (2). Both these cases are authorities for the proposition that where a petition by the wife for dissolution of her marriage has been dismissed the appellate Court has power to continue the order of alimony on the presentation of an appeal by her till the disposal of the appeal and till such time as the Court directs unless the appellate Court considers that the conduct of the wife has been such as to disentitle her to an order of continuance. It is not alleged in this case that there are any circumstances which deprive the petitioner of her right to have the alimony continued. In the absence of a clear authority to the contrary or of any Legislative provision I think I must follow the practice that prevails in the English Courts. Mr. Nihal Singh has not shown nor does there appear to be any Statute in England under which the order continuing the payment of the alimony was made in the two cases cited above. I hold therefore that this Court has jurisdiction to direct that the payment of the alimony be continued pending the the appeal.

Mr. Osborne on behalf of the petitioner then has asked me to fix the amount of the alimony as Rs. 75 per mensem. As however I am not passing a fresh order for the payment of the alimony but am merely continuing the order which has already been passed by the District Judge and which was apparently accepted by both the parties I do not think that I would be justified in increasing the amount even if I have the legal power to increase the amount. I do not consider that any circumstances have been shown which would justify such an increase. In addition to the other deductions that have been made previously in the salary of the respondent there has been a further cut of Rs. 40 per mensem since the last year and this has an important bearing on the question of the amount of alimony that he should pay to the petitioner. Next comes the question of costs. It is by virtue of S. 7, Divorce Act, that the petitioner's counsel has asked me to pass an order that the respondent should pay Rs. 500 as costs required by the petitioner for prosecuting her appeal in this Court. Section 7 does not expressly deal with the question of costs but merely provides that the Courts shall in all suits and proceedings under the Act, act and give relief on principles and rules which, in the opinion of the said Courts are as nearly as may be, conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. Though no direct authority has been cited to show that the costs can be ordered to be paid to an unsuccessful petitioner when she has presented an appeal to the superior Court, still on the same principles which underlay the continuance of the order of alimony I consider that this Court has jurisdiction to make the order applied for and particularly when it is borne in mind that the respondent is bound to maintain and to defray the necessary expenses incurred by his wife which consideration applies both to the payment of alimony as well as to the payment of costs. No accounts however have been filed before me to show the exact amount spent by the petitioner in the appeal. I consider that under the circumstances the sum of Rs. 200 will be sufficient allowance to the petitioner under this head. It is, of course, open to the petitioner to move this Court to increase the amount if necessity arises.

An application also has been made on behalf of the appellant that the hearing of the appeal be expedited. This, under the cricumstances of the case, is in my opinion, eminently desirable and both counsel agree that orders be passed as prayed for. I accordingly direct that the necessary copies of the record be prepared as expeditiously as possible and that the appeal be fixed for hearing at a very early date and in any case within six months from today. I accept this petition and direct that the order granting the petitioner alimony at the rate of Rs. 50 a month passed by the District Judge be continued in force till the disposal of the appeal in this Court and that the respondent pay to the petitioner Rs. 200 within a month from today as her expenses of the appeal. He will either deposit this amount in this Court or present a receipt signed by the petitioner in this Court within that time. There will be no order as to the costs of this petition.

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(1) [1890] 62 L T 128.
(2) [1872] 26 L T 106.

R. K. *Petition accepted.*

✻ A. I. R. 1933 Lahore 8

JAI LAL, J.

Mathura Das Puri—Decree-holder—Appellant.

v.

Jalal Din and *another* — Judgment-debtors — Respondents.

Misc. Second Appeal No. 1125 of 1931, Decided on 9th March 1932, against order of Addl. Dist. Judge, Lahore, D/- 17th April 1931.

(a) Civil P. C. (1908), S. 15— Suit for specific sum — Value of suit is value for jurisdiction in appeal from decree or in execution—Reduction in claim does not alter jurisdiction—Jurisdiction.

In a suit for the recovery of a specific sum which is the value of the suit for the purposes of jurisdiction, the reduction of the amount as a result of adjudication by the Court or by a compromise between the parties does not alter the original valuation for the purposes of an appeal either from the decree or an order in execution of it: *A. I. R.* 1926 *Lah.* 376 (*F. B.*); *A. I. R.* 1921 *Lah.* 157 and *A. I. R.* 1925 *Lah.* 670, *Dist.* [P 8 C 2; P 9 C 1]

✻ **(b) Suits Valuation Act (1887), S. 11—Hearing by inferior Court — Prejudice is presumed.**

The hearing of an appeal by a Court of inferior jurisdiction must raise a presumption that the party concerned has been materially prejudiced by the hearing of the appeal by such Court. [P 9 C 2]

Mohammad Amin and *Daulat Ram*—for Appellant.

Dina Nath Bhasin—for Respondents.

Judgment

The appellant instituted a suit against the respondent, his tenant, for the recovery of Rs. 7,490, which included several items on account of rent and other claims. The suit was, however for the recovery of the specific amount and it is conceded that it was not a suit for accounts. The plaintiff valued the relief at Rs. 7,490. During the pendency of the suit the dispute was settled between the parties and one of the defendants presented a written petition to the Court on 11th November 1929, wherein he agreed to the passing of a decree for Rs. 3,000 against him and his co-defendant. At the end of this petition reference is made to a sum of Rs. 700, which was to be paid by the plaintiff to the defendants. The plaintiff was examined by the Court on 13th November, but the other defendant repudiated the compromise. Consequently an enquiry was held by the trial Court and on 5th of March 1930, a decree in terms of the compromise was passed, that is to say, a decree for Rs. 3,000 against the respondents and a reference was made also to the sum of Rs. 700. When the appellant executed the decree a dispute arose as to the right of the judgment-debtors to set off this sum of Rs. 700 against the decretal amount of Rs. 3,000 and this dispute was decided by the trial Court in favour of the appellant. The respondent, that is to say, the judgment-debtor, thereupon presented an appeal to the District Judge of Lahore, which was heard by the Additional District Judge of Lahore; the main attack in the appeal was directed against the order of the executing Court with regard to the sum of Rs. 700. An objection was raised by the decree-holder, the appellant before me, as to the jurisdiction of the Additional District Judge to entertain the appeal, but was overruled. On the merits also the Additional District Judge differed from the executing Court and set aside its order.

In view of my decision on the question of jurisdiction it is not necessary to examine the order of the Additional District Judge on the merits of the appeal, and it is for that reason that I have not thought it necessary to set out in detail the terms of the compromise with regard to Rs. 700 or of the decree that was passed thereupon. With regard to the question of jurisdiction I am of opinion that the appeal must succeed. It is clear, as I have stated above, that the suit was for the recovery of the specific sum of Rs. 7,490 which was the value of the suit for the purposes of jurisdiction. In such cases the reduction of the amount as a result of adjudication by the Court or by a compromise between the parties does not alter the original valuation for the purposes of an appeal. The Additional District Judge has relied upon certain judgments in support of his view, that is to say, *Jaswant Ram* v. *Moti Ram* (1), *Budha Mal* v. *Ralia Ram* (2) and *Ilahi Jan* v. *Rahmat Ullah* (3). Those cases however did not relate to suits for recovery of specific amounts. They related either to suits for accounts or suits for redemption where inter alia the question of the valuation of improvements made by the mortgagee directly arose. In such cases it was held that the valuation fixed by the plaintiff is a tentative one and that the Court which is competent to hear the appeal is selected with reference to the amount in dispute as determined by the decree. No authority has been cited which lays down that the value in cases like the present is altered as a result of the decree of the Court. On the other hand, there is ample authority supporting the opposite view that in such cases the original value of the suit determines the Court of appeal from any decree that may be passed in the suit.

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(1) A I R 1926 Lah 376=96 I C 890=7 Lah 570 (F B).

(2) A I R 1928 Lah 157 = 110 I C 631=9 Lah 33.

(3) A I R 1928 Lah 670=111 I C 1 9.

The next question is whether the same rule applies to proceedings in execution of the decree. No direct authority on this question has been cited by either party but a reference to S. 37, Civil P. C., shows that the expression "Court which passed a decree" ordinarily means, where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for execution of the decree, would have jurisdiction to try such suits. This section has to be read in conjunction with S. 38, which provides that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution, and S. 39, which authorises the Court which passed a decree to send it for execution to another Court under certain circumstances. It is therefore clear that even for the purposes of the execution of the decree the competent Court is the Court which passed the decree and that means a Court which had jurisdiction to entertain the suit in which the decree was passed. Reference may also be made to S. 2, Civil P. C., where the term "decree" is defined to include the determination of any question within S. 47. This, in my opinion, leaves no doubt that as far as the Court executing the decree is concerned it must be the Court which had jurisdiction to try the suit or a Court to which such Court has sent the decree for execution.

The question is whether there is any difference as to the Court competent to entertain an appeal from orders passed in execution of the decree. The definition of "decree" as mentioned by me above, in my opinion, makes it clear that an appeal is competent only to the Court which would have been competent to entertain an appeal from the original decree, that is to say, according to the valuation of the suit in which the decree was passed. From what I have stated above, it is obvious that the Additional District Judge was not competent to entertain the appeal in this case. It is however contended by the respondent's counsel that the case is covered by S. 11, Suits Valuation Act, which provides that an objection that by reason of the over-valuation or under-valuation of an appeal, the lower appellate Court which had no jurisdiction to take cognizance of the appeal, exercised jurisdiction with respect thereto shall not be entertained by an appellate Court unless the objection was raised in the lower appellate Court in the memorandum of appeal, or the appellate Court is satisfied for reasons to be recorded that the appeal was over-valued or under-valued and that the over-valuation or under-valuation has prejudicially affected the disposal of the appeal on its merits. The objection in this case was taken at the hearing of the appeal, and the hearing of an appeal by a Court of inferior jurisdiction must, in my opinion, raise a presumption that the party concerned has been materially prejudiced by the hearing of the appeal by such Court. I accept this appeal and setting aside the order of the Additional District Judge send the case back to him with direction to return the memorandum of appeal to the judgment-debtor for presentation to the Court having jurisdiction to hear the appeal. The costs of this appeal shall abide the result.

M.N. *Appeal allowed.*

A. I. R. 1933 Lahore 9

HARRISON, J.

Budha and *another*—Appellants.

v.

Mohammad Din— Respondent.

Second Appeal No. 1272 of 1931, Decided on 11th March 1932.

Admissions — Inadmissible document — Plaintiff admitting execution —Yet he can take his stand on Registration Act and object to its admissibility — Evidence, exclusion of—Registration Act (1908), S. 49.

A mere admission of execution, even supported by the admission of the existence of an agreement embodied in an inadmissible document, both admissions being answers to questions which should have been disallowed, does not debar the person making the admissions from taking his stand on the Registration Act and objecting to the document or any evidence as to its contents: *A. I. R.* 1928 *Lah.* 662 and *A. I. R.* 1921 *Lah.* 64, *Dist.* [P 10 C 1]

N. C. Mehra for *Jalaluddin*—for Appellants.

Mohammad Nazir—for Respondent.

Judgment

The plaintiff in this case is a mortgagee. He sued for possession on the basis of his mortgage and was met with the plea that the mortgage had been redeemed. The only issue was: "Does not the mortgage of the land in suit subsist?" In order to discharge the onus the defendants produced an unregistered document, on which they relied. They called a witness—the scribe—to whom the plaintiff at once took exception on the ground that the document was inadmissible. The evidence was recorded subject to future decision of the objection. A further witness was examined and then the plaintiff was put into the witness box. He admitted the execution and this was held with retrospective effect to render the other evidence admissible. Relying on *A. I. R.* 1928 *Lah.* 662, the trial Judge disallowed the objection as to the admissibility of the document and dismissed the suit. The appeal was accepted by the learned District Judge, relying on *Bisheshar Lal* v. *Bhure* (1).

On appeal the same point has been raised and counsel relies both on *A. I. R.* 1928 *Lah.* 662 and *A. I. R.* 1921 *Lah.* 64. The two cases are similar and deal with the result of an admission in pleadings, that is to say, it was held that where the admission in pleadings renders it unnecessary to produce evidence at all, objection cannot be taken to the admissibility of the superfluous evidence when and if produced. This is a totally different matter from the position in this case. The parties had joined issue. The onus was on the defendants and they wished to produce an unregisterd document and evidence as to its contents. The evidence was inadmissible from the start and it appears to me that the view taken by the learned District Judge is correct. A mere admission of execution, even supported by the admission of the existence of an agreement embodied in the inadmissible document, both admissions being answers to questions which should have been disallowed, does not debar the plaintiff from taking the stand on the Registration Act and objecting to the document or any evidence as to its contents. I therefore hold that the defendants have failed to discharge this onus which was rightly placed on them and I dismiss the appeal with costs.

B.V./R.K. *Appeal dismissed.*

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(1) A I R 1920 Lah 20 = 56 I C 595=1 Lah 426.

A. I. R. 1933 Lahore 10

BHIDE, J.

Mulkh Raj — Plaintiff — Appellant.

v.

Nanak and *others* — Defendants—Respondents.

Second Appeal No. 2009 of 1931, Decided on 19th October 1932, against decree of Dist. Judge, Gurdaspur, D/- 11th August 1931.

(a) Transfer of Property Act (1882), S. 52—Doctrine applies to execution sales also.

A purchaser at an auction-sale purchases only the right, title and interest of the judgment-debtor and where the right of the judgment-debtor in the property in dispute is sub judice at the time of the sale the auction purchaser takes the property subject to the decision of that suit: 16 *O. C.* 225' *Dist.*; 23 *W. R.* 329; 15 *Cal.* 94 and 28 *Cal.* 23, *Rel. on.* [P 11 C 1]

(b) Limitation Act (1908), Art. 12—Applicability.

Where a person not a party to sale is not suing to set aside the sale but only contends that his rights are not affected by the sale, Art. 12 does not apply. [P 11 C 1]

Shamair Chand and *Qabul Chand*—for Appellant.

Guran Ditta Mal—for Respondents.

Judgment

This appeal arise out of a suit for recovery of Rs. 169 by the sale of certain house-property which had been hypothicated in favour of plaintiff Mulk Raj by one Nanak. The house was sold to the defendant Nathu Mal on 15th November, 1924, in execution of a decree of one Devi Dayal against Nanak. During these execution proceedings Mulk Raj objected to the attachment, but the objection was dismissed. It appears that objections were raised by certain other persons also and one of them had also subsequently obtained an injunction staying the sale. But the sale was confirmed before the injunction was received by the executing Court. Before the sale in favour of Nathumal, Mulk Raj had instituted a regular suit to establish his lien over the property. This suit was dismissed by the trial Court but decreed on appeal on 12th June, 1926. It was during the pendency of this suit that the sale in favour of Nathu Mal took place. On 7th July 1930, Mulk Raj instituted the present suit for recovery of Rs. 169 by enforcement of his lien. The suit has been dismissed by the Courts below and the plaintiff has now preferred a second appeal to this Court.

The learned District Judge has held that sale in favour of Nathu Mal must prevail, as the plaintiff had not got it set aside by instituting a suit for the purpose within the period of limitation prescribed by Art. 12, Sch. 1, Limitation Act. The learned counsel for the appellant contends that the doctrine of lis pendens applies and that the sale cannot affect his right as it took place, as stated above, during the pendency of the suit instituted by the appellant to have his lien on the property declared valid. The sale was no doubt not voluntary having been effected in execution proceeding. But there is authority in support of the learned counsel's contention that this does not make any difference: vide Law of Transfer in British India by Gour, Volume 1, Commentary, in para. 946 sixth edition; also *Rabia Khanum* v. *J. P. Wise* (1), *Gobind Chunder Ray* v. *Guru Churn Karmakar* (2), *Dinanath Ghose* v. *Shema Bibi* (3). The learned counsel for the respondents relied on *Nuzhat-ud-daula Abbas Husain Khan* v. *Dilband Begam* (4). But that case is distinguishable. In that case the suit was of a collusive nature and the doctrine of lis pendens was held to be inapplicable to such a proceeding. It was further held that the doctrine does not extend so as to prejudice the rights of a purchaser at a court-sale when the original decree is reversed or varied. But no such circumstances are present in this case. A purchaser at an auction-sale purchases only the right, title and interest of the judgment-debtor. The right of the judgment-debtor in the property in dispute were sub judice at the time of the sale, so far as the plaintiff's mortgage was concerned. Consequently the auction purchaser must be held to have taken the property subject to the decision of that suit.

As regards the applicability of Art. 12, Limitation Act, it may be pointed out that the plaintiff is not suing to set aside the sale, nor is it necessary for him to do so as he was not a party to it. All that he contends is that his rights are not affected by the sale. For reasons given above this contention must, I think, prevail. I accordingly accept the appeal and grant the plaintiff the decree prayed for with costs throughout.

R.K. *Appeal accepted.*

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(1) [1875] 23 W R 329.
(2) [1888] 15 Cal 94.
(3) [1901] 28 Cal 23.
(4) [1918] 16 O C 225=21 I C 570.

A. I. R. 1933 Lahore 11

TEK CHAND, J.

Kanshi Ram—Plaintiff—Petitioner.

v.

Dule Rai & Co.—Defendant—Opposite Party.

Civil Revn. Petn. No. 488 of 1931, Decided on 15th June 1932, against order of Senior Sub-Judge, Amritsar.

Civil P. C. (1908), S. 20—Carrying on business—Defendant firm held to carry on business at its sub-office at Amritsar and suit instituted there against firm held rightly instituted.

A suit was brought against a firm for rendition of accounts in the Court at Amritsar. The defendant firm had its head office in Bombay and the evidence showed that it had a regular sub-office in Amritsar, that all correspondence with the customers at Amritsar was conducted by the defendant through this sub-office, that orders were received here, that moneys were received and disbursed by the sub-office. In some cases the Amritsar sub-office passed receipts. But the orders placed by the customers with the Amritsar office were not binding until they had been accepted by the head office at Bombay.

Held: that the defendant firm was carrying on business at Amritsar and that a suit was rightly instituted in the Court at Amritsar: 98 *P. R.* 1918, *Rel. on.*; *A. I. R.* 1925 *Lah.* 387 and *A. I. R.* 1924 *All.* 530, *Dist.* [P 12 C 1]

Fakir Chand—for Petitioner.

Badri Das—for Opposite Party.

Judgment

The plaintiff brought a suit against the defendant for rendition of accounts in the Court of the Subordinate Judge at Amritsar. On objection by the defendant the plaint was returned for presentation in the proper Court on the ground that the Courts at Amritasar had no jurisdiction to entertain it. The plaintiff appealed to the Senior Subordinate Judge but the appeal was dismissed. He has preferred a petition for revision to this Court and contends that on the facts admitted or proved on the record the suit was cognizable by the Courts at Amritsar and they have wrongly declined jurisdiction. The relevant facts are that the plaintiff resides at Amritsar and carries on business there. The defendant firm Dule Rai and Company have got its head office at Bombay and it is clear from the evidence on the record that it had a Sub-Office at Amritsar. As pointed out by the learned Senior Subordinate Judge,

> "the evidence produced by both parties shows that the defendant firm had a regular sub-office in Amritsar, that all correspondence with the customers at Amritsar was conducted by the defendant through this sub-office, that orders were received here and that moneys were received and disbursed by the sub-office."

There is also evidence to the effect that in some cases the Amritsar Sub-Office passed receipts. It is no doubt true that the order placed by the customers with the Amritsar office was not binding until they had been accepted by the head office at Bombay, but this fact would be immaterial if it could be shown that the defendant firm was "carrying on business" at Amritsar. In my opinion the evidence on the point is conclusive in favour of the petitioner. The rulings cited by the Lower Court are clearly distinguishable as in none of them the defendant firm had a branch office at the place where the suit was brought. Mr. Badri Das has cited before me *Ram Das Uttam Chand* v. *Dhanpat Diwan Chand* (1) and *Tika Ram* v. *Daulat Ram* (2). In those cases also the defendant had no regular branch office at Sargodha or Badaon where the suits were brought. The case is very similar to, if not stronger than, *Punjab Family Relief Fund* v. *Sardari Mal* (3), in which it was held that where the defendant having a head office at Lahore kept an agent at Lyallpur, who, though he could not enter into contracts, collected subscriptions and induced new members to join, supplying them with entrance forms which were filled in and sent to Lahore, it was held that the defendant carried on business at Lyallpur. The lower Courts have laid stress on the point that in the present case certain facts relating to the defendant firm were not proved by the plaintiff; but it appears from the record that the plaintiff summoned the defendants with their books and the latter withheld production without any reasonable cause.

I hold, therefore, that the defendant in the present case was carrying on business at Amritsar and that the suit was properly intituted in the Court of the Subordinate Judge there. I accept the petition for revision, set aside the orders of the Courts below and remand the case to the trial Judge, with directions that he should receive back the plaint and proceed with the trial of the suit in accordance with law. Court fee on this petition will be refunded; other costs will be costs in the cause.

P.N./R.K. *Case remanded.*

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(1) A I R 1925 Lah 387=88 I C 950=6 Lah 153.

(2) A I R 1924 All 530=80 I C 661=46 All 465.

(3) [1919] 98 P R 1918=45 I C 900.

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*A. I. R. 1933 Lahore 12

TEK CHAND AND MONROE, JJ.

Dasaundhi Ram —Plaintiff — Appellant.

v.

Mool Chand and *another*—Defendants —Respondents.

Second Appeal No. 1510 of 1928, Decided on 10th May 1932, against decree of Addl. Dist. Judge, Lahore, D/- 27th February 1928.

* **(a) Limitation Act (1908), Art. 64—Plaintiff sending cotton to defendant firm of commission agents—Latter making payment in the account from time to time—On going through accounts defendants' munim admitting certain amounts as due to plaintiff—Plaintiff's suit would be governed by Art. 64 and not by Limitation Act (1908), Art. 85.**

In order to bring a case within Art. 85 it is necessary that the dealings on either side must be so independent of each other that neither party giving credit to the other relied on the debt which he had against him. Where therefore a plaintiff sends cotton to the defendants who are a firm of commission agents, and the latter makes payments to the plaintiff in this account from time to time, and where after going through accounts defendants' munim admitted that a certain amount was due to the plaintiff by the defendants, suit by the plaintiff to recover that amount would not be governed by Art. 85 but by Art. 64 because the suit is one for recovery of amount found due on an "account stated" between the parties, and there is no "mutuality of accounts." [P 13 C 1,2]

***(b) Limitation Act (1908), S. 19—Affixing seal or stamp is sufficient signing.**

The affixing of a seal or stamp, on which the name of the signatory is impressed, is a sufficient signing within the meaning of S. 19: 185 *P. R.* 1883, *Rel. on.* [P 13 C 2]

* **(c) Limitation Act (1908), S. 19—Name of debtor written at top is sufficient.**

The signature of the debtor need not appear at the foot of an acknowledgment, but his name written, either by himself or at his dictation, at the top of the document, is sufficient as an acknowledgment: 122 *P. R.* 1889, *Rel. on.* [P 13 C 2]

(d) Limitation Act (1908), S. 19—Valid signature—Limitation Act (1908), Art. 64.

It is a settled law that what is good and valid signature for S. 19 is also good and valid signature for Art. 64 and vice versa. [P 13 C 2]

Ram Lal Anand—for Appellant.

Meher Chand Mahajan—for Respondents.

Tek Chand, J.

This second appeal arises out of a suit instituted by the plaintiff-appellant against the defendants-respondents for recovery of Rupees 3,000 alleged to be due to him on foot of an "account stated" between them on 2nd January 1922. This suit was decreed by the trial Court against defendants 3, 6 and 7, but has been dis-

a period of six years to sue. In this view of the case it is not necessary to discuss at length the question whether Ex. P. 8 amounts to an acknowledgment under S. 19 and gave the plaintiff a further extension of time. It would be sufficient to say that the writer Uttam Chand, defendant 7, clearly admitted his and his brother's liability to pay the sum due on the account. I hold therefore that the suit is clearly within time and has been wrongly dismissed. I would accordingly accept the appeal, set aside the judgment and decree of the learned District Judge and pass a decree for Rs. 3,000 in favour of the plaintiff against defendants 3, 6 and 7 with costs throughout.

Monroe, J.—I agree.

S.N./R.K. *Decree set aside.*

A. I. R. 1933 Lahore 14

COLDSTREAM AND BHIDE, JJ.

Ram Chand Lotia and *Sons*—Plaintiffs —Appellants.

v.

Municipal Committee, Lahore—Defendant —Respondent.

First Appeal No. 2360 of 1928, Decided on 20th July 1931, against decree of Senior Sub-Judge, Lahore, D/- 30th April 1928.

Contract Act (1872), S. 70—Plaintiff entering into contract with Municipal Committee for delivery of goods— Contract not in writing under seal —Plaintiff delivering goods and claiming its price — Municipal Committee resisting claim on ground that plaintiff was entitled to return of goods only and not its price—Plaintiff's relief for return of goods resisted by Municipal Committee— Municipal Committee cannot say that plaintiff was not entitled to claim price of goods supplied—Punjab Municipal Act (3 of 1911), S. 47.

A contract for delivery of goods was made with the plaintiff by or on behalf of the Municipal Committee which not being in writing under seal was not binding on the Municipal Committee under S. 47, Punjab Municipal Act. Plaintiff who delivered the goods to the Committee claimed the price thereof from the Committee and the Committee resisted the claim on the ground that the plaintiff was entitled to the return of the goods only and not its price. The Municipal Committee also resisted the plaintiff's claim for amendment of the plaint by inserting a relief for the return of goods under S. 70, Contract Act.

Held: that as the Committee resisted the plaintiff's claim to amend the plaint by inserting a relief for the return of the goods, it was not open to the Committee to say that the plaintiff was entitled to a return of the goods only and not for recovery of its price. [P 15 C 1]

M. C. Mahajan and *Barkat Ali*—for Appellants.

Mool Chand and *Muhammad Latif*—for Respondent.

Bhide, J.

The plaintiffs Ram Chand Lotia and Sons sued the Municipal Committee of Lahore for recovery of Rs. 5,835 as the price of pig iron supplied by them to the committee. The committee denied any liability alleging that the plaintiffs had supplied goods in excess of the quantity ordered by the committee, and that when they were asked to take them back had refused to do so without any justification. It was also pleaded that no formal agreement in writing under seal having been entered into, as required by S. 47, Punjab Municipal Act, there was no contract binding the Committee. The learned Senior Subordinate Judge who tried the suit upheld both the contentions and dismissed the suit. Plaintiffs have appealed. It is conceded on behalf of the appellants that in view of the provision of S. 47 Punjab Municipal Act, there was no valid and binding contract between the parties but it was contended that the plaintiffs were entitled to recover the prices for the goods supplied on the principle embodied in S. 70, Contract Act. Reliance was placed in support of this contention on *Secy. of State* v. *G. T. Sarin & Co.* (1), *Municipal Committee, Gujranwala* v. *Fazuldin* (2) and *Bhandari Bros.* v. *Municipal Committee, Amritsar* (3). In reply, it was urged on behalf of the respondents that apart from the question of formalites required for the contract, the goods were never ordered by the committee and hence, the rulings relied on have no application to the facts of the case. It was further urged that the plaintiffs were at the most entitled to a return of the goods and not to the price or any interest thereon.

As regards the first contention of the learned counsel for the respondents, there is no doubt that an order for one "wagon" of "pig iron for foundry purposes" was placed with the plaintiffs by the committee on 11th February, 1924. The Committee admits that they did require 20 tons and have, as a matter of fact, paid for 540 Maunds. The dispute has arisen owing to the unfortunate use of the word "Wagon" in the indent. The evidence shows that a waggon varies in its capacity from about 16 to 45 tons. Kesho Ram one of the proprietors of the plaintiff firm, has gone into the witness-box and deposed that he consulted the Municipal Engineer on the point and was told that he could send about 40 tons if a waggon can hold that quantity, and accordingly the plaintiffs sent 42 tons. There seems no reason to doubt that 42 tons can be conveyed in a waggon. It is alleged on behalf of the committee that Kesho Ram's evidence is false; but no attempt was made to contradict his statement by putting the Municipal Enginner in the witness-box. Hussain Bakhsh, foreman who took the delivery of the coal (pig iron), has admitted that the Municipal Engineer was, as a matter of fact, consulted on the phone by the superintendent, Water-works, when the delivery was taken. The Superintendent knew that the original requisition was only for 20 tons and no satisfactory explanation is forthcoming as to why 42 tons were accepted when only 20 tons were wanted. It was not till a fortnight later that the mistake was detected and the excess quantity was ordered to be returned to the plaintiffs. Plaintiffs do not however appear to have been informed till about 20th June, 1924, (vide Ex. D/12), when they at once protested and refused to take back the goods. It was urged that the plaintiffs have not shown that they had received the 42 tons in a waggon; but this argument seems beside the point, as the plaintiffs were not asked to order a waggon specially for the Committee.

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(1) A I R 1930 Lah 364=120 I C 615=11 Lah 375.

(2) A I R 1929 Lah 742=121 I C 187=11 Lah 121.

(3) A I R 1931 Lah 457=134 I C 1028.

In view of the above facts it must, I think, be held that the goods were duly accepted on behalf of the Committee. The next question for consideration is whether the contract having been found to be not binding on the committee the plaintiffs are only entitled to have the goods back or can claim the price thereof with interest. There is no doubt that the plaintiffs were asked to remove the goods in dispute about 20th June, 1924, but this offer was not repeated in the present suit. In fact when the plaintiffs sought to amend the plaint by including a claim on the basis of S. 70, Contract Act, the application was resisted. In these circumstances, it is scarcely open to the Committee to urge now that the plaintiffs can only ask for a return of the goods under S. 70, Contract Act. There is no evidence on the record even to show whether the identical goods are still in existence and in what condition they are. In these circumstances, after the lapse of some seven years it would not, I think, be fair to ask the plaintiffs now to remove their goods merely on the basis of an offer made for the first time in this Court.

The plaintiffs claim that the pig iron supplied was of the quality "pig-iron, Red A No. 1," which was quoted as Rs. 7-14-0 per maund in their tender (Ex. D/3). But there is no evidence on the record to show that the goods were of this quality. The Committee had distinctly stated in their indent that the pig iron was required for foundary purposes and the prices quoted for the same in the plaintiff's tender was Rs. 5-9-0 per maund. Some of the witnesses have stated that the pig iron suppled was of the first quality, but they are all referring to pig iron required for foundry purposes. In these circumstances, I do not think plaintiffs can claim more than Rs. 5-9-0 per maund for the goods supplied by them. It is not disputed that the quanity supplied by the plaintiffs was 42 tons, i. e., 1134 maunds 15 seers. They have already paid for 540 maunds. The price of the remaining 594 maunds and 15 seers at Rs. 5-9-0 per maund works out to about Rs. 3,306. The plaintiffs admit they have received another sum of Rs. 1392-13-4 from the committee by mistake. Making allowance for this, I would grant the plaintiffs a decree for Rs. 1913-2-8. I do not think the plaintiffs are entitled to any interest or costs, as they had the option of removing the goods in June 1924 but did not avail themselves of it. I would accordingly decree the plaintiffs' claim to the extent of Rs. 1913-2-8 and leave the parties to bear their costs.

Coldstream, J.—I agree.

K.N./R.K. *Order accordingly.*

A. I. R. 1933 Lahore 15

TEK CHAND AND COLDSTREAM, JJ.

Municipal Committee, Lahore—Plaintiff—Appellant.

v.

Miran Bakhsh—Defendant — Respondent.

First Appeal No. 2724 of 1926, Decided on 12th January 1932, against decree of Sub-Judge, First Class, Lahore, D/- 31st July 1926.

(a) Practice—Relief—Alternative—Suit for rent on contract—Alternative case of compensation made in replication — Plaintiff can claim alternative relief.

Where the claim as laid in the plaint is one for rent based on contract and the alternative claim for compensation though not mentioned in

the plaint is put forward in the replication filed by the plaintiff the plaintiff is entitled to alternative claim and it does not amount to a change of entire character of suit. [P 17 C 1]

(b) Landlord and Tenant—Lease invalid—Landlord can claim compensation for period of tenant's possession—Contract Act (1872), S. 70.

Although the lessor is not entitled to enforce the contract of lease, the same being invalid, he can claim compensation for the loss which has been caused to him by the continuance of the lessee in possession of the premises. [P 17 C 1]

(c) Landlord and Tenant—Lease invalid—Tenant in possession for period of lease—Measure of compensation is lease money agreed—Contract Act (1872), S. 70.

Where the tenant continues in possession of the permises for the entire period and there is no evidence on the record that there was a fall in the market rate during that period, the proper measure of compensation is the amount for which the tenant had taken the property on lease. [P 17 C 2]

Mool Chand and *Mohammad Latif*—for Appellant.

Meher Chand Mahajan and *Basant Krishna*—for Respondent.

Tek Chand, J.

On 7th February 1922 the Municipal Committee of Lahore held a public auction for the lease of centain properties, situate outside Shahalmi Gate, for a period of three years, commencing 1st April 1922 and ending 31st March, 1925. The highest bid was by Miran Bakhsh, defendant, for Rs. 9,900 per annum. He however failed to deposit forthwith 1/4th of one year's rent, as required by the conditions of the auction. The "lease" had therefore to be re-auctioned and was knocked down in favour of Umar Din at Rs. 9,800 p. a. Some time later, Miran Bakhsh applied to the Municipal Committee for permission to take over the lease from Umar Din on the terms on which it had been granted to him. The Municipal Committee agreed to this on 31st March 1922, and on 1st April Miran Bakhsh got possession of the properties in question. No document was however executed, as it should have been under S. 47, Punjab Municipal Act. The defendant continued to make part payments towards the rent. Eventually disputes arose between the Committee and him, and on 18th August 1924 the Committee instituted a suit for recovery of Rs. 7,699 on account of the unpaid portion of the rent from the 1st of April 1922 up to 30th September 1924. In the plaint a claim for future interest at 6 p. c. p. a. from the date of institution of the suit till realization was also made. The suit was resisted on various grounds, it being pleaded, inter alia, that as no formal writing had been executed as required by S. 47, Punjab Municipal Act, there was no valid contract between the parties, which could be enforced in a Court of law. It was further pleaded that the defendant had not been put in possession of the entire property, which was alleged to have been leased out to him, and that owing to various acts on the part of the Municipal Committee and its employees the defendant was not able to realize the full rent of the premises from his sub-tenants and that for this reason the reduction ought to be made in the amount due by him to the Committee. The Municipal Committee filed a replication in which it was averred that the Committee had sent several notices to the defendant to execute the document but that he had contumaciously refused to do so. It was also pleaded that in case the Court found that the suit for rent was not maintainable on the alleged lease, the plaintiff was still entitled "in justice" to the amount claimed, as the defendant had had the use and occupation of the properties in question for the entire period and had derived benefit therefrom. The plaintiff traversed the plea that the possession of the entire property had not been given to the defendant and denied that the rental value of the property had been diminished by the acts of the Committee or its employees.

On these pleadings the trial Court framed various issues and after recording voluminous evidence decided all the issues against the defendant, except the one relating to the validity of the contract under S. 47, Municipal Act. On that point it held that the contract between the parties should have been reduced to writing and signed by the President or the Vice-President of the Committee and one other member and the Secretary, and that as this had not been done the contract was invalid. It accordingly dismissed the suit, without recording any clear finding on the alternative claim on equitable grounds, which has been put forward in the replication. The Municipal Committee has preferred a first appeal to this Court and we have heard elaborate arguments by counsel for both sides.

Mr. Mool Chand for the Committee has not disputed the correctness of the finding of the lower Court that under S. 47, Municipal Act, the contract between the parties should have been reduced to writting and signed by the officials of the Committee as prescribed therein. He has also conceded that in view of the clear wording of the section and the various rulings of the High Courts, the suit for rent as such cannot be maintained. He has however contended that the defendant, having occupied the premises for the entire period for which the suit has been brought and having derived benefit therefrom, is, under S. 70, Contract Act, bound to make compensation to the Committee in respect of the property concerned. In support of this contention the learned counsel has relied on four recent rulings of this Court, *Municipal Committee, Gujaranwala* v. *Fazal Din* (1), *Secretary of State* v. *G. T. Sarin & Co.* (2), *Bhandari Bros.* v. *Municipal Committee* (*A. I. R.* 1931 *Lah.* 457), and *Ram Chand Lotia & Sons* v. *Municipal Committee, Lahore* (3).

Mr. Mehr Chand for the respondent has not questioned the correctness of these rulings, but he has argued that the claim as laid in the plaint was one for rent based on contract, and that the plaintiff should not be allowed in appeal to change the entire character of the suit by claiming the amount on equitable considerations. After examining the pleadings, I am of opinion that this contention has no force. It is no doubt true that the alternative claim for compensation was not mentioned in the plaint, but the replication filed by the plaintiff on 15th December, 1924, clearly stated that, even if the contract could not be legally enforced, the defendant having entered into possession on the basis of the said contract and having derived benefit therefrom was liable "in justice" to compensate the plaintiff. It is also clear from the judgment that arguments on the alternative claim were addressed to the lower Court. I would, therefore, hold that, while the plaintiff is not entitled to enforce the contract, it can claim compensation for the loss which has been caused to it by the continuance of the defendant in possession of the premises, for the period in question. Mr. Mehr Chand re-agitated before us the question covered by issue No. 6, which had been found by the lower Court against him, namely, whether possession of the entire property in question was delivered to the defendant. He contended that in addition to the 20 quarters and one thara, possession of which was admittedly given to the defendant, certain patris and another thara near the temple were also included in the properties, the lease of which was auctioned on 7th February 1922. After examining the oral and documentary evidence of the record, I am of opinion that this contention is without force and that the finding of the lower Court is amply borne out by the record, that the patris and the second thara, now alleged by the defendant as having been included in the lease, were not so included.

The next point for determination is the amount of compensation to which the plaintiff is entitled under S. 70, Contract Act. Having regard to the fact that the defendant continued in possession of the premises for the entire period in question and that there is no evidence on the record that there was a fall in the market rate during the period, I am of opinion, that the proper measure of compensation is the amount for which the defendant had taken the property on lease. It is, however, apparent from the record that the rental value of four of the quarters, of which possession had been taken by the defendant, was considerably diminished by reason of the erection of certain electric poles by the Municipal Committee in front of these quarters some time about the end of 1922 or in the beginning of January 1923. The fact that these poles were erected is admitted by the Municipal employees, who appeared as witnesses for the plaintiff. The evidence produced by the defendant clearly shows that the rent, which each of these four quarters fetched, was reduced approximately by Re. 1 a day for each quarter. Taking that this diminution was caused some time early in January and it continued till the end of September 1923, the amount payable to the plaintiff must be reduced by (4×30×21)=Rs. 2,520. The plaintiff is, therefore, entitled to a decree for Rs. 7,699 minus Rs. 2,520 or Rs. 5,179 as compensation for the use and occupation of the premises by the defendant during the period in question.

The claim for future interest from the date of the institution of the suit till realization, though made in the plaint, was not seriously pressed before us and is obviously unsustainable. For the foregoing reasons, I would accept the appeal and pass a decree in favour of the plaintiff-appellant against the defendant-respondent for Rs. 5,179 leaving the parties to bear their own costs throughout. The cross-objections necessarily fail and are dismissed.

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(1) A I R 1929 Lah 742=121 I C 187=11 Lah 121.

(2) A I R 1930 Lah 864=120 I C 615=11 Lah 875.

(3) A I R 1933 Lah 14.

Coldstream, J.—I agree.

R.K. *Decree modified.*

⁎⁎ A. I. R. 1933 Lahore 18

DALIP SINGH, J.

Secy. of State—Defendant—Appellant.

v.

Balwant Singh — Plaintiff — Respondent.

Misc. First Appeal No. 891 of 1932, Decided on 22nd November 1932, against order of Sub-Judge, First Class, Lahore, D/- 25th May 1932.

⁎⁎ **(a) Civil P. C. (1908) Sch. 2, Para. 17—Arbitrator named refusing to act—Dominant intention to refer to arbitration—Court can appoint fresh arbitrator—Test laid down.**

When an arbitrator named in an arbitration clause refuses to act, the question is a question of intention in each case. If the dominant intention of the parties is that the matter should be referred to arbitration then the fact that in the same or a subsequent agreement the parties agreed on the personnel of the arbitrator makes no difference, and when that arbitrator either becomes incapable or refuses to act the agreement to refer to arbitration remains and the Court can appoint a fresh arbitrator. If on the other hand the agreement of the parties in essence is to refer the case to the arbitration of a particular person or persons and to him or to them alone, then on the failure of that person or persons to act or his or their incapacity to do so the agreement to refer to arbitration is itself gone and therefore the Court has no power to appoint an arbitrator. It is immaterial whether the contract itself contains the name of the arbitrator or whether the contract merely contains a clause to refer to arbitration and the arbitrator is appointed by a subsequent agreement. In all cases it is a question merely of the intention and the matter is settled really by the decision of that question.

Held: that the intention clearly was to have a reference to arbitration and the person of the arbitrator was a secondary agreement: 33 *All.* 743 (*P. C.*); *A. I. R.* 1929 *Cal.* 177; *A. I. R.* 1925 *Bom.* 469 and *A. I. R.* 1928 *All.* 740, *Dist.*; *Case law referred.* [P 19 C 2; P 20 C 1, 2]

⁎ **(b) Deed—Construction—Written clause over-rides printed one.**

If the printed and written clauses are irreconcilable the printed clause is over-ridden by the written clause. [P 21 C 1]

⁎ **(c) Civil P. C. (1908), Sch. 2, Para. 17—Mere inaction does not cut limitation—Delay must amount to abandonment.**

The delay must be such as to lead to the inference that the parties had abandoned the reference to arbitration and anything short of this inference does not make any difference. The statutory period of limitation cannot be cut down by mere inaction. [P 21 C 2]

⁎ ⁎ **(d) Civil P. C. (1908), S. 20 and Sch. 2, Para. 17—Arbitration—Refusal to, is fundamental cause of action for application under Sch. 2, Para. 17.**

The refusal to refer to arbitration is a fundamental cause of action for the purpose of filing an agreement of reference to arbitration. [P 21 C 2; P 22 C 1]

Ram Lal—for Appellant.

J. G. Sethi—for Respondent.

Judgment

Balwant Singh applied under Para 17, 2, Civil P. C., to file an agreement of reference to arbitration against the Secretary of State. The facts are that the plaintiff Balawant Singh executed certain works on the Kangra Valley Railway. Disputes arose as to the sum due and the Chief Engineer, N. W. Ry., suggested one Mr. Lawton as an arbitrator in the matter. The offer was accepted by the plaintiff. Mr. Lawton, however, for various causes was unable to take up the matter and on 26th January, 1931, the plaintiff called upon the Chief Engineer to have the matter referred to arbitration. The Chief Engineer replied that Mr. Lawton could not take up the matter and he was not now willing to refer the matter to arbitration at all. The plaintiff, therefore, prayed: (1) that the agreement contained in the letters dated 11th and 15th March 1930, be filed in the Court, Exs. P. 1 and P. 7, and an order of reference made in accordance therewith to Mr. Lawton, and if he cannot be appointed another suitable arbitrator be appointed; (2) or in the alternative he asked that the agreement contained in para. 45, part 2, of the N. W. Ry. Works Hand-Book be filed and the matter in dispute be referred to an arbitrator in accordance with these provisions, or (3) that the agreement contained in the clause printed in the work orders should be filed and the matter might be referred to any person other than the Chief Engineer, N. W. Ry. as he had disqualified himself and was not a fit and proper person to be appointed.

The Secretary of State pleaded that the work had admittedly been executed, that the work was carried on, on the work order system and each work order constituted an independent and a separate contract. He denied that para. 45 of the N. W. Ry. Works Hand-Book applied. He admitted that there was a printed clause appointing the Chief Engineer, N. W. Ry. as the sole arbitrator in the event of a dispute. He admitted that there was an agreement to refer the matter in dispute to the arbitration of Mr. Lawton and that Mr. Lawton had refused to act as an arbitrator in April 1930, to the knowledge of the plaintiff and that he was always willing to abide by the terms of the printed clause printed on the back of each of the work orders, but that the plaintiff had no right to have the matter referred to any arbitrator except the one agreed upon in the special conditions aforesaid. It is contended further that the Kangra Courts alone had jurisdiction except *qua* the agreement to refer the matter to Mr. Lawton and that as Mr. Lawton had refused to act none could be appointed as a substitute. The plaintiff denied that Mr. Lawton had ever refused to act to the knowledge of the plaintiff and that the reference to arbitration was good.

Various issues were framed which are given in the judgment and the Court held that the intention of the parties was that the dispute, if any, arising under the contract should be referred to arbitration, that Mr. Lawton had not refused in April, 1930, to act as an arbitrator, that the Court was empowered to appoint another arbitrator though the rulings on the point were conflicting. It held that the clause in para. 45 and the printed agreement on the back of the work orders must be filed in the Court, that the Chief Engineer of the N. W. Ry. had disqualified himself and that, therefore, if the parties did not agree to an Engineer other than the Chief Engineer, and if the Punjab Government did not make a selection in accordance with para. 45 the Court could make an appointment of an arbitrator. On the question of jurisdiction it held that the Lahore Courts had jurisdiction on the ground that the Secretary of State was a *quasi* corporation and might be presumed to reside in Lahore, but that the Secretary of State could not resile from the reference without sufficient cause and it, therefore, ordered the agreements to be filed and the parties be given an opportunity up to the 15th June, 1932, to agree to a Railway Engineer to act as an arbitrator other than the Engineer in Chief; further steps to be taken after the Court came to know if the parties would or would not agree.

The Secretary of State has come in appeal and lengthy and prolonged argument have been addressed to me by counsel on both sides. The main case of the Secretary of State is that the agreement to refer the disputes which had arisen to Mr. Lawton did away with all previous agreements to refer to arbitration, that that agreement was to a specific arbitrator, namely, Mr. Lawton, and that as he had refused to act the arbitration clause ceased to have any force. The following rulings were cited: *Mohan Lal* v. *Damodar Das* (1) *Sri Ram* v. *Sorabji* (2), *Bejam* v. *Ghulam* (3), *Radha Kishan* v. *Daulat Ram* (4), *Bala Pattabhirama* v. *Seetharama Chetti* (5), *Murugappa Chettiar* v. *Narayanasami Pillai* (6), *Narayanappa* v. *Ramchandrappa* (7), *Ramayya* v. *Bapayya* (8), *Suryanarayana* v. *Prahabasubhayya* (9), *Laxman* v. *Manju Nath* (10), *A. I. R.* 1931 *Bom.* 529 and *Ahmad Nur Khan* v. *Abdul Rahaman Khan* (11). On the other side have been cited: *Sadik Hussain* v. *Kaniz Zeohara Begam* (12), *General Electric Trading Co.* v. *Siemens* (*India*) *Ltd.* (13), *Vallabhadas Meghji* v. *Cowasji Framji & Co.* (14) and *Mahedeo Prasad* v. *Badridas Ram Sarup* (15); these three rulings need not be discussed further as they deal with the Arbitration Act which does not apply to the present case, *Fazlilahi* v. *Prag Narain* (16), *Bala Pattabhirama* v. *Setharama Chetty* (5), *Pestonjee Nussurwanjee* v. *Manookjee* (17). There is no doubt that there is some conflict of rulings on the question of what happens when an arbitrator nemed in an arbitration clause refuses to act. I do not propose to enter into any lengthy discussion of the rulings. It seems to me that the question is a question of intention in each case. If the dominant intention of the parties is that the matter should be referred to arbitration then the fact that in the same or subsequent agreement the parties agreed on the personnel of the arbitrator makes no difference, and when that arbitrator either becomes incapable or refuses to act the agreement to refer to arbitration remains and the Court can appoint a fresh arbitrator. If on the other hand the agreement of the parties in essence is to refer the case to the arbitration of a particular person or persons and to him or to them alone, then on the failure of that person or persons to act or his or their incapacity to do so the agreement to refer to arbitration is itself gone and therefore the Court has no power to appoint an arbitrator.

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(1) [1918] 71 P R 1918=44 I C 866.
(2) [1919] 155 P R 1919=51 I C 636.
(3) [1882] 191 P R 1882.
(4) [1900] 110 P R 1900.
(5) [1894] 17 Mad 498.
(6) [1912] 17 I C 389.
(7) A I R 1931 Mad 28=129 I C 638=54 Mad 469.
(8) A I R 1926 Mad 1183=97 I C 824.
(9) [1917] 41 Mad 471=42 I C 911 (F B).
10) A I R 1921 Bom 458=64 I C 289=45 Bom 1181.
(11) A I R 1919 All 48=54 I C 366=42 All 191.
(12) [1911] 33 All 743=14 O C 289=38 I A 181=12 I C 15 (P C).
(13) A I R 1929 Cal 177=116 I C 625=56 Cal 848.
(14) A I R 1925 Bom 469=88 I C 90=49 Bom 706.
(15) A I R 1928 All 740=110 I C 881=50 All 955.
(16) A I R 1922 All 133 = 67 I C 789 = 44 All 523.
(17) [1867-69] 12 M I A 112 (P C).

It seems to me, looking at the matter from this point of view, that it makes no difference whatsoever whether the contract itself contains the name of the arbitrator or whether the contract merely contains a clause to refer to arbitration and the arbitrator is appointed by the subsequent agreement. No doubt the presence of the name in the contract itself is a circumstance to be borne in mind in deciding the intention of the parties but I do not think it affects the question further. The rulings appear to draw a distinction between the case where the order of reference to arbitration has been made following the filing of the agreement to refer and the arbitrator then fails to act and the case where the arbitrator has become incapable or has refused to act before the agreement to refer has been made a rule of Court. From my point of view it seems to me that it makes no difference. I am quite unable to see what real distinction exists when the contract is in essence one to refer to arbitration and not to refer to the arbitration of a specific arbitrator whether the Court is aware or not aware at the time when it orders the agreement to refer to be filed whether the arbitrator is incapable or unwilling to act or not. What is being filed is the agreement to refer to arbitration. Assume that the Court does not know that the arbitrator named or agreed to, will not act, let us suppose that the Court passes the order to file the agreement, sends it to the arbitrator who returns the papers to the Court and refuses to act, the Court can, it seems to me, then appoint another arbitrator. What legal difficulty or distinction exists between the case where the Court does it in ignorance of the arbitrator's incapacity or unwillingness or where the Court does it knowing of the incapacity or unwillingness of the arbitrator, is not clear to me. Nor does the learned counsel for the appellant throw any light on this question. It appears to me therefore that in all cases it is a question merely of the intention and the matter is settled really by the decision of that question. That being so all I have got to see is what the intention of the parties was in the present contract. Now looking at Ex. 9, which is one of the contracts, I find at p. 6, Cl. (c) the following words:

> "I agree to all the conditions and instructions of the contract contained in work hand book Parts 1 and 11, pp. 1 to 17."

At the back I find a clause

> "I agree that should any dispute arise on matters connected with this agreement then the same might be referred to the Engineer in Chief for the time being of the N. W. Ry. whose decision should be final and binding on both parties."

The handbook at p. 11, Cl. 45 is headed "Arbitration" and there I find that it is stated that all differences and disputes shall be referred for decision to an arbitrator who must be a Railway Engineer to be agreed by or between the parties or in default of such agreement selected by the Government of the Punjab, and this condition shall be deemed to be a submission to arbitration within the meaning of Arbitration Act, 1899, etc. Bearing in mind the fact that Ex. P 9 is headed "Contractors Agreement" and is a printed form and bearing in mind that the Work Hand-book contains a direction that all contracts shall be subject to these conditions, it seems to me perfectly clear that the intention of the parties was that the matter should, if a dispute arose, be referred to arbitration and that the two clauses can be reconciled by supposing that the parties had agreed that the Chief Engineer, N. W. Ry., should be the Engineer whom the parties agreed to select as the arbitrator.

The learned counsel for the appellant wishes to contend that para. 45 did not apply at all and that the Chief Engineer was the sole arbitrator in the case. From my way of looking at the matter the result would be different except that it seems to me that the intention clearly was to have a reference to arbitration and the person of the arbitrator was, if one may so put it, as a secondary agreement, to be the Chief Engineer. Disputes did arise and a letter was addressed by the plaintiff stating his claims to the Chief Engineer. The Chief Engineer wrote back saying that he had been through the claim and he did not think anything was due to the plaintiff and suggested that Mr. Lawton should be appointed as an arbitrator. The plaintiff agreed to Mr. Lawton's being appointed as an arbitrator. It is clear that the Chief Engineer never thought that under the terms of the contract he himself was the sole arbitrator in the case. At any rate he made no reference what-

[illegible] 1993 [illegible]

[illegible] would [illegible]

Kundan [illegible]

[illegible]

contends (4) that S. [illegible]

[illegible]

my view of the matter this is the fundamental cause of action, and the mere fact as to whether the personnel should be Mr. Lawton or the Chief Engineer or some one else has little to do with the case as at present and therefore I consider that the Lahore Courts had jurisdiction and that this argument also fails.

The result is that I dismiss the appeal with costs.

R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 22

TEK CHAND, J.

Mohan Lal—Plaintiff—Appellant.

v.

Fatoo and *others* — Defendants — Respondents.

Second Appeal No. 620 of 1928, Decided on 4th July 1932, against decree of Dist. Judge, Jullundur, D/- 28th November 1927.

(a) Limitation Act (1908), Art. 142— Delivery of possession under warrant gives fresh starting point of limitation.

Delivery of possession to plaintiff under a warrant of a former decree gives him a fresh starting point of limitation. [P 23 C 1]

(b) Civil P. C. (1908), O. 21, R. 35 (1)—Applicability.

Where the land is in actual possesssion of the judgment-debtor, R. 35 (1) applies. [P 22 C 2]

(c) Limitation Act (1908), Art. 142—No resistance offered—Report that possession of whole land delivered—Fresh period of 12 years is granted to decree-holder.

Where there is no allegation that any resistance was offered by the judgment-debtor or that he had refused to vacate the property, but on the other hand the report makes it quite clear that possession of the entire land was delivered to the decree-holder, this is sufficient compliance with the provisions of the Code and the decree-holder can claim a fresh period of 12 years from that date for recovery of possession. [P 22 C 2; P 23 C 1]

(d) Civil P. C. (1908), O. 21, R. 35 (1)—Delivery of possession to decree-holder under warrant—Judgment-debtor's consent is not necessary.

There is no provision of the law that in executing a warrant for possession under Cl. (1), R. 35, the consent of the judgment-debtor is essential, or that it is obligatory upon the decree-holder or the executing official to apprise the judgment-debtor of the fact that the possession had been delivered to the decree-holder. All that is necessary under the law is to deliver possession to the decree-holder, and if any resistance by a person bound by the decree is offered, to remove him from possession thereof. Where no such resistance is offered the provisions of the law are duly complied with by delivering possession to the decree-holder. [P 23 C 1]

(e) Civil P. C. (1908), O. 21, R. 35 (1)—Decree awarding possession can be enforced only by R. 35 (1).

Delivery of possession by going through the process prescribed by R. 35 (1) is the only way in which the decree of the Court awarding possession to the plaintiff can be enforced; and as, in contemplation of law, both parties must be considered as being present at the time when the delivery is made such delivery must, as against the defendant, be deemed equivalent to actual possession: 5 *Cal.* 585 and *A. I. R.* 1917 *P. C.* 197 *Foll.*; *A. I. R.* 1921 *All.* 9 (*F. B.*) and 36 *Bom.* 373 (*F. B.*), *Dist.* [P 23 C 1]

Badri Das—for Appellant.

Achhru Ram—for Respondents.

Judgment

On 4th March 1909 a decree was passed in favour of the plaintiff-appellant for possession of the land in dispute as a mortgagee. This decree was affirmed on appeal by the Divisional Judge on 30th November 1911. The decree-holder took certain infructuous proceedings in execution, and eventually a warrant for possession of the land was issued by the executing Court. This warrant was duly executed on 17th January 1915. The bailiff's report was that possession had been given on the spot in the presence of the Girdawar, two lambardars, the patwari and the chaukidar. The report is signed by all these persons as well as by the decree-holder and is dated 17th January 1915.

On 15th January 1927 the plaintiff brought the present suit for possession of the same land on the ground that the defendants had regained possession after the execution of the warrant. The Courts below have dismissed the suit as time barred and have held that the delivery of possession on 17th January 1915, as described in the execution proceedings in the former decree, did not give a fresh starting point of limitation to the plaintiff. After examining the terms of the warrant for possession and report dated 17th January 1915 and hearing both counsel at length, I am of opinion that the decision of the lower Courts is wrong and cannot be sustained. The land was in actual possession of the judgment-debtor, and admittedly Cl. (1), R. 35, O. 21, was applicable to the case. That rule provides that

> "where a decree is for delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and if necessary, by removing any person bound by the decree who refuses to vacate the property."

In this case it is not alleged that any resistance was offered by the judgment-debtor or that he had refused to vacate the property. On the other hand the report makes it quite clear that possession of the entire land was delivered to the decree-holder. This was sufficient compliance with the provisions of the

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should be allowed: *A. I. R.* 1931 *Lah.* 696, *App'.* [P 24 C 1, 2; P 25 C 1]

Shamair Chand and *Qabul Chand*—for Appellant.

Mohammad Monier—for Respondent.

Judgment

In a suit instituted by the appellant against the respondent for recovery of Rs. 5,000 on foot of two bonds, which had been executed by the defendant in his favour, a decree was passed on the basis of a compromise on 19th August, 1930. In the compromise it was agreed that the amount due to the plaintiff on foot of the two bonds in dispute was Rs. 5,000, and that in full payment of this amount, as well as another sum of Rs. 385, which was due by the defendant to the plaintiff on a third bond, the judgment-debtor would lease one-half square belonging to him for a period of eleven years to the decree-holder. At the expiry of this period the decretal amount as well as the sum of Rs. 385 aforesaid was to be considered as having been paid in full. It was agreed that the judgment-debtor would get mutation of the lease effected or a lease-deed executed and registered in favour of the decree-holder within ten days from the date of the decree; but if he failed to do so, the decree-holder would be entitled to execute the decree for Rs. 5,000 in any manner open to him under the law. The judgment-debtor failed to have the mutation of the lease effected or a lease-deed executed and registered within ten days and the decree-holder, on 6th of October, 1930, applied for execution of the decree by attachment of the property of the judgment-debtor and his arrest. In reply the judgment-debtor pleaded that it was the decree-holder, and not he, who had committed the default. The executing Court found that this contention was incorrect and that default had been committed by the judgment-debtor. On this finding, it granted the application for execution of the decree.

On appeal the learned District Judge, while agreeing that the judgment debtor had committed the default, has held that the power given to the decree-holder to execute the decree in the ordinary way was in the nature of penalty, which the Court was not bound to enforce. He accordingly accepted the appeal and allowed the judgment-debtor to execute the lease-deed or have mutation effected for a period of twelve years (and not eleven years, as had been agreed upon in the compromise) within ten days from the date of the appellate order. He also ordered that if the judgment debtor failed to comply with the above direction within the time fixed, the decree-holder would be entitled to execute the decree.

The decree-holder has preferred a second appeal, and on his behalf it has been contended that the power which was given to the decree-holder to execute the decree in the ordinary way, on the judgment-debtor failing to avail himself of the concession which the decree-holder had given to him to execute a lease of one-half square of land in favour of the decree-holder within ten days from the date of the decree, was not in the nature of a penalty and the District Judge had no power to refuse to enforce it. After hearing both counsel and examining the terms of the compromise and the decree, I am of opinion that this contention is well founded and must prevail. The question as to when and to what extent, an executing Court can refuse on equitable grounds to enforce a default clause embodied in a decree, has been the subject of consideration in *Civil Appeal No.* 816 of 1929 reported in *A. I. R.* 1931 *Lah.* 696. That case, on a difference of opinion between Jai Lal J., and Agha Haidar J., was referred to Bhide, J., who agreeing with Jai Lal, J., laid down: (a) that where a decree is passed as a result of an agreement between the parties it does not stand on a higher footing than the agreement which preceded it, and therefore the Court has the power to relieve the defaulting party from the consequences of the default; but (b) that the Court does not possess unrestricted power in the matter, inasmuch as it cannot interfere with the effect of default if as a result thereof the decree-holder seeks merely to take away a concession which he had given to the judgment-debtor. If, on the other hand, as a result of the default, the decree-holder is attempting to realize more than was really due to him, in other words, if he is enforcing a penalty, then the Court is entitled to step in and give to relief to the judgment-debtor against the forfeiture.

Applying the principle laid down in this ruling to the case before me, there can be no doubt that the decision of the learned District Judge is erroneous. Here the decree-holder is clearly not attempting to enforce a penalty against the judgment-debtor. All that he is seeking to do is to take away the concession which he had given to the judgment-debtor, and which the judgment-debtor had failed to avail himself of within the time fixed. As stated already, by the compromise he had, for a fixed period cut down his power to enforce his legal right to execute the decree in any manner open to him under the law, and now on the judgment-debtor's default he is merely claiming a revivor of those rights. It is obvious that a provision of this kind in the compromise decree cannot by any stretch of reasoning be described as a penalty. I accept the appeal, set aside the order of the Additional District Judge and restore that of the trial Court. Having regard to all the circumstances, I leave the parties to bear their own costs throughout.

P.N./R.K. *Appeal allowed.*

A. I. R. 1933 Lahore 25

ADDISION AND AGHA HAIDAR, JJ.

Shiromani Gurdwara Parbhandhak Committe, Khosakotla, and *another* — Appellants.

v.

Prem Das and *others*—Respondents.

First Appeal No. 2074 of 1929, Decidedon 24th February 1932, against decree of Sikh Gurdwara Tribunal, Lahore, D/- 29th April 1929.

(a) Civil P. C. (1908), S. 100 —Adverse Possession.

The question of adverse possession is a mixed question of law and fact. [P 27 C 1]

(b) Adverse Possession — Party claiming title by adverse possession, should make clear allegations in plaint—Without this declaration of such title cannot be given.

If a party claims a title by adverse possession it is his duty to make clear allegations in the plaint, and to lead evidence of facts from which he asks the Court to draw the inference that the proved facts amount in law to adverse possession. A declaration cannot be given on a title neither stated in the plaint nor raised on the issues: 2 *Cal.* 418 and (1908) *A. W. N.* 277, *Ref.*; 31 *Mad.* 531, *Rel. on.* [P 27 C 1, 2]

(c) Words and Phrases — "Dharamsala" and "Gurudwara" are often used as synonymous in old documents.

In old documents the words "Dharamsala' and "Gurudwara" are very often used as synonymous. [P 26 C 2]

(d) Adverse Possession — Party claiming adverse possession occupying position of Mahant—Ex parte mutation of suit property obtained in party's name—This is not overt act as might come to knowledge of persons interested in suit property.

Where party claiming declaration of title by adverse possession and their predecessors, had been occupying the position of Mahants while in possession of the property in suit for over twelve years, the mere fact that certain mutation had been obtained in ex parte proceedings and entries had been made in favour of their predecessor, cannot be said to be such an overt act as might be expected to come to the knowledge of the parties interested in disputing the pretentions of the party claiming such declaration. [P 27 C 1, 2]

(e) Adverse Possession—Lessee from Mahant of Mutt—When he can claim adverse possession stated — Limitation Act (1908), Art. 144.

A lessee cannot claim adverse possession for himself under Art. 144 during the lifetime of the head of the mutt who granted him the lease: *A. I. R.* 1922 *P. C.* 123, *Foll.* [P 27 C 2]

Bhagat Singh—for Appellants.

Gobind Ram Khanna and *Mehr Chand Sud*—for Respondents.

Agha Haidar, J.

These are two connected appeals against the order of the Sikh Gurdwaras Tribunal, Lahore, dated 29th April, 1929, in two separate suits bearing Nos. 275 and 276 of 1927 respectively. They relate to two properties, one situated in the village Ratian, Tahsil Moga in the district of Ferozepore, and the other in the village Datewal, Tahsil Zira in the same district. An area of 233 kanals, 8 marlas of land in Khosa Kotla was claimed in suit No. 276; but at a very early stage the respondents did not contest the claim of the petitioners, and so it may be left out of consideration for the purposes of this appeal. Civil Appeal No. 2074 of 1929 has arisen out of suit No. 275 and Civil Appeal No. 2075 of 1929 is against the order in suit No. 276. The claims in both the suits were decreed by the Sikh Gurdwaras Tribunal, Lahore, hereinafter referred to as the Tribunal. The trial Court disposed of the two suits together by one judgment and as a matter of convenience, I propose to follow the same course in this Court. In the village Khosa Kotla, Tahsil Zira, in the district of Ferozepore, there are two religious institutions, one, Gurdwara Guru Sar," which was founded to commemorate the visit of Guru Hargobind to the locality, and the other " Dharamsala Salig Ram." Gurdwara Guru Sar is a Sikh institution, while Dharamsala Salig Ram belongs to the Udasis. The following pedigree-tables or the Mahants or heads of the two institutions may be subjoined for the purpose of understanding some of the questions involved in the two suits:

Gurudwara Guru Sar.	Dharamsala Salig Ram.
Sangat Das	Salig Ram
Khup Chain Dass	Brahm Dass
Gulab Das	Budh Das
Ram Dass	Narain Dass
Hira Singh	Prem Dass and Sant Ram
Budh Das	

One Bishen Das, who describes himself as the uncle of Prem Das and Sant Ram, would also figure in suit No. 275 of 1927. I now take up Civil Appeal No. 2074 of 1929, arising out of suit No. 275 which relates to Rattian property. The plaintiffs, Prem Das and Sant Ram, came into Court alleging that the property described in the plaint was owned and possessed by them along with their paternal uncle, Bishen Das, and had belonged to them for many generations past. After referring to the entry of Gurdwara Guru Sar in Sch. 1 to the Sikh Gurdwaras Act, (8 of 1925), they alleged that the land in dispute was not the property of the Gurdwara and that it had been wrongly entered in the consolidated list of the property published under S. 3, Sub-S. 2 of the aforesaid Act as the property belonging to Gurdwara Guru Sar. In the end they prayed that a declaratory decree to the effect that the land in dispute was neither the property of the Gurdwara Guru Sar, nor had the said Gurdwara any connection with the same, and that, on the other hand, it was owned and possessed by them along with their paternal uncle Bishen Das, may be passed in their favour. The respondents pleaded that the land in dispute was the property of the Gurdwara Guru Sar and was in possession of the petitioner Prem Das as an office holder.

The Tribunal held that the petitioners along with their paternal uncle Bishan Das had acquired title to the property in village Rattian by adverse possession and decreed their claim in part. No adjudication was made in respect of the interests of Bishan Das. It is said that he had gone to America several years ago and was not represented either in the trial Court or in this Court, either by counsel or by putting in an appearance personally. I would therefore refrain from making any observations which would in any way affect his rights and interests in the property. The net result was that the petitioners' claim was decreed in respect of half of the property by the Tribunal. According to the revenue records, the land was originally granted as muafi to Sukhchain Das, Mahant of the Gurdwara Guru Sar, during the Sikh times in the year 1803. Sukhchain Das was succeeded by Gulab Das who died some time in 1878. His successor was Ram Das who died in 1887. He did not leave a proper chela, but Hira Singh succeeded him as sadiq chela. Hira Singh died somewhere about 1892 leaving him surviving two sons, Sampuran Singh and Bhagta Singh, who did not show any inclination to serve the Gurdwara Guru Sar in their sacerdotal capacity and stayed away in their native village without taking any interest in the Gurdwara. The mahantship of the Gurdwara thus became vacant and the villagers, in the absence of any regular successor to the mahantship on the demise of Hira Singh, transplanted Budh Das, the contemporary head of the Dharamsala Salig Ram, to the mahantship of the Gurdwara. The Government confirmed the grant of the muafi land in Budh Das's name for the benefit of the "dharamsala".

Having regard to the history of the institution, there cannot be any manner of doubt that this description of the institution was a mere misnomer and and that the real beneficiary under the Government's confirmation of the grant was the Gurdwara Guru Sar, wrongly described as dharamsala. I may observe that in old documents the words "dharam sala" and "gurdwara" are very often used as synonymous, as held by the present Bench in its judgment dated 10th January, 1932, in Civil Appeal No. 693 of 1929. The seeds of future trouble and dissensions were sown by Budh Das. In the mutation attested by the Assistant Collector on 5th July, 1898, there is a reference in col. 13 to a tamlik nama dated 2nd July, 1898, vide Ex. P. 5 at pp. 31-33 of the printed record. In this mutation Budh Das, chela of Brahm Das, is mentioned as the owner of the property in mouza Rattian. The names of the transferees, Bishan Das and Narain Das, are given in col. 9 as holding in equal shares; and in col. 15 we find that the report of the patwari attested by the Girdawar Kanungo both dated 26th July, 1898. This report is to the effect that Budh Das proprietor has gifted away his muafi estate in favour of Bishan Das and Narain Das, sons of Chetan Das, in equal shares by way of tamlik. Budh Das died some time in 1910 and was succeeded by

Narain Das in respect of half the share. He was followed by the two petitioners, who, in their turn, succeeded to the same share. It is this deed of gift on which the Tribunal has based its finding as regards adverse possession.

It is important to note that in their petition which, to all intents and purposes, serves the purpose of a plaint in these proceedings, the petitioners simply alleged that they owned and possessed the property. They did not base their title on adverse possession. The defendants had no opportunity of meeting this claim and the whole record is silent on the point. According to the rules of pleadings, it was the duty of the petitioners not only to put forward the case of adverse possession on which they subsequently relied as the foundation of their title but to have further given particulars of the allegation. Moreover, S. 5, sub-S. (2) of the Sikh Gurdwaras Act, under which the petitioners filed their petition of objections, is quite clear that the petition shall specify the nature of the right, title or interest claimed and the grounds of the claim. This has not been done, and it appears that, during the course of the arguments, the point was taken up by the counsel for the petitioners and, curiously enough, was at once accepted by the learned members of the Tribunal, with the result that the petitioners' claim was allowed as regards the Rattian property on the basis of adverse possession. It is not necessary to mulitiply authorities dealing with the circumstances under which a claim is brought on the strength of adverse possession. The earliest case is reported as *Shiro Kumari Debi* v. *Govind Shaw* (1), where it is laid down that

> "a declaration of title may be made on proof of twelve years' adverse possession. Such a declaration cannot however be given on a title not distinctly stated in the plaint or in the issues."

This case was followed by a learned Judge of the Allahabad High Court in *Zaki-ud-Din* v. *Nazar Muhammad* (2) Again, in *Somasundarum Chetty* v. *Vadivelupillai* (3), the learned Judges following *Shiro Kumari Debi* v. *Govind Shaw* (1), laid down that "a declaration cannot be given on a title neither stated in the plaint nor raised on the issues." I may also observe that the question of adverse possession is a mixed question of law and fact and, if a party claims a title by adverse possession, it is his duty to make clear allegations in the plaint, and to lead evidence of facts from which he asked the Court to draw the inference that the proved facts amount in law to adverse possession. In view of the general principles and the authorites quoted above the finding of the Tribunal that the petitioners had acquired title by adverse possession cannot be sustained. There is another way of looking at the matter. The petitioners and their predecessors had been occupying the position of mahants while in possession of the property in suit during all these years and, therefore, the mere fact that certain mutation had been obtained in ex-parte proceedings and entries had been made in favour of their predecessor Narain Das, cannot be said to be such an overt act as might be expected to come to the knowledge of the parties interested in disputing the pretensions of the petitioners. It is said that Jiwan Singh was the mahant of the Gurdwara Guru-Sar, but he is put down as a mere granthi, and there is no evidence on the record that he was ever duly installed as mahant. Furthermore, Budh Das died in 1910, and adverse title which might possibly have been claimed could only commence from his death. On this point I need not cite authority except *Vidya Varuthi* v. *Balusami* (4), where the principle is enunciated that a lessee cannot claim adverse possession for himself under Article 144 of the Limitation Act during the life-time of the head of the mutt who granted him the lease. On the same principle, while Budh Das continued as Mahant, the period of limitation did not run against the institution of the Gurdwara Guru Sar. In this view of the case I would accept Civil Appeal No. 2074 of 1929, against the decree passed in suit No. 275 of 1927 and setting aside the decree, dismiss the petitioners' claim with costs throughout. (His Lordship then considered Appeal No. 2075 and allowed the same.)

Addison, J.—I concur.

B.V./R.K. *Order accordingly.*

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(1) [1876] 2 Cal 418

(2) [1908] A W N 277.

(3) [1908] 31 Mad 581.

(4) A I R 1922 P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).

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* A. I. R. 1933 Lahore 27

BHIDE, J.

Elahi Bakhsh and *others*—Petitioners.

v.

Mohammad Ghauns—Opposite Party.

Civil Revn. Petn. No. 401 of 1932, Decided on 3rd November 1932, against order of Dist. Judge, Shahpur and Jhang, D/- 21st April 1932.

✲ (a) Mussalman Wakf Act (42 of 1923), S. 2 (c) —Muttawali cannot be appointed under the Act.

A District Judge has no jurisdiction to pass any order appointing a mutawalli under S. 2 (c) of the Act. [P 28 C 1]

(b) Civil P. C. (1908), S. 92—Suit under S. 92 is not necessary for appointing Muttawali — Notice to living Muttawalis is necessary—Mahomedan law, Wakf.

A suit under S. 92 is not absolutely necessary in all cases of appointing a Mutawalli. A Court has power to appoint a Mutawalli in certain circumstances and if some Mutawallis are living, a notice to them is necessary before appointing a Mutawalli. [P 28 C 1]

Ghulam Mohi-ud-din—for Petitioners.

M. A. Khan and *Harbhajan Das*—for Opposite Parties.

Judgment

This is a petition for revision of an order of the District Judge, Jhang, appointing one Mahammad Ghauns as a Mutwalli of a mosque. The order purports to have been passed under S. 2 (c), Mussalman Wakf Act, 1923. On behalf of the petitioners it is contended that the learned District Judge had no jurisdiction to pass any order appointing a Mutwalli under S. 2 (c) of the aforesaid Act. This contention appears to me to be correct. S. 2(c) of the Mussalman Wakf Act merely defines the word "Mutwalli" for the purpose of the Act. It no doubt contemplates that a Mutwalli may be appointed by a Court of competent jurisdiction but it does not confer any power to do so. It is conceded by the learned counsel for the respondent that the Mussalman Wakf Act, 1923, does not contain any distinct provision for the appointment of a Mutwalli by Court, but he says that under the Muhammadan Law, a Qazi is empowered to appoint a Mutwalli and that the Court can perform the functions of a Qazi. The learned counsel for the petitioners had urged that the poper procedure was to file a suit under S. 92, Civil P. C. It appears however that this procedure is not absolutely necessary in all cases: cf. *A. I. R.* 1924 *Cal.* 441. It would appear from para. 165 of the Principles of Muhammadan Law by Mulla, that a Court has power to appoint a Mutwalli in certain circumstances. The learned District Judge has not however gone into the question as to whether those circumstances existed in the present case, and whether a suit was necessary. The learned counsel for the petitioner has stated that there were three Mutwallis for this mosque, of whom one has died. Two of the Mutwallis are said to be living and in charge of the mosque. It appears that no notice was given to them. I accept the petition for revision and setting aside the order of the learned District Judge remand the case to him for redecision after issuing notices to all interested persons. I leave the parties to bear their costs.

R.K. *Petition accepted.*

A. I. R. 1933 Lahore 28

JAI LAL, J.

Muhammad Umar Hayat Khan—Plaintiff—Appellant.

v.

Muhammad Zaman—Defendant—Respondent.

Second Appeal No. 491 of 1932, Decided on 13th October 1932, against order of Dist. Judge, Sargodha, D/- 23rd December 1931.

Easements Act (1882), S. 15—Easement of light and air through holes in joint wall dividing two tenements can be claimed—Easements Act (1882), S. 4.

The plaintiff and the defendants were the joint owners of the wall dividing their properties. The plaintiff's house had otherwise acquired an easement of receiving light and air through holes in that wall. The defendant obstructed it :

Held : that the fact that the wall was joint does not prevent the acquisition of the easement claimed, the defendant's property adjoining the wall and not the wall itself being the servient tenement. [P 29 C 1]

M. L. Puri—for Appellant.

R. C. Manchanda—for Respondent.

Judgment

The plaintiff and the defendant are owners of adjoining houses in Sargodha. The plaintiff's house, it has been found, has been in existence for more than 20 years and in the southern wall of this house there are two holes which had been giving light and ventilation to the plaintiff's house for more than 20 years. On the south of the wall in which these holes exist is the land of the defendant on which he has recently built a house and in doing so has built up against the wall in which the plaintiff's ventilators are and has thereby closed them. The plaintiffs consequently instituted this suit out of which this second appeal has arisen for an injunction and other consequent reliefs. The District Judge on appeal has found that the wall on which these holes exist is the joint wall of the plaintiff and the defendant. But being of an opinion that an easement cannot be acquired against a person's own property and as the wall has been found by him to be the joint property of the plaintiff and the defendant he has dismissed the suit holding that the plaintiff could not acquire an easement in the joint wall.

There has, in my opinion, been a misapprehension in the mind of the learned District Judge as to nature of the plaintiff's suit. The easement claimed by the plaintiff is against the defendant's property which is to the south of the joint wall. The wall is the means of enjoying the easement. The easement is not claimed against or in the wall. It is not the wall which is the servient tenement but the defendant's land to the south. It is therefore clear that the plaintiff who is the owner of the property to the north is entitled to an easement, on the facts found by the District Judge, against the land of the defendant, which is to the south. The question whether the defendant is entitled to close the ventilators as a joint owner of the wall has nothing to do with the enjoyment of the easement. If the defendant had claimed, which he did not claim, in his written statement that he as a joint owner of the wall was entitled to close the holes in it that question would have had to be determined with regard to the respective rights of the parties as joint owner of the wall. As I have already stated the defendant did not claim any such right and no such right has been claimed even before me. I am unable to understand how the defendant as a joint owner of the wall could close the holes which the plaintiff made in the wall more than 20 years ago. On all these grounds therefore the action of the defendant in building up against the holes thereby stopping the access of light and air of the plaintiff's house was illegal and unauthorised and the plaintiff is certainly entitled to the relief for that reason. What relief the plaintiff is entitled to is a matter which should be determined by the learned District Judge on a consideration of all the facts of the case. The case will go back to the District Judge under S. 151, Civil P. C., with directions to decide the appeal of the plaintiff, the defendant's appeal before him having been disposed of by this order. Costs of parties will abide the result.

M.N. *Appeal allowed.*

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* A. I. R. 1933 Lahore 29

TEK CHAND, J.

Mt. Jas Kuar—Plaintiff—Appellant.

v.

Mt. Bhag Devi—Defendant—Respondent.

Second Appeal No. 1384 of 1931, Decided on 17th March 1932.

(a) Specific Relief Act (1877), S. 54—Mere prescriptive right is not sufficient— Obstruction must amount to actionable nuisance.

The mere fact that the plaintiff possesses a prescriptive easement of light and air on the property of the defendant, is not by itself sufficient to justify the grant of an injunction. In order to entitle him to this relief it is further necessary to show that the obstruction complained of amounts to an "actionable nuisance": *Colls* v. *The Home* and *Colonial Stores* (1904) *A. C.* 179; *A. I. R.* 1914 *P. C.* 45, *Ref.* [P 31 C 1]

*** (b) Easements Act (1882), S. 15—Perpetual injunction—Reflected light cannot be taken into consideration.**

Where the deprivation of light and air is very substantial and the plaintiff has suffered a legal wrong, reflected light is not to be taken into consideration in considering the question of granting perpetual injunction to him. Reflected light is a different kind of light from that to which the plaintiff is entitled by prescription: *Prine* v. *Hilditch*, (1930) 1 *Ch.* 500; *Dent* v. *Auction Mart Co.* (1886) 2 *Eq.* 238, *Ref.* [P 32 C 1]

(c) Civil P. C. (1908), S. 24—District Judge can transfer suit remanded to one Court by Additional District Judge to another Court under his control—Punjab Courts Act (1918), S. 34.

The mere fact that proceedings on remand under O. 41, R. 25, Civil P. C., are proceedings in appeal, which remained pending in the Court of the Additional Judge does not affect the power of the District Judge under S. 24, to transfer any suit, appeal or civil proceedings from one subordinate Court to another Court of equal or competent jurisdiction. Moreover S. 34, Punjab Courts Act, authorizes every District Judge to direct by written order that any civil business cognizable by his Court or the Courts under his control shall be distributed among such Courts in such a manner as he thinks fit. Therefore the order of the District Judge transferring the inquiry from the Court to which the suit was remanded by the Additional District Judge to another Court under his control is not ultra vires. [P 31 C 2]

(d) Easements Act (1882), S. 15—Window, Valuable source of light and air—Pecuniary compensation not adequate—Defendant threatening to block it—Proper remedy is perpetual injunction.

Where the window in the wall of the room of the first floor of plaintiff's house is much more valuable to the plaintiff as a source of natural light and air, and pecuniary compensation cannot afford adequate relief to him for the threatened infringement of such an easement, the only appropriate order that can be passed is the grant of a perpetual injunction directing the defendant to so construct his house as to leave forty-five degrees of unobstructed light to enter into the window of the room in the first floor of the plaintiff's house. [P 32 C 2]

Mehr Chand Mahajan — for Appellant.

Jagan Nath Aggarwal — for Respondent.

Judgment

The plaintiff, Mt. Jas Kaur, is the owner of a four storeyed house in Kucha Gogi Tarkhan, Mohalla

Sathan, Lahore City. In the northern wall of this house there is a ventilator through which light and air used to get into one of the rooms on the ground floor, and there is a window opening in one of the rooms of the first floor. The defendant Mt. Bhag Devi is the owner of a plot of land adjoining the northern wall of the plaintiff's house. This plot was lying vacant until a short time before the suit. In May 1930 the defendant began to construct a house on it and in doing so she completely blocked the ventilator, and was about to block the window of the plaintiff's house, when the latter instituted a suit in the Court of Mr. Jagadish Narain Kapur, Subordinate Judge 4th Class, Lahore, for issue of a mandatory injunction for the demolition of the wall in front of the ventilator and a perpetual injunction directing the defendants not to close the window. The defendant denied the plaintiff's ownership of the alleged dominant tenement and the existence of the easement of light and air through the ventilator and the window, and pleaded that even if the easement was established, the obstruction had not caused, nor was it likely to cause, such diminution of light and air as would entitle the plaintiff to get the injunction prayed for. It was also urged that the suit regarding the window was premature, that proper court-fee had not been paid on the plaint and that the plaintiff was estopped from maintaining the suit by her acts and conduct.

On these pleadings Mr. Jagadish Narain framed the following issues: (1) whether it is necessary that court-fee should be paid separately for each prayer. (2) Whether the suit regarding the window is premature. (3) Whether the plaintiff has got a right of easement regarding the window and skylight (4) Relief.

The learned Judge found issues 1 to 3 in favour of the plaintiff and decreed the suit, issuing the injunction prayed for. From this decree the defendant preferred an appeal in the Court of Mr. M. S. Mirza, Additional Judge, Lahore, and contended inter alia that there had been no proper trial of the suit as issues had not been framed on the pleas denying the plaintiff's ownership of the dominant tenement and alleging estoppel on her part. It was also urged that the trial Judge ought to have made an enquiry into the question as to whether the construction of the defendant's house had caused, or was likely to cause, such diminution of light and air as would justify the grant of relief by way of injunction. The additional Judge accepted these contentions and remanded the case under O. 41, R, 25, for the trial of the following three issues: (1) Whether the plaintiff is the owner of the house in respect of which the easement is claimed. (2) Whether there is such diminution of light and air as to justify an injunction. (3) Whether the plaintiff is estopped by her act or conduct from bringing the present suit?

On the date when the remand order was passed, Mr. Jagdish Narain, who had originally tried the suit, had been transferred and Mr. Des Raj Pahwa had taken his place. The case was accordingly assigned to him for enquiry into these issues. But before Mr. Des Raj could deal with the matter, another Subordinate Judge of the 4th Class, Mr. Cornelius had been attached to the district and in order to find work for him a number of cases, including this case, were transferred from the Court of Mr. Des Raj to that of Mr. Cornelius, by a written order of the District Judge. Mr. Cornelius held the enquiry into the issues which had been sent down by the Appellate Court and submitted his findings on them. He held that the plaintiff was the owner of the dominant tenement, that no acts or conduct on her part were proved by reason of which she might be estopped from maintaining the suit, but that the diminution of light and air was not such as to justify the issue of the mandatory injunction prayed for. The remand report was considered by the learned Additional Judge, who agreeing with the findings of Mr. Cornelius accepted the defendant's appeal and dismissed the plaintiff's suit with costs throughout.

The plaintiff has preferred a second appeal to this Court and the first contention raised on her behalf is that the order of the Additional Judge remanding the case under O. 41, R. 25, was illegal and unjustified. It is argued that the issues originally framed by Mr. Jagdish Narain were comprehensive of all the material points which arose for consideration in the case, that the defendant had full opportunity of leading evidence on them, but failed to do so and therefore she could not ask for a remand in order to fill the gaps in her case. After hearing counsel at length and examining the relevant portions of the record, I am of opinion that this contention is without force. The defendant had definitely pleaded that the plaintiff was not the owner of the alleged dominant tenement, but was

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merely an occupier thereof and as such was not competent to maintain the suit. She had also pleaded estoppel and acquiescence. Neither of these matters was however put in issue by Mr. Jagdish Narain. Issues 3 and 4 which covered the material points in dispute were couched in general terms, and did not specifically require proof or disproof of the plea that the alleged infringement of the easement was not of such a nature as would entitle the plaintiff to claim relief by grant of a mandatory injunction. It is hardly necessary to point out that in a case like this the mere fact, that the plaintiff possesses a prescriptive easement of light and air on the property of the defendant, is not by itself sufficient to justify the grant of an injunction. In order to entitle her to this relief it is further necessary to show that the obstruction complained of amounts to an "actionable nuisance" as explained in the well known decision of the House of Lords in *Colls* v. *The Home* and *Colonial Stores* (1) and that of their Lordships of the Privy Council in *Paul* v. *Robson* (2). I hold therefore that the Additional Judge cannot be said to have acted illegally in framing additional issues and remanding the case under O. 41, R. 25.

The second point raised by the appellant's counsel is that the Additional Judge having entrusted the enquiry under O. 41, R. 25, to Mr. Des Raj Pahwa, the District Judge had no power to transfer it to the Court of Mr. Cornelius even though he was a Subordinate Judge of equal status. It was argued that the Additional Judge was seized of the appeal, that the proceedings on remand were merely proceedings in that appeal, and that the only person who could modify the order of the Additional Judge directing enquiry by a particular Subordinate Judge was the Additional Judge himself and not the District Judge, even though the latter officer possessed the general power of superintendence and transfer over all Courts subordinate to him. No authority, statutory or judicial, has been cited in support of this ingenious contention and, after hearing counsel, I am not prepared to accept it. It is no doubt true that proceedings on remand under R. 25 were proceedings in appeal, which remained pending in the Court of the Additional Judge; but, in my opinion, this circumstance does not affect the power of the District Judge under S. 24, Civil [illegible] to transfer any suit, appeal or civil proceedings" from one subordinate Court to another Court of equal or competent jurisdiction. Moreover S. 34, Punjab Courts Act, authorises every District Judge to "direct by written order" that "any civil business congnizable by his Court or the Courts under his control, shall be distributed among such Courts in such a manner as he thinks fit." It cannot be seriously contended that proceedings in the Court to which a case has been remanded under R. 25 is not "civil business" within the meaning of this section. I hold therefore that the order of the District Judge transferring the enquiry to the Court of Mr. Cornelius was not illegal or ultra vires.

On the merits both parties have accepted the finding that the plaintiff is the owner of the alleged dominant tenement; that she is not barred by estoppel or acquiescence from maintaining the suit; and that the ventilator and the window in question have been in existence for more than twenty years. The only question for consideration therefore is whether the infringment of this easement by the defendant amounts to actionable nuisance; and, if so, what is the appropriate relief which should be granted to her. Before discussing this point, it seems necessary to observe that, though Mr. Cornelius and the learned Additional Judge had inspected the spot, they have not left any permanent and intelligible notes of their inspections on the record, and both counsel are agreed that it is not possible to follow the portion of judgment of the learned Additional Judge, dated 23rd May, 1931, in which a description of the rooms in question is given and reference is made to the other alleged sources of light. It is admitted that the facts have not been correctly stated in the judgment and the plans on the record of the lower Courts were neither accurate nor full. In order to avoid a further remand, both parties got prepared a new plan and filed it in this Court. This plan is admitted as correct by the plaintiff and defendant, both of whom have affixed their signatures on it, and has been marked as Exhibit L by me. This plan shows that the ventilator is the only opening through which one of the back rooms of the ground floor used to receive natural light and air direct from the sky. The western wall of this room adjoins the house of one Pir Bakhsh and is absolutely blind. On the south, there is another backroom belonging to plaintiff, which is itself very dark: and towards the east is the big front room which opens into the street. The learned Additional Judge has treated the room in question as a part and parcel of this front room and has taken into consideration the sources though which light and air enter that room.

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(1) [1904] A C 179=73 L J Ch 484=90 L T 687=53 W R 30=20 T L R 475.

(2) A I R 1914 P C 45=24 I C 300=41 I A 180=42 Cal 46 (P C).

Admittedly, this is an erroneous description of the room, and this error vitiates the findings and the ultimate decision of the case by the learned Judge. By constructing a solid wall in front of the ventilator, the defendant has completely blocked the only source from which the room received light and fresh air. The situation of the door on the first floor is exactly the same, the only point of difference being that the opening is in the form of a window, which the defendant has not been able to block as the suit was promptly instituted by the plaintiff and a temporary injunction issued stopping the building. There is however no manner of doubt that if the defendant is allowed to construct the proposed wall against this window, the comfort, convenience and usefulness of the plaintiff's room in the first floor will be very materially interfered with, having regard to the character of the building as a residential house situate in a crowded lane in the city of Lahore.

It is not seriously denied that the deprivation of light and air is very substantial and that the plaintiff has suffered a legal wrong, but it is contended that the plaintiff can, by making structural alterations in his building, arrange to receive into these rooms reflected light from the front room. But, as observed by Maugham, J., in the recent case of *Price* v. *Hilditch* (3) (506),

> "it has been well settled for at least a generation' that reflected light is not to be taken into consideration in a matter of this kind. It was originally suggested, in *Dent* v. *Auction Mart Co.* (4) that glazed titles would perhaps afford to the plaintiff such light as he had before the alteration, but Wood, V. C., pointed out that there was nothing to compel the defendant or his successors to tile the well with glazed tiles or to maintain the tiles; and it was in any case a different kind of light from that to which he was entitled by prescription."

I hold therefore that the infringement of the easement amounted to an "actionable nuisance," and the decision of the Additional Judge to the contrary is erroneous. The only question which remains now to be considered is as to the form of relief to be granted to the plaintiff. As regards the ventilator, it is no doubt true, as has been pointed out already, that it was the only aperture from which natural light and air could enter the room. The dimensions of the ventilator are 1'-7" x 1'-9" but the plaintiff herself had fixed into it a wooden frieze, which had nine star-shaped holes, each whole being 2½" in diameter, and the total area of the holes being 22 square inches. Having regard to this fact and also taking into consideration the loss which would be caused to the defendant by a demolition of the wall, which has been constructed already, I think the appropriate relief, so far as this obstruction is concerned, is the grant of compensation, which I assess at Rs. 150. The window in the northern wall of the room of the first floor is however much more valuable to the plaintiff as a source of natural light and air, and pecuniary compensation cannot afford adequate relief to her. For the threatened infrigement of this easement, the only appropriate order that can be passed is the grant of a perpetual injunction directing the defendant to so construct her house as to leave forty-five degrees of unobstructed light to enter into the window of the the room in the first floor of the plaintiff's house.

For the foregoing reasons, I accept the appeal, set aside the judgment and decree of the learned Additional Judge, and in lieu thereof pass a decree in favour of the plaintiff against the defendant for payment of Rs. 150 as damages for obstructing the ventilator in the room on the ground-floor of the plaintiff's house, and also issue a mandatory injunction to the defendant directing her to so construct her building as to leave forty-five degrees of unobstructed light to enter into the window of the room on the first floor of the plaintiff's house. As the plaintiff has succeeded on all points, she shall get her costs in all Courts.

K.N./R.K. *Appeal allowed.*

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(3) [1930] 1 Ch 500=99 L J Ch 299=143 L T 33.

(4) [1866] 2 Eq 238=35 L J Ch 555=12 Jur N S 447=14 L T 627=14 W R 709.

A. I. R. 1933 Lahore 33

BHIDE, J.

Ralla Ram—Defendant—Appellant.

v.

Bhana Mal and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 636 of 1931, Decided on 5th July 1932, against decree of Dist. Judge, Jullundur, D/- 7-1-31.

(a) Civil P. C. (1908), S. 100 — Question whether person's intention is to acknowledge liability is one of fact—Limitation Act (1908), S. 19.

The question whether a person's intention is to acknowledge an existing liability or not is one of fact and the finding on such fact is not one which can be interfered with in second appeal. [P 33 C 2]

(b) Limitation Act (1908), S. 19—Mortgagee mortgaging property mortgaged to him — Recital in deed that property is mortgaged to mortgagee is acknowledgment of existence of mortgage.

The recital in the subsequent mortgage deed to the effect that the property had been mortgaged in favour of the mortgagee and that he was re-mortgaging it amounts to an acknowledgment of the existence of the mortgage at the time: 9 *P. R.* 1897; 1 *I. C.* 510 and 11 *I. C.* 377, *Rel. on.* 8 *Bom.* 99, *Dist.*

[P 33 C 2; P 34 C 1]

Achhru Ram—for Appellant.

Anant Ram Khosla—for Respondents.

Judgment

Civil Appeals Nos. 636 and 580 of 1931 are connected and will be disposed of together. They arise out of two suits for redemption of mortgages. The material facts were briefly as follows: Two persons, named Shiv Dayal and Mangal, mortgaged the property in dispute in favour of Dulo Mal for Rs. 80 on 27th October 1862. They incurred a further charge of Rs. 43 on the same property on 10th May 1865. On the 11th of May 1869 the mortgagee Dulo Mal mortgaged the same property in favour of Kishen Chand for Rs. 123. Shiv Dayal and Mangal died without issue and their heir Dhanna Mal transferred the equity of redemption to one Bhana Mal. One of the suits for redemption referred to above was instituted by Bhana Mal; the other suit was instituted by Ralla Ram, a descendant of Dulo Mal and was for the redemption of the mortgage effected by Dulo Mal in favour of Kishen Chand on 11th May 1869. Both these suits were decreed by the trial Court. Appeals were preferred to the learned District Judge by Ralla Ram and Bhana Mal respectively. As regards the former appeal the learned District Judge held that the appeal was not competent, inasmuch as it was filed only from the preliminary decree while a final decree had also been passed before the institution of the appeal. The learned District Judge relied upon *A. I. R.* 1928 *Lah.* 73 in support of this view. The learned Judge, however, also went into the facts of the case and decided against the appellant on the merits. In the latter appeal, the learned Judge pointed out that the decree in favour of Ralla Ram had become infructuous, inasmuch as Bhana Mal had also been given a decree for redemption of the original mortgage by Shiv Dayal and Mangal. Subject to this observation the appeal of Bhana Mal was dismissed. From these decisions Ralla Ram and Bhana Mal had preferred second appeals.

In the appeal by Ralla Ram the learned counsel who appeared for him contended that the learned District Judge's view that the appeal before him was not competent though supported by *A. I. R.* 1928 *Lah.* 73, was not sound as that decision was opposed to some later Full Bench rulings of other High Courts. He therefore requested that a reference might be made to a larger Bench for reconsideration of the point; but as the learned District Judge has gone into the facts of the case and decided on the merits, I do not consider it necessary to make any reference on this question of law as I have come to the conclusion that the learned District Judge's decision was correct on the merits and must be maintained. As regards the facts of the case, the only point which the learned counsel urged was that the suit was time barred. The mortgage was of the year 1862, as stated already; the suit was instituted on the 8th of May 1929. In order to bring the suit within limitation reliance was placed on an acknowledgment of the mortgage contained in the deed executed by Dulo Mal in favour of Kishen Chand on 11th May 1869. The learned counsel for Ralla Ram has urged that the recital in the mortgage deed of 1869 was only descriptive and did not amount to an acknowledgment of liability within the meaning of S. 19, Limitation Act. This contention does not appear to me to be sound. In the first place, the question whether Dulo Mal's intention was to acknowledge an existing liability or not is one of fact and the finding of the learned District Judge, is not, I think, one which can be interfered with in second appeal. Secondly, it appears to me that the recital in the mortgage deed to the effect that the property had been mortgaged in 1862 in favour of Dula Mal and that he was re-mortgaging it in favour of Kishen Chand did amount to an acknowledgment of the existence of the mortgage at the time. The view taken by the learned District Judge is supported by *Jalli* v. *Pir Baksh* (1) on which he has relied. The learned counsel for appellant cited *Dharma Vithal* v. *Govind Sadvalkar* (2) but this ruling was considered and distinguished in *Jalli* v. *Pir Baksh* (1). There are other authorities also to support the same view: see for example *Genda Mal* v. *Ilahi Buksh* (3) and *Hari Chand* v. *Phiraya Ram* (4). I therefore see no reason to interfere with the learned District Judge's decision and dismiss the appeal of Ralla Ram with costs.

Coming now to the appeal of Bhana Mal, the only point which was urged was that the learned District Judge has himself remarked that the decree in favour of Ralla Ram had become infructuous and that under the circumstances Bhana Mal's appeal should have been accepted and Ralla Ram's suit dismissed. But at the time the suit was instituted Ralla Ram had a right of redemption. It was further possible that Bhana Mal might not have complied with the terms of the decree for redemption which was passed in his favour and in that case Ralla Ram could have redeemed the property on the basis of the decree passed in his favour. It seems to me, therefore, that the learned District Judge was right in rejecting the appeal as he did.

It has been pointed that there is a slight error in the decree-sheet, inasmuch as the number of the suit has not been correctly given. The number of Ralla Ram's suit is 363/252 and not 359 as given in the decree-sheet. The number should be corrected. The mistake is purely a clerical one. The appeal is dismissed with costs in other respects.

P.N./R.K. *Appeal dismissed.*

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(1) [1897] 9 P R 1897.
(2) [1884] 8 Bom 99.
(3) [1909] 1 I C 510.
(4) [1911] 11 I C 377.

A. I. R. 1933 Lahore 34

JAI LAL, J.

Nanak Chand and *others*—Plaintiffs—Petitioners.

v.

Ishar Das and *others*—Defendants—Opposite Party.

Civil Revn. Petn. No. 296 of 1931, Decided on 24th February 1932.

(a) Civil P. C. (1908), Ss. 10 and 115—Three previous suits on hundis by plaintiffs disposed of—Subsequent suit on different hundi against same defendants—Suit contested by only one defendant and stayed at his instance—It is unfair to plaintiffs to stay suit.

Plaintiffs, whose three previous suits on hundis had been disposed of and decreed against certain defendants brought a suit on a different hundi against practically the same defendants. It was defended on the same ground, but only one of the defendants was contesting the suit and it was stayed under S. 10 at his instance:

Held: that the suit being on different hundi and only one of the defendants contesting it, it was unfair to the plaintiffs to stay proceedings in the suit even if it could be legally done. [P 34 C 2]

(b) Civil P. C. (1908), Ss. 10—Application from order under S. 10—High Court can interfere if suitable grounds are disclosed.

The High Court has jurisdiction to interfere on an application from an order passed under S. 10, if suitable grounds are disclosed. [P 34 C 2]

H. C. Kumar—for Petitioners.

Ajit Prasada—for Respondent.

Judgment

This is a petition for revision of an order passed by the Subordinate Judge, First Class, Delhi, under S. 10, Civil P. C., staying the petitioners' suit against the respondent and eight others. The suit was based on a hundi and it appears that three previously instituted suits on different hundis have been disposed of by the Senior Subordinate Judge of Delhi and decreed against the defendants. The present suit is against practically the same defendants and is being defended on the same ground. It, however, appears that only one of these defendants is contesting the suit and it is at his instance that the proceedings have been stayed. The suit being on a different hundi and only one of the defendants contesting the right of the plaintiffs it is, in my opinion, unfair to the plaintiffs to stay proceedings in a suit, like this, even if it could legally be done.

A preliminary objection was taken that this Court is not entitled to entertain an application for revision from an order passed under S. 10 and some authority was cited in support of this contention. Later authority however inclines to the view that this Court has jurisdiction to interfere in such cases if suitable grounds are disclosed. I accordingly overrule the preliminary objection and, accepting the petition, set aside the order of the Subordinate Judge staying the suit under S. 10, Civil P. C., and direct him to proceed with it in accordance with law. The costs of this petition shall be borne by the parties.

R.M./R.K. *Petition allowed.*

* A. I. R. 1933 Lahore 35

AGHA HAIDAR, J.

Nagar Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 455 of 1932, Decided on 8th July 1932.

*** Penal Code (1860), S. 397—"Uses" includes carrying weapon for purpose of overawing victims of dacoity.**

The word "uses" in S. 397 should be given wider meaning and should not be confined merely to cutting, stabbing or shooting (as the case may be) but also to carrying the weapon for the purpose of overawing the victims of the dacoity. If a dacoit is armed with a gun or a chhavi then undoubtedly he inspires his victim with the feeling of fear and the power of resistance is to a great extent paralysed: *A. I. R.* 1926 *Sind* 150, *Foll.* [P 35 C 2]

Des Raj Sawney, (Public Prosecutor)—for the Crown.

Facts

On the night intervening between 21st and 22nd October 1931, a dacoity was undoubtedly committed in the house and shop of Punun Singh, P. W. 2, a resident of the village Sundarpura in the district of Ferozepore. Punun Singh was sleeping outside his shop on the night in question when someone pronged him with a stick in his chest and woke him up. He found that he was surrounded by a number of dacoits who asked him to produce his valuables. He demurred and consequently was maltreated. Some of the dacoits entered his house, where his son, Daulat Ram, P. W. 16, his brother, Moti Ram P. W. 4, and some ladies were sleeping. Moti Ram ran away after a slight beating and did not return till after the dacoits had left. Daulat Ram was present all the time and so was Mt. Gango, P. W. 12, wife of Moti Ram. The dacoits broke open several trunks in the house and, rifling their contents, carried away the booty. They also took away a tin of ghee, Ex. P-63, bearing the name of Punun Singh in Landa characters. One of the dacoits remained standing outside the house and was firing his gun to scare away such villagers as might come to the rescue of Punun Singh. When the dacoits left the house and the shop of Punun Singh, the neighbours arrived and in the morning Moti Ram lodged the First Information Report at the Jalalabad police station in the district of Ferozepore. The police soon arrived at the spot and took up the investigation as a result of which six persons were put on trial under S. 395 read with S. 397, Penal Code.

Judgment

(After stating facts and discussing evidence, his Lordship proceeded). In my opinion, on the evidence as it stands, the case against all the accused persons is fully established. As regards the question of sentence, I felt some doubt as regards the applicability of S. 327, Penal Code, to the case of Nagar, son of Vir Singh, and Nanka Singh, accused. According to the prosecution evidence Nanka Singh carried a gun and Nagar, son of Vir Singh, was armed with a chhavi; S. 397, Penal Code provides that, if a person at the time of committing dacoity uses any deadly weapon, the maximum punishment, to which he is liable, is seven years. It does not appear that these two dacoits used their respective weapons upon any of the inmates of the house of Punun Singh. The only evidence is that Nanka Singh was firing the gun in order to frighten away the possible rescuers from the village. As regards the chhavi, there is no evidence that Nagar, son of Vir Singh, made any particular use of it upon any one of the inmates while the dacoity was in progress. Under these circumstances I felt some dlfficulty as to the applicability of S. 397, Penal Code, as on the facts stated above, it cannot be said that the accused used or employed their deadly weapon at the time of committing the dacoity upon any human being. My attention was however directed to a case reported as *Nazar Shah* v. *Emperor* (1), where it has been laid down by two learned Judges of the said Court that the word "uses" in S. 397, Penal Code, should be given a wider meaning and should not be confined merely to cutting, stabbing or shooting (as the case may be) but also to carrying the weapon for the purpose of overawing the victims of the dacoity. If the dacoity is armed with a gun or a chhavi then undoubtedly it inspires his victim with the feeling of fear and the power of resistance is to a great extent paralysed. This interpretation is not unreasonable, and, in the absence of any other authority, I feel obliged to accept it even if I had some doubt on the subject. The result is that I uphold the convictions and sentences of all the accused and dismiss the appeals preferred by them.

R.M./R.K. *Appeals dismissed.*

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(1) A I R 1926 Sind 150=92 I C 750=27 Cr L J 334=20 S L R 46.

A. I. R. 1933 Lahore 36

ADDISON, J.

Ram Kishan and *others*—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1361 of 1931, Decided on 26th February 1932, case reported by Sess. Judge, Ferozepore.

(a) Criminal P. C. (1898), S. 107—Essentials for order under, laid down.

It must be proved, for S. 107, Criminal P. C., to apply that a person is likely himself to commit a breach of the peace, or that a person is likely to do a wrongful act that may probably occasion breach of the peace. The mere fact that certain Sahukars were threatening to get the zamindars imprisoned as they would not pay their debts is not sufficient as it would not necessarily be the doing of a wrongful act as debtors can be imprisoned in execution of decrees, and if a rightful act causes tension likely to lead to a breach of the peace, the doers of that act cannot be placed on security. [P 36 C 2]

(b) Criminal P. C. (1898), S. 561-A—Irrelevant remarks in order of reference expunged.

Where an order of reference is for the most part irrelevant and in several portions uncalled for, objectionable and without jurisdiction and would be a source of trouble, the High Court expunged from the record the whole of the referring order of the Sessions Judge except the relevent portions. [P 36 C 2]

J. L. Kapur—for Accused.

C. H. Carden Noad—for the Crown.

Order

This is an unnecessarily long reference by the Sessions Judge, Ferozepore, recommending that the order of the Magistrate, First Class, placing five persons on security under the provisions of S. 107, Criminal P. C., be set aside. The learned counsel, who appeared for the five persons bound down, stated that he did not wish to refer to any part of the order of the Sessions Judge, except the last three pages, commencing with the words, "Now as to the evidence on which the judgment of the learned trial Judge etc.," as it was irrelevant; while the learned Government Advocate asked me to delete from the record all the order of the Sessions Judge except what the learned counsel for the petitioner relied on and the first paragraph of the order, on the ground that all the rest was irrelevant and without jurisdiction while portions of it were improper and objectionable.

The evidence is undoubtedly somewhat vague. At the best it amounts to this that the petitioners, who are Arora Sahukars, were threatening to bring a false suit against the zamindars who were refusing to pay their rents and debts, and that, this was causing tension likely to lead to a breach of the peace. It must be proved, for S. 107, Criminal P. C., to apply, that a person is likely, himself to commit a breach of the peace, or that a person is likely to do a wrongful act that may probably occasion breach of the peace. The first alternative is not applicable, and I am doubtful if the evidence is explicit for me to hold that the petitioners were likely to institute false suits, which acts would probably occasion breach of the peace; for at places all that is said is that the Sahukars were threatening to get the zamindars imprisoned as they would not pay their debts and this would not necessarily be the doing of a wrongful act as debtors can be imprisoned in execution of decrees. The second alternative has not therefore been proved to apply on the facts which can be held to have been clearly established; for if a rightful act causes tension likely to lead to a breach of the peace, the doers of that act cannot be placed on security. I therefore hold that the evidence is too vague to bring the petitioners within the provisions of S. 107, Criminal P. C., and for this reason alone I accept the petition and set aside the order of the Magistrate, First Class, placing the petitioners on security.

At the same time it is to be regretted that the Sessions Judge should have gone out of his way to write an order for the most part irrelevant and in several portions uncalled for, objectionable and without jurisdiction. It was his duty to deal only with matters which arose in the case before him, and yet he went out of his way to pass strictures on the District authorities and Magistrate though the proceedings discussed, he admits, were not the subject-matter of the reference and were not before him. It was mere waste of time on his part therefore to deal with them. Besides, it is obvious that the Sessions Judge has taken an exaggerated and even a wrong view of the irrelevant matters he has discussed at such length. His remarks can only thus be a source of trouble. I therefore expunge from the record the whole of the referring order of the Sessions Judge, except the first paragraph and the portion of the end, already referred to, and relied on by the petitioners' counsel. I further direct that no copies of the expunged portions be given to anybody; this order applying to the High Court and to the Courts below.

In future I would advise this Sessions Judge to attend to his legitimate duties, instead of making work and writing irrelevant treatises.

R.K. *Petition accepted.*

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* A. I. R. 1933 Lahore 37

SHADI LAL, C. J.

Basheshar Nath—Petitioner.

v.

Ratan Chand and *others* -- Opposite Parties.

Criminal Revn. Case No. 698 of 1932, Decided on 14th October 1932, reported by Sub-Judge, Amritsar.

*** Criminal Trial—Stay of—Civil suit involving similar issue—Rule as to stay laid down.**

There is no invariable rule that criminal proceedings taken against a person should be stayed pending the decision of a civil suit involving a similar issue. Each case must be considered on its own merits. The only general rule is that every Court should be allowed, as far as possible, to decide cases before it with the utmost expedition. [P 38 C 2; P 39 C 1]

Where the civil suit was likely to be delayed and the complainants, who were merely co-defendants with the accused in the civil suit had no control over the civil suit and could not expedite its proceedings:

Held: that the Magistrate was justified in holding that all the prosecution evidence should be recorded before the question of staying the criminal case could be considered; *A. I. R.* 1927 *Mad.* 778 and *A. I. R.* 1929 *Pat.* 500, *Rel. on.* [P 39 C 1]

Shamair Chand—for Opposite Parties.

Facts

The present petitioner Basheshar Nath sold some land, houses and shops belonging to him to the respondents Ratan Chand, Harjas Mal and Hans Raj by registered sale-deed, dated 3rd October 1930. In that sale-deed he alleged that the property belonged to him and that it was not encumbered with anybody else. He further alleged that the title-deeds in respect of this property had been burnt when his house caught fire or had been mislaid and he therefore gave the vendee copies of the said title-deeds. In about March 1931 the vendees of this property received a notice from Messrs Grindlay and Company, Bankers at Lahore stating that the property sold to them had been equitably mortgaged with them (Messrs. Grindlay and Company) by deposit of title-deeds and that the vendor was heavily indebted to them. Subsequently Messrs. Grindlay & Company filed a suit for the recovery of Rs. 1,21,000 odd against Basheshar Nath vendor in the Court of the Subordinate Judge First Class at Lahore. In this suit the present respondents Ratan Chand, Harjas Rai and Hans Raj were impleaded as defendants on the allegation that properties mentioned as Nos. 5 and 6 in the plaint which were previously equitably mortgaged with the plaintiffs had been sold by defendant 1 Basheshar Nath to these defendants. Basheshar Nath defendant in his pleas in the civil suit denied that the properties Nos. 5 and 6 in the plaint had been equitably mortgaged with the plaintiffs and further denied that the title-deeds of these properties had been deposited with the plaintiffs by way of equitable mortgage. It was further denied that the documents alleged to be the title-deeds in respect of these properties were, as a matter of fact, the actual title-deeds.

The defendants Ratan Chand, Harjas Rai and Hans Raj in their pleas denied knowledge of the fact that the properties Nos. 5 and 6 which had been sold to them by Basheshar Nath defendant 1 had been equitably mortgaged with the plaintiffs and they also further stated that they could not say whether documents put in by the plaintiffs and alleged to be the title-deeds relating to the properties sold to them were really the title-deeds relating to these properties. These pleas were filed by these defendants-respondents on 6th October 1931. On 17th October 1931 these defendants-respondents Ratan Chand, Harjas Mal and Hans Raj filed a complaint under S. 420, I. P. C., against Basheshar Nath their vendor, on the allegation that he had by false representation induced them to purchase the property sold to them by registered sale-deed on 3rd October 1930, and which but for such false representation they would not have purchased. The false representation alleged was that the properties sold to them were not encumbered elsewhere and that the title-deeds had been either destroyed by fire or had been mislaid. The criminal Court after examining the complainants issued a warrant against the accused Basheshar Nath. The accused on appearing in Court filed an application asking for the stay of criminal proceedings pending decision of the civil suit in which the same question had been raised and was to be decided. The lower Court on this application passed an order that the application would be considered after the close of the case for the prosecution. Against this order the accused Basheshar Nath has come up in revision to this Court asking that the criminal proceeding be stayed pending decision of the civil suit.

Report

Notice was issued to the respondents and I have heard lengthy arguments from counsel on behalf of their respective clients. The learned counsel for the respondents has urged that the criminal proceedings have nothing whatsoever to do with the civil suit and that it is not necessary that the criminal proceedings should be stayed for the decision of the civil suit. It has, further been urged that the civil suit will, in all probability, take a considerable time before it is decided and that in the meantime, if the criminal suit is stayed, the complainant will suffer considerable loss and the possibility is that his witnesses may not be subsequently available when the criminal case eventually proceeds. Learned counsel has also referred me to several rulings wherein it has been held that it is not necessary that a criminal case should be stayed pending decision of a civil suit where the two cases arise out of the same proceedings.

On behalf of the petitioner learned counsel has referred me to *A. I. R.* 1925 *Pat.* 193 and *A. I. R.* 1927 *Lah.* 17, wherein it has been held that where the matter to be decided in a criminal case is identical with an issue which has to be decided in a civil Court between the parties which was instituted prior to the complaint in the criminal case, the latter should be stayed. In the present case as will be seen from the brief history of the proceedings the main question for decision in the criminal case is as to whether the properties sold to the respondents were previously equitably mortgaged with the plaintiffs in the civil suit (Messrs. Grindlay and Co., Bankers, Lahore) and whether the title-deeds in respect of these properties had been deposited with the bank by way of equitable mortgage. The plaintiffs in the civil suit have alleged that these properties were equitably mortgaged with them and that the title-deeds were deposited with them by way of equitable mortgage. The present petitioner Basheshar Nath has definitely denied that the properties were mortgaged and that the title-deeds were deposited with the bank by way of equitable mortgage and he has further denied that the documents alleged by the plaintiff bank to be the title-deeds in respect of these properties are not, as a matter of fact, the title-deeds relating to these properties. The complainant respondents in the present proceedings have in the civil suit also professed ignorance as regards the properties sold to them having been equitably mortgaged with the plaintiff bank and have also indirectly denied that the documents (alleged to be the title-deeds in respect of these properties) are, as a matter of fact, the title-deeds of these properties. The civil Court has framed a specific issue as to whether these properties along with other properties were equitably mortgaged by defendant 1 Basheshar Nath to the plaintiff bank. We thus see that the main question in issue in the criminal case is directly in issue in the civil suit. Unless the complainant in the criminal case can definitely establish that the properties sold to him were previously equitably mortgaged with the plaintiff bank and that the title-deeds of these properties had been deposited with the plaintiff bank by way of equitable mortgage and had not been destroyed by fire or mislaid as alleged by the accused petitioner the criminal case cannot succeed. The civil suit was filed several months prior to the institution of the criminal complaint. The issues to be decided in both the civil and criminal cases are identical. In these circumstances it seems to me right and proper that the criminal case proceedings should be stayed pending decision of the civil suit.

Learned counsel for the respondents has urged that the criminal Court would, in any case, not be bound by the findings of the civil Court in respect of this issue hence there would be no real advantage in directing the stay of the criminal proceedings. It has however been held in *Emperor* v. *Bishendas* (1) that save for very exceptional reasons a criminal Court should not go behind the finding of a civil Court and convict of cheating and fraud a person who upon the very same facts has succeeded in satisfying a civil Court. If therefore the civil Court finds that the properties were not equitably mortgaged with the plaintiff bank the complainant would not be able to succeed in his criminal case. For these reasons in my opinion it is equitable that the criminal proceedings should be stayed pending decision of civil suit. I accordingly direct the stay of the criminal proceedings pending the orders of the High Court to whom these proceedings are forwarded with a recommendation that the criminal proceedings be stayed till the final decision of the civil suit.

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(1) [1910] 33 P R 1910=12 Cr L J 50=8 I C 1161.

Order

There is no invariable rule that criminal proceedings taken against a person should be stayed pending the decision of a civil suit involving a similar issue. Each case must be considered on its own merits, and the only general rule, that can be laid down is that every Court should be allowed, as far as possible, to decide cases before it with the utmost expedition, vide inter alia *Ramiah* v. *Ramiah, A. I. R.* 1927 *Mad.* 778 and *Hirday Narain Singh* v. *Emperor, A. I. R.* 1929 *Pat.* 500. There can be no doubt that the civil suit is likely to be delayed and the complainants, who are merely co-defendants with the accused in the civil suit, have no control over the civil suit and cannot expedite its proceedings. In these circumstances the Magistrate was justified in holding that all the prosecution evidence should be recorded before the question of staying the criminal case can be considered. I accordingly decline to accept the recommendation made by the Sessions Judge and direct the Magistrate to proceed with the trial of the Criminal case.

R.K. *Reference rejected.*

A. I. R. 1933 Lahore 39

JAI LAL AND ABDUL QADIR, JJ.

Mohammad Khan and *another*—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. No. 909 of 1932, Decided on 29th August 1932, from reference made by Sess. Judge, Attock, D/- 27th June 1932.

(a) Criminal Trial—Practice — Committal proceedings — Deliberately refraining pronouncement of guilt or not whether correct —(*Quaere*).

Practice of Committing Magistrate deliberately leaving it to the Sessions Judge to decide whether the guilt of the accused has not been proved by the evidence on the record as he does not consider it within his province to pronounce an opinion on the reliability or otherwise of the evidence whether correct. [P 39 C 2]

(b) Criminal P. C. (1898), S. 215—Scope.

Section 215 precludes High Court from quashing commitment, unless it is opposed to law or that there is any point of law involved which must necessitate the quashing of the commitment. [P 39 C 2]

B. R. Puri—for Accused.

Abdul Rashid—for the Crown.

Jai Lal, J.

This is a reference by the Sessions Judge of Attock at Campbellpur, recommending that the commitment of Muhammad Khan son of Shahinchi Khan and Muhammad Khan son of Allah Yar Khan be quashed under S. 215, Criminal P. C. S. 215 provides that a commitment once made by a competent Magistrate can be quashed by the High Court only and only on a point of law. In this case the accused were committed by a Magistrate of the First Class for the offence of murder. In his order of commitment the Magistrate considered that there was evidence against Muhammad Khan son of Allah Yar Khan which made out a prima facie case against him; with regard to Muhammad Khan son of Shahinchi Khan he remarked that there was some evidence against him, though there was other evidence on the record which was in his favour, and he deliberately left it to the Sessions Judge to decide whether the guilt of this man had or had not been proved by the evidence on the record as he did not consider it within his province to pronounce an opinion on the reliability or otherwise of the evidence. This procedure of the Magistrate has the sanction of the judgment of the Chief Court of the Punjab which has generally been followed in this province. The learned Sessions Judge however is of opinion that a good deal of the time of the Sessions Judge is wasted in trying cases in which the committing Magistrate might very well have weighed the evidence and if found by them to be unreliable or insufficient, have passed an order of discharge. This however is not the practice in this province at any rate. It is not necessary for me in this case to express an opinion about the wisdom underlying this practice, because, in my opinion S. 215, Criminal P. C., clearly precludes this Court from quashing this commitment. It has not been shown that the commitment is opposed to law or that there was any point of law involved which must necessitate the quashing of the commitment. This Court therefore on the facts of this case is not competent to quash the commitment, and any opinion that may be expressed here as to the correctness or otherwise of the practice which prevails in this province would be obiter.

I would therefore decline to entertain the reference and to quash the commitment. The record will immediately be returned to the learned Sessions Judge with direction to proceed with the trial in accordance with law.

Abdul Qadir, J.—I agree.

R.K. *Reference rejected.*

A. I. R. 1933 Lahore 40

JAI LAL, J.

Dayal Ram and *others*—Defendants—Appellants.

v.

Ladha Ram and *another* —Plaintiffs—Respondents.

Second Appeal No. 1594 of 1931, Decided on 1st April 1932, from decree of Dist. Judge, Jhang, at Sargodha, D/- 6th June 1931.

Civil P. C. (1908), O. 41, R. 33—Some cosharers suing for possession of entire land—Other cosharers refusing to join as plaintiffs and made defendants—Trial Court decreeing suit to the extent of plaintiffs' share only—Appeal by trespassers-defendants — Appellate Court has power to pass decree in favour of plaintiffs for entire suit-land.

Some cosharers of certain land sued for possession of the entire land. The defendants were alleged to be trespassers. The other cosharers refused to join as plaintiffs and so were made defendants. The trial Court decreed the suit only so far as the share of the plaintiff was concerned. The trespassers-defendants appealed, and the lower appellate Court decreed possession of the entire suit land:

Held: that R. 33, O. 41 was wide enough to enable the appellate Court to pass a decree in favour of the plaintiffs for the entire property: *A. I. R.* 1927 *Lah* 663; *A. I. R.* 1930 *All.* 422 and 6 *M. L. J.* 27, *Rel. on*; *A. I. R.* 1930 *Mad.* 801 (*F. B.*) and *A. I. R.* 1931 *P. C.* 234, *Foll.*

[P 41 C 1]

Nanak Chand—for Appellants.

Kishen Dayal—for Respondents.

Judgment

Two persons, Ladha Ram and Vishan Dass, instituted a suit against defendants 1 to 4 for possession of land alleging that it belonged to the plaintiffs and defendants 5 and 6, Kala Ram and Chaman Lal, and that defendants 1 to 4 had taken illegal possession of it. The suit was for possession of the entire land including the shares of defendants 5 and 6, who, it was alleged in the plaint, had declined to join as plaintiffs. Subsequent to the institution of the suit Kala Ram applied to be made a plaintiff. He was consequently struck off from the list of defendants and made a plaintiff. The trial Court decreed the suit with regard to half the share in the land to which the original plaintiffs were entitled but dismissed it with regard to the shares of Kala Ram and Chaman Lal. Against this decree an appeal was presented by defendants 1 to 4 and also one by Kala Ram so far as his share was concerned. The District Judge held that the entire land was owned by Ladha Ram, Vishan Dass, Kala Ram and Chaman Lal and that there was no substance in the plea of the defendants that Kala Ram was estopped from claiming his share in the land by virtue of a post-card written by him in reply to the 'defendants' notice. The learned Judge therefore decreed the entire suit of the plaintiff.

Defendants 1 to 4 have presented this appeal and it has been admitted on one point only whether it was open to the District Judge to decree the entire suit considering that there was no appeal before him with regard to the share of Chaman Lal, who still remained a pro forma party to the suit as well as to the appeal. But the learned counsel for the appellants has argued the appeal on its merits. I am however of opinion that the conclusions of the District Judge are supported by evidence and cannot therefore be attacked on second appeal.

The only question that remains for decision therefore is whether a decree could be passed in favour of the plaintiffs for possession of the entire property including the share of Chaman Lal. Now it has been held in *A. I. R.* 1927 *Lah.* 663 and *A. I. R.* 1930 *All.* 422 that some of several cosharers are entitled to maintain a suit for possession of the entire property against the trespasser making the other cosharers pro forma defendants. In *Gopalasami* v. *Periasami Tevar* (1) it was held that the same rule would apply if the other cosharers would not or could not join as plaintiffs. In the present case however a further question arises whether on appeal by the defendants against the decree passed against them the decree could be modified so as to give the plaintiffs any relief which had not been given to them by the original decree; but it must be remembered that Kala Ram had filed an appeal so far as his share is concerned. The respondents' counsel has referred me to O. 41, R. 33, Civil P. C. That rule seems to be wide enough to cover the case like the present and *Balram Singh* v. *Baldeo Singh* (2), in which the suit was however for a declaration seems to support the contention of the respondents' counsel. *Subramaniam Chettiar* v. *Sinnammal* (3) and *Iswarayya* v. *Swarnam Iswarayya* (4) are two other cases cited by the respondents' counsel which support his contention. I do not think it necessary to refer to the other case cited on behilf of the respondents, as in my opinion, O. 41, R. 33, is wide enough to entitle the District Judge to pass a decree in favour of the plaintiffs for the entire property in the circumstances of the case. I accordingly dismiss this appeal with costs.

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(1) [1896] 6 M L J 27.

(2) [1917] 42 I C 443.

(3) A I R 1930 Mad 801=127 I C 624=53 Mad 881 (F B).

(4) A I R 1931 P C 234=133 I C 716=58 I A 350=54 Mad 774 (P C).

S.N./R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 41

BHIDE, J.

Bukkan Singh and *another*—Decree-holders—Appellants.

v.

The District Board, Ludhiana—Judgment-debtors—Respondents.

Misc. Second Appeal No. 384 of 1932, Decided on 9th July 1932.

(a) Civil P. C. (1908), S. 47—Question whether decree is not capable of execution falls under S. 47.

The question whether a decree is or is not capable of execution falls within the scope of S. 47 and can be examined by an executing Court: 39 *Mad*. 541 and 22 *Bom*. 463, *Foll*. [P 42 C 1]

(b) Decree—Execution— Decree brief and ambiguous—Pleading should be looked at to ascertain precise scope and meaning—Decree restraining realization of Haisiat-tax by District Board held incapable of execution in view of Validating Act, 1927—Punjab District Boards Act (1883), S. 30.

Where the decree is brief and ambiguous the pleadings of the parties should be looked at to ascertain the precise scope and meaning of the decree. [P 41 C 2]

On imposition of a tax known as the Haisiat-tax by the District Board, *P* instituted a suit for injunction and obtained a decree restraining the Board from realizing the tax. Subsequently on the passing of the Validating Act 3 of 1927, validating the imposition of the tax, the Board proceeded to realize the tax from the assessees. *P* presented an application for execution of their decree against the Board. From the pleadings and issues it appeared that what *P* claimed was that the Haisiat-tax as imposed under S. 30, Punjab District Board Act, was ultra vires and it was this tax that the decree restrained the Board from realizing.

Held: that the tax which the Board were trying to realize derived its sanction not merely from the Punjab District Board Act, but the Validating Act, 1927. To such a tax the decree had no application at all and could not therefore be executed as regards the realization of such tax: *A. I. R.* 1927 *Lah*. 476, *Rel. on*. [P 42 C 1]

M. L. Puri—for Appellants.

M. C. Mahajan and *Jhanda Singh*—for Respondent.

Judgment

The District Board of Ludhiana had imposed a tax known as the Haisiat tax under Notification No. 17008, dated 20th July 1925. The plaintiffs instituted a suit for a permanent injunction to restrain the District Board from realizing the tax from them on the ground that the tax was illegal. The District Board confessed judgment as it had been decided by this Court in the meantime that the imposition of the tax by the District Board was ultra vires. The plaintiffs were accordingly granted a decree. An appeal was preferred to the District Judge in respect of costs but the appeal was also dismissed. Subsequently Act 3 of 1927 was passed by the Punjab Legislative Council validating the imposition of the tax by the District Board. The Act came into force on 3rd February, 1928, and thereafter the District Board proceeded to realize the tax from the assessees. The plaintiffs then presented a petition for execution of their decree against the District Board.

The petition was opposed by the District Board on the ground that the decree in question had ceased to be operative in view of the Validating Act referred to above. This contention of the District Board was upheld by the Courts below and the plaintiffs have now preferred a second appeal to challenge the decision. The learned counsel for the appellant laid great stress on the fact that an executing Court is not entitled to go behind the decree and must take it as it stands: see *Lahore Bank* v. *Ghulam Jitani* (1) and *Nathan* v. *Samson* (2). This is a well established proposition and was indeed not disputed by the learned counsel for the respondent. All that the learned counsel for the respondent contended was that an executing Court has the power to see whether the decree is capable of executing and that the Courts below were right in holding that the decree has in the circumstances of the case ceased to be capable of execution. There can, I think, be no doubt that the question whether a decree is or is not capable of execution falls within the scope of S. 47, Civil P. C., and can be examined by an executing Court: see inter alia *Subramania Pillai* v. *Kumaravelu Ambalam* (3) and *Laldas* v. *Kisondas* (4). In the present instance the decree restrains the District Board from realising the Haisiat-tax. The District Board contends that the decree has ceased to be operative owing to the Validating Act (3 of 1927) passed by the Punjab Legislative Council. It has been held by a Division Bench of this Court in *Ganpatrai* v. *District Board, Sargodha* (5) that this latter Act was within the powers of the Punjab Legislative Council and is valid. We have therefore to see whether the decree passed against the District Board is still capable of execution. For this purpose we must ascertain the precise meaning of the decree. It seems obvious that the decree could not possibly mean that the District Board was in no circumstances to realize the Haisiat-tax, e. g., even if it was authorised to levy such a tax by special legislation. The decree in the present case is somewhat brief and ambiguous. To ascertain the precise scope and meaning of the decree, we must therefore look at the pleading of the parties: cf. *Noor Hoosan Shah* v. *Hussan Bibi* (6). From the pleadings and issues it would appear that what the plaintiffs claimed was that the Haisiat-tax as imposed under S. 30, Punjab District Board Act, was ultra vires and it was this tax which the decree restrained the District Board from realizing. If the District Board were trying to realize any such tax, i. e., a tax for the imposition of which there was no sanction beyond S. 30, Punjab Dt. Board Act, the decree would still have force. But the tax which the District Board are now trying to realize derives its sanction not merely from the Punjab District Board Act but the Validating Act, 1927. To such a tax the decree had no application at all and consequently the decree cannot be executed as regards the realization of such a tax. The appeal fails and is dismissed with costs.

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(1) A I R 1924 Lah 448=78 I C 460=5 Lah 54.

(2) A I R 1931 Rang 252=135 I C 65=9 Rang 480 (F B).

(3) [1916] 39 Mad 541=33 I C 66.

(4) [1898] 22 Bom 463.

R.M./R.K. *Appeal dismissed.*

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(5) A I R 1932 Lah 87=134 I C 110.

(6) A I R 1927 Lah 476=102 I C 5=8 Lah 318.

✻ A. I. R. 1933 Lahore 42

SHADI LAL, C. J.

Jora Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 255 of 1932, Decided on 14th October 1932, reported by Addl. Sess. Judge, Ferozepore, D/- 22nd February 1932.

✻ Criminal P. C. (1898), S. 514—Bond forfeited — Accused subsequently found — Amount was reduced from Rs. 2,000 to Rs. 500.

It is necessary that a person should not stand surety for an accused person unless he is in a position to produce the accused in Court. Where however the accused has subsequently been arrested and the surety is unable to pay the forfeited amount which is excessive the High Court reduced the amount from Rs. 2,000 to Rs. 500. [P 42 C 2]

Saunders—for Petitioner.

Ram Lal, (Asst. Legal Remembrancer)—for the Crown.

Facts

The accused on conviction by Pandit B. L. Kichloo, exercising the powers of a Magistrate of the First Class in the Ferozepore District was sentenced by order, dated 7th November 1931, under S. 397, I. P. C., to forfeit the whole amount of a bond of Rs. 3,000.

Report

In this case Jora Singh was ordered by a Magistrate, First Class, Ferozepore District, to forfeit the whole amount of a bond of Rs. 3,000 as he had failed to produce an accused person for whom he had stood surety. Jora Singh appealed to the District Magistrate who accepted his appeal to the extent of reducing the penalty to Rs. 2,000. At this time the accused person had not yet been produced. Today learned counsel for Jora Singh files an affidavit showing that the accused person has since appeared and prays for revision of the order of the District Magistrate. It seems to me that, in the circumstances, the penalty may well be reduced, and I accordingly forward the proceedings under S. 438, Criminal P. C., to the High Court for orders. Recovery of the penalty should be suspended in the meantime.

Order

The petitioner Jora Singh stood surety for the appearance of the accused Bakhshish Singh in Court and executed a bail bond in the sum of Rs. 3,000. The accused however did not appear in Court, with the result that the bond has been forfeited to the extent of Rs. 2,000. The amount forfeited is undoubtedly excessive, and the surety is unable to pay it. At the same time, it is necessary that a person should not stand surety for an accused person unless he is in a position to produce the accused in Court. It is however common ground that the accused has now been arrested, and, considering all the circumstances of the case I am of opinion that the amount to be forfeited should be reduced to Rs. 500. I accept the application for revision pro tanto and modify the order of the District Magistrate accordingly.

R.K. *Reference accepted.*

A. I. R. 1933 Lahore 43

SHADI LAL, C. J. AND BROADWAY, J.

Bhagat Ram-Bindraban—Defendant—Appellant.

v.

Puran Chand—Plaintiff—Respondent.

Letters Patent Appeal No. 97 of 1927, Decided on 3rd May 1932, against decision of Zafar Ali, J., D/- 14th April 1927, in Civil Appeal No. 2728 of 1926.

(a) Provincial Insolvency Act (1920), S. 53 —Transfer made within two years prescribed by S. 53—Onus of proving good faith and consideration shifts to transferee.

Once the Official Receiver establishes that the transfer has been made within the two years prescribed by S. 53, the onus is shifted to the transferee to establish good faith and consideration: *A. I. R.* 1931 *P. C.* 75, *Expl.* and *Dist.* [P 43 C 2]

(b) Provincial Insolvency Act (1920), S. 53 —Transfer of whole property in favour of creditor—Persons are not acting in good faith.

A creditor taking the whole or substantially the whole of the property of his debtor in payment of a past debt knowing that there are creditors cannot be said to be acting in good faith. In re. *Jukes Ex parte, Official Receiver* (1902), 2 *K. B.* 58, *Rel. on.* [P 44 C 1]

Badri Das, Dev Raj Sawhney and *Faqir Chand*—for Appellant.

Nawal Kishore—for Respondent.

Broadway, J.

One Achhru Ram carried on business in Sahewal Kalan and apparently became heavily indebted. One of his creditors was the firm of Bhagat Ram Bindra Ban of Amritsar to which a sum of about Rs. 13,000 was said to be due. Bhagat Ram Bindra Ban, having learnt that another creditor had obtained a decree against Achhru Ram, sent their munim to Sahewal Kalan, and on 10th June 1923, succeeded in obtaining a transfer of practically all of Achhru Ram's goods in his shop in consideration for the sum of Rs. 3,000 which was credited against their own claim of Rs. 13,000. On 17th November 1923, Achhru Ram applied to be adjudicated an insolvent and was duly adjudicated on 5th December 1924. On 7th May 1925, the Official Receiver put in an application purporting to be under Ss. 53 and 54, Provincial Insolvency Act, and asking that this transfer be annulled. The Insolvency Court refused to annul the said transfer whereupon the Official Receiver preferred an appeal to this Court which came before Zafar Ali, J., who held that the transfer clearly contravened the provisions of S. 53, Provincial Insolvency Act, and accordingly passed an order annulling the same. Against this annulment order, Bhagat Ram Bindra Ban have preferred this appeal under Cl. 10 of the Letters Patent and on their behalf we have heard Mr. Badri Das. The learned counsel urged that, on the facts before the Court, the transfer fell within the purview of S. 54, Provincial Insolvency Act, and as the application had been made beyond the period prescribed therein, the transfer should not have been annulled. It is clear however from the record of the case that the application, although containing a reference to S. 54 was considered to be, and dealt with as, one under S. 53 of the Act. It is also clear that no reference to S. 54 was made before Zafar Ali, J., and therefore this point cannot now be raised. Admittedly, a transfer to a creditor may be dealt with under S. 53 of the Act.

The next point taken by Mr. Badri Das was that the onus of proving that the transfer had not been made in good faith and was not for valuable consideration lay on the Official Receiver —an ouns which he had not discharged. It is clear that in the past the view taken by the Courts has been that once the Official Receiver had established that a transfer had been made within the two years prescribed by S. 53, the onus was shifted to the transferee to establish good faith and consideration. A recent pronouncement of their Lordships of the Judicial Committee in *Official Receiver* v. *P. L. K. M. R. M. Chettyar Firm* (1) seems to indicate that the onus of proving bad faith and want of consideration rests on the persons challenging the transfer. The facts of that case were somewhat peculiar and the circumstances of it are referred to by their Lordships of the Judicial Committee as "remarkable." Assuming however that the onus lay on the Official Receiver, it seems to me that in the present case it must be held that that onus had been satisfactorily discharged. A reference to the record shows that Bhagat Ram Bindra Ban were well aware that their debtor Achhru Ram was insolvent. Achhru Ram has himself stated that he informed the firm's munim that his assets were wholly inadequate to meet his liabilities. Notwithstanding this knowledge Achhru Ram was practically forced by these creditors to hand over the bulk, if not all, of his available property. In addition to the goods taken over under this transfer the assets of Achhru Ram were very small. He had a share in certain immovable property which was mortgaged practically up to its full value. Under these circumstances the remarks of Wright, J., *In re Jukes, Ex parte Official Receiver* (2) are pertinent. He says:

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(1) A I R 1931 P C 75=131 I C 767=58 I A 115=9 Rang 170 (P C).

> "But I cannot help thinking that if a creditor of a debtor takes the whole, or substantially the whole, of the property of his debtor in payment of a past debt, and knowing that there are other creditors, he cannot be said to be acting in good faith."

The knowledge that Bhagat Ram Bindra Ban undoubtedly possessed of the financial situation of their debtor Achhru Ram renders it impossible to believe that they were acting in good faith. In these circumstances I would dismiss this appeal with costs.

Shadi Lal, C. J.—I concur.

R.M./R.K. *Appeal dismissed.*

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(2) [1902] 2 K B 58=71 L J K B 710=86 L T 456=50 W R 560=9 Manson 249.

✻✻ A. I. R. 1933 Lahore 44

HARRISON AND ADDISON, JJ.

Behari Lal Madho Parshad—Defendant—Appellant.

v.

Sirsa Trading Co. Ltd.—Plaintiff—Respondent.

Misc. First Appeal No. 1196 of 1931, Decided on 24th October 1932, against order of Dist. Judge, Hissar, D/- 9th July 1931.

(a) Civil P. C. (1908), S. 104 (1) (f)—Objections overruled—Award made decree—Decision is appealable (*Obiter*).

When the award is put into Court under S. 11, Arbitration Act, and the award becomes a decree on overruling objections by the parties, the decision is appealable (*Obiter*). [P 44 C 2]

✻✻ **(b) Arbitration Act (1899), S. 2—S. 2 (including proviso) does not affect arbitrations under Companies Act (1913), S. 152 (3).**

Arbitration Act applies to all references to arbitration under the Companies Act wherever they take place, whether they take place within a presidency town or in a place to which the Local Government has extended the provisions of the Arbitration Act by virtue of the proviso to S. 2 or in places outside presidency towns where the Local Government has not extended the Arbitration Act under the proviso mentioned. The whole of S. 2 (including the proviso), Arbitration Act, has no effect in cases of arbitration under the Companies Act: *A. I. R.* 1931 *Lah.* 555, *Diss. from*; *A. I. R.* 1933 *Pat.* 49 and *A. I. R.* 1929 *Lah.* 246 (1), *Rel. on.* [P 45 C 1]

Shamair Chand and *Qabul Chand*—for Appellant.

J. G. Sethi—for Respondent.

Addison, J.

There was a dispute between the Sirsa Trading Co. Ltd., and the firm Behari Lal Madho Parshad which was decided by arbitration. When the award was put into Court under S. 11, Arbitration Act, 1899, an objection was taken on behalf of the firm mentioned that the Arbitration Act did not apply as it had not been extended to any part of the Hissar district by special notification under the proviso to S. 2 of the Act. The District Judge repelled this objection and held that the other objections had no force. The objections were therefore overruled and the award became a decree of the Court. Against this decision the firm Behari Lal Madho Parshad has preferred Civil Appeal No. 1196 of 1931 and Civil Revision No. 485 of 1931, it being noted that it is doubtful whether an appeal or a revision lies. The appeal and the revision have been preferred to a Division Bench as there are conflicting decisions of this Court whether the Arbitration Act applies. It has not been argued before us whether an appeal or a revision lies. There is some conflict as to this. Prima facie it appears to me that an appeal does lie under S. 104 (1) (f), Civil P. C. There is no doubt that the agreement to refer is governed by S. 152, Companies Act. Sub-S. (3) of that section runs as follows:

> "The provisions of the Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject matter of the arbitration, shall apply to all arbitrations between companies and persons in pursuance of this Act."

These words are not ambiguous and mean that all the provisions of the Arbitration Act, except those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to arbitrations under the Companies Act. By S. 1, Arbitration Act, 1899, that Act extends to the whole of the British India but by S. 2 of that Act its application is limited to cases where if the subject-matter submitted to arbitration were the subject of a suit, the suit could be instituted in the presidency town, whether with leave or otherwise, while there is a proviso to S. 2 adding that the Local Government may by notification declare that Act applicable in any other local area as if it were a presidency town. For the purpose of this argument S. 23, Arbitration Act, which is an addition to S. 2 need not be discussed. S. 2 is the only section which restricts the application of the Act in respect of the subject-matter of the arbitration. The meaning of the words used in S. 152 (3), Companies Act, therefore is that the whole of the Arbitration Act shall apply to arbitrations under the Companies Act except S. 2. It follows that, as S. 1, Arbitration Act, extends that Act to the whole of British India, all the clauses of the Arbitration Act except S. 2 apply where there is an arbitration under the Companies Act. In other words, the facilities in the matter of arbitration under the Indian Companies Act are not to be restricted by S. 2, Arbitration Act, which limits the application of the Act to cases where the subject-matter could be the subject of a suit in a presidency suit or in a specially notified area. When the Arbitration Act was passed in 1899 the second proviso to S. 3 expressly exempted arbitration under the Companies Act from its operation. That proviso to S. 3 has been repealed because of the passing of S. 152, Companies Act, which rendered it unnecessary. It follows that that Arbitration Act applies to all references to arbitration under the Companies Act wherever they take place, whether they take place within a presidency town or in a place to which the Local Government has extended the provisions of the Arbitration Act by virtue of the proviso to S. 2 or in places outside presidency towns where the Local Government has not extended the Arbitration Act under the proviso mentioned.

No question in fact arises as to whether the Local Government has or has not made any notification under the proviso to S. 2 when there is a reference under the Companies Act; for by virtue of S. 152 (3), Companies Act, S. 2 is deleted in cases where the arbitration is under the Companies Act. Some attempt was made to argue that though S. 2 must be held to be deleted from the Arbitration Act in cases where the arbitration is under the Companies Act the words used in S. 152 (3), Companies Act, still left the proviso to S. 2 untouched and therefore arbitrations under the Companies Act could only take place where the Local Government had extended the provisions of the Act by notification. There can however obviously be no proviso without a section. Besides the qualifying clause "other than ...... of the arbitration," in S. 152 (3), Companies Act, can have no other meaning than that the whole of S. 2 (including the proviso), Arbitration Act, has no effect in cases of arbitration under the Companies Act. The matter appears to me to be free from any difficulty.

The District Judge followed a decision of mine in *Firm Dilsukh Rai-Lal Chand* v. *The Sirsa Trading Co. Ltd.* (*Civil Appeal No.* 1374 *of* 1930). This judgment is very brief, it being practically conceded before me that the Arbitration Act did apply in cases of arbitration under the Companies Act. The same view was taken by Dalip Singh, J., in *Attock Oil Co. Ltd.* v. *Abdul Majid*, *A. I. R.* 1929 *Lah.* 246. That was a case of an agreement to refer to arbitration under the Companies Act. Instead of the provisions of the Arbitration Act being followed the respondent applied under Sch. 2, para. 17, Civil P. C., to file the agreement of reference to arbitration. The Court below granted the application and called upon the parties to name their arbitrators. On appeal it was contended that under S. 152, Companies Act, Arbitration Act was made applicable to all arbitrations and agreements of reference and that by virtue of S. 3, Arbitration Act, Sch. 2, Para. 17, Civil P. C., was excluded from the operation of that Act. This position was conceded by counsel for the respondent and the learned Judge considered it to be correct though he added that he must not be taken to express any considered opinion on the point. Jai Lal J., however, in *Sundar Mal-Lakhu Mal* v *Paris Business Corporation* (1), took the opposite view and held that S. 152, Companies Act, is:

> "subject to the applicability of the Arbitration Act to the local area in which the Court in which the suit is instituted is situated."

With great respect I am unable to agree as in my opinion this overlooks the words of the clause, "other than ...... of the arbitration," in S. 152 (3), Companies Act. These words exclude S. 2 from the Act in cases of arbitration under the Companies Act and no question arises of any extension by notification of the Arbitration Act to any local area. It might be mentioned that a single Judge of the Patna High Court considered the decisions of Dalip Singh, J., and Jai Lal J., in the above case and approved of the decision of Dalip Singh, J. and dissented from that given by Jai Lal J. The case in question is *Ruplal Agarwala* v. *Dhansar Coal Co.* (2), For the reasons given I would dismiss the appeal with costs. The revision is also dismissed but without costs.

Harrison, J.—I agree.

R.K. *Appeal dismissed.*

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(1) A I R 1931 Lah 555=132 I C 399.
(2) A I R 1933 Pat 49.

A. I. R. 1933 Lahore 46

BHIDE, J.

Roshan Lal and *another*—Judgment-debtors—Appellants.

v.

Punjab National Bank, Ltd.—Decree-holders—Respondents.

Misc. First Appeal No. 333 of 1932, Decided on 27th July 1932, against order of Senior Sub-Judge, Lahore, D/- 19th November 1931.

Civil P. C. (1908), Sch. 2, Para. 20—Dispute between mortgagee bank and mortgagors referred to arbitration—No agreement in writing that reference would be governed by Arbitration Act — Award made rule of Court—In execution decree challenged—Decree is not nullity on face of it—Executing Court cannot go behind decree—Companies Act (1913), S. 152—Execution, Decree binding.

A dispute between a mortgagee bank and mortgagors was referred to arbitration. But the parties had not agreed in writing that the reference would be governed by the provisions of the Arbitration Act. An award was made and the Court passed a decree in terms of the award under Para. 20. In execution of the decree an objection was raised that the decree was a nullity inasmuch as reference to arbitration was governed by S. 152, Companies Act and Arbitration Act:

Held: that the decree could not be said to be on the face of it a nullity as for instance in a case where a decree is passed against a dead person, and it was not open to the executing Court to go behind the decree: *A. I. R.* 1932 *Lah.* 289; *A. I. R.* 1924 *Lah.* 448 and *A. I. R.* 1931 *Rang.* 252 (*F. B.*), *Rel. on.*; *A. I. R.* 1925 *Cal.* 907 (*F. B.*), *not Foll*; *A. I. R.* 1933 *Pat.* 49 and *A. I. R.* 1931 *Lah.* 555, *Ref.* [P 46 C 2]

H. C. Kumar—for Appellants.

Badri Das—for Respondents.

Judgment

This is an appeal from the order of the Senior Subordinate Judge, Lahore, directing execution of a decree for Rs. 14,975-14-9 to proceed against the appellants who are the legal representatives of one Mukand Lal. The material facts are briefly as follows: Two persons, named Jagan Nath and Mukand Lal, had borrowed a certain sum from the Punjab National Bank on the security on certain properties which were equitably mortgaged in favour of the Bank. A dispute having arisen between the parties subsequently the matter was referred to arbitration and an award made. The Punjab National Bank then presented an application to the Court of the Senior Subordinate Judge under para. 20, Sch. 2, Civil P. C., for the award being filed. Notice was issued to Jagan Nath and Mukand Lal who appeared but did not raise any objection to the award being made a rule of the Court. A decree was accordingly passed in favour of the Bank on the basis of the award. Subsequently, the Bank took out execution when Mukand Lal, one of the judgment-debtors, raised an objection that the decree was a nullity inasmuch as the reference to arbitration was governed by S. 152, Companies Act, and the Arbitration Act, 1899, and no decree could be passed on the basis of the award under para 20, Sch. 2, Civil P. C. This objection was disallowed by the learned Senior Subordinate Judge who held that the decree was not a nullity and further that it was not open to the executing Court to go behind the decree. The legal representatives of Mukand Lal, (who is now dead), have presented an appeal from this decision and their counsel has reiterated the above objections before me.

As regards the first point, namely, that the decree in question was a nullity, the learned counsel has relied on *Ruplal* v. *Dhansar Coal Co.* (1), a Single Bench decision of the Patna High Court. This decision dissents from the view taken by the learned Judge of this Court in *A. I. R.* 1931 *Lah.* 555. According to the view taken in the latter ruling a decree could be legally passed on the basis of the award under para. 20, Sch. 2, Civil P. C. in this case, inasmuch as the parties had not agreed in writing that the reference to arbitration would be governed by the provisions of the Arbitration Act, 1899. The matter is not perhaps free from doubt, but in any case it seems to me clear that the decree cannot be said to be on the face of it a nullity, as for instance in a case where a decree is passed against a dead person. Secondly, it seems to me that the learned Senior Subordinate Judge was right in holding that, it was not open to him as an executing Court to go behind the decree. The view of the learned Senior Subordinate Judge is supported by a recent Division Bench decision in *Ghulam Muhammad* v. *Fazal Nishan* (2). The learned counsel for the appellants had relied on *Gorachand Haldar* v. *Profulla Kumar Roy* (3), but this ruling was considered by the Division Bench in *Ghulam Mohammad* v. *Fazal Nishan* (2) and was not followed.

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(1) A I R 1933 Pat 49.

(2) A I R 1932 Lah 289=133 I C 276=13 Lah 25.

(3) A I R 1925 Cal 907=89 I C 685=53 Cal 166 (F B).

Lahore Bank, Ltd. v. *Ghulam Jilani* (4) also supports the view taken by the learned Senior Subordinate Judge. A Full Bench of the Rangoon High Court has taken the same view recently: see *Nathan* v. *Samson* (5). In view of these rulings, I uphold the decision of the learned Senior Subordinate Judge and dismiss this appeal. In view of all the circumstances, I leave the parties to bear their costs in this Court.

P.N./R.K. *Appeal dismissed.*

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(4) A I R 1924 Lah 448=78 I C 460=5 Lah 54.

(5) A I R 1931 Rang 252=135 I C 65=9 Rang 480 (F B).

✻✻ A. I. R. 1933 Lahore 47

DALIP SINGH, J.

Punjab Ram—Plaintiff—Appellant.

v.

Jowaya—Defendant—Respondent.

Second Appeal No. 664 of 1930, Decided on 22nd October 1932, against decree of Dist. Judge, Montgomery, D/- 16th January 1930.

(a) Limitation Act (1908), S. 19—Unconditional acknowledgment—Suit can be based on it.

An unconditional acknowledgment implies a promise to pay and therefore a suit can be based on the acknowledgment: *A. I. R.* 1929 *Lah.* 263 and 264, *Foll.* [P 47 C 2]

✻(b) Limitation Act (1908), S. 19—Law at time of suit is to be applied.

On the question whether an acknowledgment is good or bad, the Act to be looked at is the existing Limitation Act and not the Limitation Act which was enforced at the time when the acknowledgment was made: 35 *All.* 227 (*P. C.*), *Expl.* and *Appl.* [P 48 C 1]

✻✻(c) Limitation Act (1908), S. 19—"Before expiration of period prescribed for suit" explained.

The words "before the expiration of the period prescribed for a suit" do not mean the period prescribed in the schedule to the Limitation Act in force at the time of the suit but they refer to the period prescribed for the suit at the time when the acknowledgment was made: 35 *All.* 227 (*P. C.*), *Expl.* and *Dist.* [P 48 C 1]

(d) Court-fees Act (1870), S. 13—Stamp should be refunded when remand is under Civil P. C. (1908), O. 41, R. 23, but not when under S. 151.

Where the remand is under O 41, R. 23, the decision being on a preliminary point stamp in the appeal should be refunded, but not when the remand is under S. 151. [P 48 C 1]

J. L. Kapur for *R. C. Manchanda*—for Appellant.

Brij Lal—for Respondent.

Judgment

The plaintiff in this case sued for Rs. 1,277 principal and interest due on a book account. It was alleged that the last balance was struck by the defendant for Rs. 745-5-0 on 12th January 1925, and that interest had been agreed to be paid at the rate of Rs. 25 p. c. p. a. A subsequent advance of Rs. 6-11-9 was alleged. The defendant took various pleas, but the main plea taken was as to limitation and there was also a plea that the suit could not lie on the basis of the balance alone. Two preliminary issues were struck by the trial Court (1) Does the last balance contain a promise to pay ? (2) Is the claim within time ?

On the first, the trial Court held, following some Punjab Record rulings of the Chief Court, that the balance contained no express or implied promise to pay and therefore no suit could be brought on its basis. As regards the second point it held that the balance of 12th January 1925 was based on another balance struck on 1st January 1923; that the balance of 1st January 1923, was barred by limitation as it was struck after three years from the last item in the account. It held that the rulings showed that the law of limitation applicable was the law existing at the time when the suit was brought, relying on *Shib Shankar Lal* v. *Soni Ram* (1), which was upheld by the Privy Council in *Soni Ram* v. *Kanhaiya Lal* (2), and certain other rulings. It therefore dismissed the greater part of the plaintiffs' claim, except as to Rupees 31-3-6 which was held to be within limitation. As regards that it gave the plaintiffs an ex parte decree, on proof adduced, for Rs. 50. Both sides appealed to the learned District Judge who upheld the decision of the trial Court on both the preliminary issues and also on the ex parte decree. Both sides have come in second appeal to this Court.

So far as the point in the preliminary issue is concerned, the matter is now set at rest by the rulings *Kahan Chand* v. *Daya Ram Amrit Lal* (3) and *Fateh Chand* v. *Ganga Singh* (4), following the Privy Council ruling *Mani Ram* v. *Rup Chand* (5). The Privy Council have laid down that an unconditional acknowledgment implies a promise to pay and it follows therefore that a suit can be based on the acknowledgment. So far as the question of limitation is concerned, the rulings relied on by the lower Courts are not applicable to the present case. All that was laid down by their Lordships of the Privy Council in *Soni Ram* v. *Kanhaiya Lal* (2) was that whenever any suit or application is brought, the limitation applicable is the limitation which is existing at the time when the suit is brought. Similarly, on the question whether an acknowledgment is good or bad, the Act to be looked at is the existing Limitation Act and not the Limitation Act which was enforced at the time when the acknowledgment was made. All therefore that that ruling lays down is that the question whether the acknowledgment is good or bad in this particular case depends on S. 19 of the present Limitation Act. Now in considering S. 19 of the present Act for the purposes of this case we have to see what is meant by the words "before the expiration of the period prescribed for a suit." Do these words mean the period prescribed in the schedule to the present Limitation Act or does it refer to the period prescribed for the suit at the time when the acknowledgment was made. It seems to me perfectly clear that it means the second. It is obvious that the words must refer to the time of the acknowledgment, for the sentence grammatically directly depends on an acknowledgment being made. Looked at from this point of view there is no conflict in the rulings at all and the previous balance of 1st January 1923, had to be within six years and not within three years and therefore was a good acknowledgment and remains a good acknowledgment even under the present Limitation Act.

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(1) [1910] 32 All 33=3 I C 725.

(2) [1913] 35 All 227=19 I C 291=40 I A 74 (P C).

(3) A I R 1929 Lah 263=115 I C 764=10 Lah 745.

(4) A I R 1929 Lah 264=115 I C 853=10 Lah 748.

(5) [1906] 33 Cal 1047=33 I A 165 (P C).

I would therefore accept this appeal and remand the case back for decision to the trial Court. Strictly speaking the appeal of the defendant fails but, as the whole case has to be gone into now, I think it would be in the interests of justice to accept his appeal also and remand the whole case back for a decision. So far as the appeal of the plaintiff is concerned the remand is under O. 41, R. 23, Civil P. C., the decision being on a preliminary point. Stamp in the appeal will therefore be refunded, and costs will abide the event. So far as the appeal of the defendant is concerned, the remand is under S. 151 of the Code and costs will abide the event.

R.K. *Appeal accepted.*

A. I. R. 1933 Lahore 48

ABDUL QADIR, J.

Mam Chand—Petitioner.

v.

Roshan Lal and *another*—Respondents.

Civil Revn. No. 121 of 1932, Decided on 27th July 1932, against order of Senior Sub-Judge, Hissar, D/- 20th January 1932.

(a) Decree — Mortgage decree — Mortgage decree is entitled to priority over money decree—Civil P. C. S. 73 (c).

A house was mortgaged in favour of *A* who obtained a decree on the basis of an arbitration award and in execution of the decree got the house sold by auction-sale. Another creditor also obtained in the meantime a money decree and attached that house in execution. The latter creditor claimed that as the house sold had also been attached under his decree, he was entitled to rateable distribution of the assets secured by the sale.

Held: that the decree obtained by *A* was a mortgage decree and as such was entitled to priority. [P 50 C 1]

(b) Decree—Mortgage decree—Definition.

Decree directing realization of decretal amount from hypothecated property, and if insufficient, making the defendant personally liable, is mortgage decree and not money decree: 25 *Cal.* 580, *Foll.* [P 49 C 2]

(c) Civil P. C. (1908), S. 115 — Other remedy—General rule—Even where another remedy is available—High Court can interfere in revision.

There is no inflexible rule that when an aggrieved party has another remedy available to him, the High Court should not interfere in revision: *A. I. R.* 1932 *Lah.* 176, *Foll.* [P 49 C 2]

(d) Civil P. C. (1908), O. 34—Scope.

Provisions of O. 34 are not applicable to decrees passed according to arbitration awards: *A. I. R.* 1930 *Lah.* 116, *Foll.* [P 50 C 1]

Shamair Chand and *Mehr Chand Sud*—for Respondents.

M. L. Puri for *Roshan Lal*—for Respondents.

Judgment

A mortgage with possession had been effected by the father of one Ali Mohammad, in favour of Mam Chand, the petitioner in this civil revision. Mam Chand obtained a decree against Ali Mohammad for Rs. 1,000 on account of the mortgage money with interest on 6th February 1931, on the basis of the award made by an arbitrator, to whom the parties had referred their case without the intervention of the Court. The decree purported to be in accordance with the award, but it did not recite the terms of the award, which were that Ali Mohammad was to pay Mam Chand Rs. 1,000 within ten days with a charge on the mortgaged house and if he failed to pay, Mam Chand would be entitled to realise the decretal amount with interest by the attachment and sale of the mortgaged property. It added that "the mortgaged house would remain mortgaged and hypothecated as before." Roshan Lal, another creditor of Ali Mohammad, obtained another decree against him for Rs. 3,800 with costs and applied for its execution on 4th May 1931. The execution of the decree of Mam Chand was proceeding in the Court of the Junior Subordinate Judge, while that of Roshan Lal proceeded in the Court of the Senior Subordinate Judge. Mam Chand got the mortgaged house attached and it was sold to one Mahabir Parshad by auction sale, on 29th October 1931 for Rs. 1,450. Roshan Lal took execution against four houses belonging to the judgment-debtor, including the one which was mortgaged with Mam Chand. On 4th July 1931, the three other houses of the judgment-debtor were attached in execution of Roshan Lal's decree. On 12th August 1931, Roshan Lal applied to the Senior Subordinate Judge that the execution of the decree of Mam Chand may be transferred to the Court of the Senior Subordinate Judge as the property of Ali Mohammad was involved in both the proceedings and he also wanted to have the fourth house attached. This prayer was granted. On 2nd November 1931, Mam Chand put in an application asking that the decree for Rs. 1,000 should be first satisfied out of the proceeds of the sale in favour of Mahabir Parshad, and the balance should be distributed rateably between him and the other creditor. Mam Chand had another decree for Rs. 400 against Ali Mohammad and claimed a rateable share out of the remaining assets of the judgment-debtor on account of that decree. Roshan Lal objected to Mam Chand getting any priority, and, in an application filed on 13th November 1931, took up the position that Mam Chand's decree was not a mortgage decree but simply a money decree and was not entitled to any priority over his decree.

It appears from a report, dated 29th November 1931, that the sum of Rs. 1,450 had been duly deposited in Court. Mam Chand met the objection of Roshan Lal by applying to the Court concerned that his decree may be amended and the terms of the award may be incorporated in it. This prayer was granted by an order dated 10th December 1931. Strengthened by this, Mam Chand insisted that his decree was entitled to a priority. Roshan Lal put in another application, dated 4th January 1932, stating that as the house sold to Mahabir Parshad had also been attached under his decree, he was entitled to a rateable distribution of the assets, which had been secured by the sale of the house. The learned Senior Subordinate Judge in his order dated 20th January 1932 accepted this contention of Roshan Lal and ordered the assets to be rateably distributed between him and Mam Chand. It is against this order that Mam Chand has filed a revision to this Court. I have heard Mr. Mehar Chand Sud, who appears for Mr. Shamair Chand, on behalf of the respondents.

Mr. M. L. Puri raises two preliminary objections to this revision being heard: (1) That the petitioner has another remedy by a suit under S. 73 (c), Civil P. C. He refers to a number of authorities which hold that the High Court should not interfere in revision where the petitioner has another remedy open to him. (2) That the petition for revision is not justified because the executing Court has interpreted the decree in favour of Mam Chand to be a money decree, and even if it has gone wrong in doing so, that is no ground for revision. The reply of Mr. Sud is that the Court below acted against the second part of the provisions of S. 73 (3) in entertaining the application of Roshan Lal for rateable distribution, in a case the decree of which was clearly a mortgage decree and thus assumed jurisdiction which it did not possess. He relies upon a Division Bench decision of the Calcutta High Court, *Fazil Howladar* v. *Krishna Bundhoo Roy* (1) which is to the following effect:

> "A decree, which directs the realization of the decretal amount from the hypothecated property, and, if sufficient, makes the defendant remain personally liable, is a mortgage decree, and not a 'decree for the payment of money."

As regards the question of another remedy being open to the petitioner, I am referred to the case of *Bakhshish Singh* v. *Biru* (2), which lays down that there is no inflexible rule that when an aggrieved party has another remedy available to him, the High Court should not interfere in revision. I think there is not much force in the preliminary objections of Mr. M. L. Puri, and the merits of the case must be considered. The history of the case has been sufficiently summarised above. The following issues were framed in the Court of the Senior Subordinate Judge: (1) Whether Mam Chand has a burden of Rs. 1,000 on the property sold and if so whether this burden will have priority in the sale? (2) Whether Mam Chand is entitled to a rateable share on account of his other decree for Rs. 400 with costs?

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(1) [1898] 25 Cal 580=2 C W N 118.
(2) A I R 1932 Lah 176=135 I C 199.

Issue 2 is no longer in dispute, as in the Court below Roshan Lal conceded it. Issue 1 only, is disputed. In my opinion there is no doubt that the decree was a mortgage decree and as such is entitled to priority. The Court below decided otherwise mainly because it followed *Digambar Suthar* v. *Suajan, A. I. R.* 1929 *Calcutta* 233, which says that an order under S. 89, T. P. Act, for the sale of mortgaged property has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage and the latter rights are extinguished. Mr. Sud contends that the T. P. Act is not in force in the Punjab and S. 89, T. P. Act, was repealed in 1931. Mr. M. L. Puri replies that S. 89, T. P. Act has been embodied in O. 34, R. 5, Civil P. C., and therefore the ruling mentioned above is applicable. This argument ignores the fact that the provisions of O. 34, Civil P. C., do not apply to decrees passed in accordance with an award on a reference to arbitration. This principle is recognised in a judgment of this Court in *Punjab National Bank Ltd., Lyallpur* v. *Thakar Das, Mathra Das A. I. R.* 1930 *Lah.* 116. In my opinion a serious injustice appears to have been done to the petitioner, by his mortgage decree not being given the priority to which it was entitled by law. This revision is accepted with costs and the order of the Court below rateably distributing the proceeds of the sale to Mahabir Parshad is set aside. It is hereby ordered that the decree of the petitioner for Rs. 1,000 should be first satisfied out of the sum realised by the sale of the mortgaged house and the rest of the sum should be rateably distributed among the two decree-holders.

B.R./R.K. *Petition accepted.*

✻ ✻ A. I. R. 1933 Lahore 50

BHIDE, J.

Mul Chand and *others* — Plaintiffs—Petitioners.

v.

Jiwan Das — Defendant — Opposite Party.

Civil Revn. Petn. No. 359 of 1932, Decided on 3rd November 1932.

✻ ✻ Civil P. C. (1908), Ss. 10, 115 and 151 —Suit connected with pending appeal—Decision turning on result of appeal—Suit should be stayed — Order refusing stay is "case" within S. 115.

Where a suit is connected with an appeal which is pending and its decision turns on the result of that appeal it is in the interest of both parties that the suit should not proceed until the decision of the appeal, pending in the appellate Court. In such cases the matter is really for the exercise of discretion, the question being whether in view of the pendency of the connected appeal the suit should be allowed to proceed until the decision of that appeal. The question is independent of the matters which must necessarily be decided in the course of the suit and the petition should be looked upon as a case within the meaning of S. 115: *A. I. R.* 1922 *Lah.* 54; *A. I. R.* 1923 *Lah.* 615 and *A. I. R.* 1924 *Lah.* 567, *Expl.* and *Dist. A. I. R.* 1930 *Lah.* 527, *Ref.* [P 50 C 2; P 51 C 1]

Govind Das—for Petitioners.

Shamair Chand and *Qabul Chand*—for Opposite Party.

Judgment

This is a petition for revision of an order of the Senior Subordinate Judge, Campbellpur, refusing to stay proceedings in a suit. The suit was connected with an appeal which is pending in this Court and its decision could turn on the result of that appeal. One of the points in dispute in the appeal is whether the mortgage in favour of one Karam Chand was discharged. If it is found that the mortgage was discharged, as alleged by the defendant, the suit pending before the Senior Subordinate Judge would be maintainable; otherwise it would be liable to be dismissed. In these circumstances it seems to be in the interest of both parties that the suit should not proceed until the decision of the appeal pending in this Court.

The learned Senior Subordinate Judge however apparently thought that he had no jurisdiction to stay proceedings under S. 10, Civil P. C., and therefore rejected the plaintiffs' application. The learned counsel for the plaintiffs, who have filed this petition for revision, has urged that the learned Senior Subordinate Judge had inherent jurisdiction to stay the suit although the case was not strictly covered by the provisions of S. 10, Civil P. C. *A. I. R.* 1930 *Lah.* 527 was cited as an authority in support of the contention. The learned counsel for the respondent did not seriously dispute this point but contended that the order being of an interlocutory character no petition for revision is competent.

The learned counsel for the respondent has referred to ***A. I. R.* 1922 *Lah.* 54, *A. I. R.* 1923 *Lah.* 615,** *A. I. R.* 1924 *Lah.* 567 and certain other authorities in support of his contention that the order which is sought to be challenged being interlocutory no revision lies. All these authorities refer to the question of stay under S. 10, Civil P. C. There appears to be a conflict of authorities on that question, but even apart from this, I think, it is possible to distinguish the present case. Under S. 10, Civil P. C., the Court is bound to stay proceedings in a suit if certain conditions are fulfilled. The Court has therefore to decide that question in the course of the suit and the order may, in this sense be perhaps considered to be an "interlocutory" order in the course of the suit. In the present instance, however, there is no such obligation. The matter is really for the exercise of discretion the question being whether in view of the pendency of the connected appeal, in the High Court, the present suit should be allowed to proceed until the decision of that appeal. The question is thus independent of the matters which must necessarily be decided in the course of the suit. The word "case" has not been defined anywhere in the Code. In *Piroj Shah & Co.* v. *Qarib Shah* (1), where an ex parte decree has been set aside, the proceedings were held to constitute a "case" for the purpose of S. 115, Civil P. C. On similar grounds the proceedings relating to the question of stay may, I think, in the circumstances of the petition be looked upon as a "case" within the meaning of S. 115, Civil P. C.

As I have stated above, the learned counsel for the respondent did not seriously dispute the fact that the learned Subordinate Judge had inherent jurisdiction to stay the suit. He was also unable to urge that his client would, in any way, be prejudiced. In fact, as I have said above, it seems to be obviously in the interests of both parties that proceedings should be stayed in the circumstances of the case. I accordingly accept the petition for revision and direct that the proceedings in the case be stayed pending decision of the connected appeal in the High Court. No order as to costs.

R.K. *Petition accepted.*

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(1) A I R 1926 Lah 379=95 I C 124=7 Lah 161.

A. I. R. 1933 Lahore 51

TEK CHAND AND JAI LAL, JJ.

***The Peoples Bank of Northern India, Ltd., Lahore,* In the matter of.**

Original Civil Appln. No. 18 of 1931, Decided on 22nd December 1931.

(a) Company—Directors need not be shareholders if articles allow it.

There is nothing in the Companies Act making it obligatory on a director to hold shares and if in the Articles of Association of the Company it has been provided that a director should hold a certain number of shares, the articles can be amended in accordance with the procedure laid down therefor so as to include non-share-holders. [P 52 C 2]

(b) Companies Act (7 of 1913), S. 153—Principles guiding exercise of jurisdiction under S. 153 stated.

The principles which should guide the Court in exercising jurisdiction under S. 153 are as follows: The first thing that the Court has to see is whether the provisions of the statute have been complied with. Secondly the Court has to see that the persons present at the meetings have acted bona fide and that they have done nothing which in the circumstances is injurious to the interests of the classes whom they represented. But the Court does not sit merely to register the decree of majority of creditors or share-holders present at the meetings. It has to look at the arrangement and see that it is such that a man of business would reasonably approve and further that it is fair and reasonable as regards the interest of all concerned. The Court has a wide discretion in the matter, though it will reject the scheme only where it is shown that there has been something wrong, but where the creditors, acting in good faith and on sufficient information, and with time to consider what they are about have pronounced that a particular scheme is to their commercial advantage the Court will be slow to differ from them: *English cases referred.* [P 52 C 2; P 53 C 1]

Jagan Nath Aggarwal and *Madan Gopal*—for the Peoples Bank of Northern India Ltd.

Mehr Chand Mahajan — for certain share-holders and creditors.

Qabul Chand for certain ex-employees —for Respondents.

Tek Chand, J.

This is an application under S. 153, Companies Act, presented by the Peoples Bank of Northern India, Ltd., through the Managing Director, Lala Mulk Raj, for sanctioning an arrangement for the resuscitation of the Bank. The preliminary facts leading to this application are set out in detail in the order of the single Bench dated 6th November, 1931 and it is not necessary to recapitulate them here. Briefly stated they are that the Peoples Bank of Northern India Ltd., is a joint stock company incorporated under the Companies Act, 7 of 1913, having its Head Office at Lahore and 72 Branches in several places in Northern India. The company was registered in April 1925, and its authorised capital is one crore of rupees of which Rs. 95,92,800 is subscribed and Rs. 39,12,809-6-3 paid up. On 29th of September, 1931, the Bank suspended payment. On that date it had over Rs. 2,25,00,000 in deposit with it.

On 26th October 1931, a petition under S. 153, Companies Act, was presented in this Court by the company stating that the business had to be suspended owing to stringency of the money market, fall in the price of Government Securities and an unprecedented demand for liquid cash, that a large number of depositors and shareholders had expressed a desire that the company be resuscitated, that in the opinion of the Directors the assets of the company were more than sufficient to pay off all its creditors in full within a reasonable time, and that the Board of Directors had drawn up a scheme of resuscitation, the terms of which were given in detail in Annexure B. The company accordingly prayed for orders of the Court authorizing the Managing Director to convene meetings of (*i*) the depositors and other creditors of the company to whom a sum of over Rs. 50 was due, and (*ii*) the share-holders of the company to consider and approve the scheme referred to above; to appoint Chairman to preside at the meetings; and to authorise the Board of Directors to obtain the consent of secured creditors (who were about a dozen in number) to the above scheme by direct negotiations as it would not be possible to convene a separate meeting of such secured creditors, they being scattered all over the country.

This petition was supported by affidavits by the Managing Director and a large number of creditors representing depisites of the whole of Rupees 12,38,865 and share-holders holding 3,600 shares in the company. The petition was granted by order of the Single Bench dated 6th November 1931 and a separate meeting of the depositors and other unsecured creditors of over Rs. 50 and share-holders as ordered to be convened to consider the scheme, with certain modifications which were embodied in that order. Two panels of Chairmen for the meetings of the share-holders and depositors were appointed and the Managing Director was authorized to obtain by correspondence the opinion of the secured creditors on the scheme. The meetings were accordingly held on the 6th of December at the Head Office of the company at Lahore, due notice of the time and place of each meeting having been given to the persons concerned by personal service as well as by advertisement in the newspapers. (His Lordship then considered the reports of the meetings of creditors and share-holders and proceeded.) The only point on which counsel were not agreed was whether under the law it was necessary for each Director who is elected by the creditors, to hold some shares in the company, and it was accordingly suggested by counsel for the Directors that such a person must be the holder in his own name of at least one share in the capital of the company. He, however, left the question for decision by the Court. After hearing both counsel, I am of opinion that there is nothing in the Companies Act making it obligatoy on a Director to hold shares. It is only in the Articles of Association of the company that it has been provided that a Director should hold a certain number of shares. These Articles can be amended in accordance with the procedure laid down therefor, and I can see no difficulty in provision being made in the amended articles for the three "unsecured creditors-representative Directors" to hold office during the resuscitation period without any share qualification. (His Lordship after disposing of certain applications, proceeded.) All matters discussed before us at the hearing by the various counsel having been disposed of, it now remains to be seen whether the scheme, as explained and elucidated above, is one which should receive our sanction.

The principles which should guide us in exercising jurisdiction under S. 153 are well settled. The first thing that the Court has to see is whether the provisions of the Statute have been complied with. Now there can be no doubt that this has been done in the case, before us. The meetings were properly advertised and held, and were attended by a very large number of the creditors and share-holders, who unanimously approved of the scheme subject to provision being made for certain "safeguards." Secondly, we have to see that the persons present at the meetings have acted bona fide and that they have done nothing which, in the circumstances, is injurious to the interests of the classes whom they represented. On this point also, I am satisfied on an examination of the names and qualifications of the persons present, the record of the proceedings and the resolutions passed, that there is nothing to impugn the good faith of those who voted in support of the scheme. But this is not enough. The Court does not sit merely to register the decree of the majority of the creditors or share-holders present at the meetings. It has to look at the arrangement and see that it is such that a man of business would reasonably approve and further that it is fair and reasonable as regards the interest of all concerned: per Lindley L. J. in *In re Alabama, New Orleans, Taxas and Pacific Junction Railway Co.* (1). The Court has a wide discretion in the matter, though as observed by the same Lord Justice in *In re English, Scottish, and Australian Chartered Bank* (2), it will reject the scheme only where it is shown that there has been something wrong, but where the creditors, acting in good faith and on sufficient information, and with time to consider what they are about have pronounced that a particular scheme is to their commercial advantage the Court will be slow to differ from them. See also to the same effect the recent decision in *In re Anglo-Continental Supply Co. Ltd.* (3). After giving the case my most anxious and careful consideration and bearing in mind the principles stated above, I have reached the conclusion that, in the unfortunate circumstances in which the company now finds itself it is to the interest of all concerned that the scheme of arrangement as explained and elucidated above, should be sanctioned by the Court.

Accordingly I would, if my learned brother agrees, accept the application under S. 153, Companies Act, and sanction the scheme for the resuscitation of the Peoples Bank of Northern India, Limited, as given in paras. 1 to 7 of Annexure B to the petition of the Managing Director dated 26th October 1931 with the following additions:

(a) that at least 20 per cent. of the sum due by each Director to the Bank on loans shall be paid on or before 28th February, 1932, and the remaining 80 per cent. shall be paid in four equal instalments on 31st August, 1932, 28th February, 1933, 31st August, 1933 and 28th February, 1934;

(b) that if a Director fails to make payment of any instalment of the loan due by him as provided in Cl. (a) above, he shall automatically cease to hold office;

(c) that during the period of resuscitation no fresh loan of any kind shall be advanced to any of the Directors;

(d) that the Chairman, Vice-Chairman, the Managing Director and the other Directors of the Central and Local Boards shall not receive any remuneration for their services during the period of resuscitation; and

(e) that soon after the sanctioning of the scheme as may be practicable the Directors shall convene meetings of the share-holders with a view to have the Articles of Association of the company amended so as to make prosion: (1) for the addition of three "unsecured creditors" representative Directors to the Central Board, to be elected by creditors of the company to whom a sum of Rs. 50 or more was due on 29th September, 1931. At the meeting held for this purpose every such creditor shall have one vote, but the person elected shall be a creditor of the company for Rs. 15,000 or more, in his own name, or in the name of his wife, child or parent. The persons elected shall hold office during the resuscitation period only and any casual vacancy arising meanwhile, shall be filled by election in a meeting of the creditors, convened in the same manner as the first meeting; (2) for the number of ordinary Directors of the Central Board being raised from five to seven, the two newly created seats being filled by election at a meeting of the share-holders at which the permanent Directors of the company shall not be entitled to vote. Any casual vacancy arising in this class of Directors shall be filled by election at a meeting of the share-holders at which also the permanent Directors shall not vote. (3) for reducing the minimum qualification of ordinary Directors of the Central Board from 500 to 300 shares; and (4) for the execution of an indemnity bond by any share-holder who wishes to transfer his shares during the resuscitation period, to the effect that such transferor shall be liable to pay to the company the unpaid or uncalled amount due on the shares, in the event of the company being unable to realize it from the transferee.

A copy of this order shall be sent to the Registrar Joint Stock Companies Punjab.

Jai Lal, J.—I agree.

M.N. *Application accepted.*

✻ A. I. R. 1933 Lahore 53

DALIP SINGH, J.

Shankar Das—Appellant.

v.

Mt. Dhan Devi—Respondent.

Second Appeal No. 353 of 1932, Decided on 1st November 1932.

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(1) [1891] 1 Ch 213=60 L J Ch 221=64 L T 127=2 Meg 377.

(2) [1893] 3 Ch 385=62 L J Ch 825=42 W R 4=69 L T 268.

(3) [1922] 2 Ch 723=91 L J Ch 658=128 L T 59=66 S J 710=1922 B & C R 199.

*** (a) Limitation Act (1908), Art. 120—Declaratory suit—Suit need not be brought on first denial when plaintiff is in possession.**

The plaintiff need not bring his declaratory suit from the time of his first denial of title, specially where the plaintiff is in possession of the property. Where the plaintiff is not in possession of the property nor is the defendant in possession of the property, the same principle applies and a fresh cause of action accrues to the plaintiff when he has his possession of the property disturbed. [P 55 C 1]

*** (b) Evidence Act (1872), S. 90—Executant depositing will for registration—Presumption under S. 90 arises from Registrar's endorsement as to execution though not of disposing mind.**

Where a person executes a will and deposits it with the Registrar and the endorsement by the Registrar shows that the will was so deposited by the executant on being identified by two persons, a presumption under S. 90 as to execution arises. The presumption however does not cover the question of disposing mind. [P 54 C 1; P 56 C 1]

*** (c) Waiver—Mere non-objection to mutation held did not amount to waiver.**

A person left a will in favour of his sons from third wife in 1893. When the property was mutated in favour of the sons of first wife and the sons of the third wife the latter objected. The property was in possession of the mortgagees. The sons of the third wife however did not object to the subsequent mutations on the death of sons of first wife and their sons. Sons of the third wife alone redeemed the mortgage in 1903 and thereafter they continued in exclusive possession of the property.

Held: that from these facts it could not be deduced that the sons of the third wife waived or abandoned their right under the will. [P 55 C 2]

(d) Will—Disposing mind—Proof of.

As regards the disposing mind the onus lies on the person who propounds the will. [P 55 C 2]

Chiranjiva Lal—for Appellant.

M. C. Mahajan—for Respondent.

Judgment

In this case the plaintiff alleged that by the will of his father one Bela Shah he had been made sole owner of the property in dispute. It seems that Bela Shah executed the will sometime in 1890 and deposited it with the Registrar. The endorsement shows that the will was so deposited by Bela Shah himself who was duly identified by two persons. In 1893 Bela Shah died and in 1894 the will was opened but nothing further was done. The pedigree table given in the judgment of the lower Court shows that Bela Shah had three wives. By the third wife he had two children, the present plaintiff Shankar Das and his brother Radha Kishen, who died childless, in whose favour the will was executed. By his second wife he had one son Ram Chand who had some children. By his first wife he had a son Nand Lal who had a son Mathra who had a son Makhan. Makhan's widow Mt. Dhan Devi, is the present defendant. On the death of Bela Singh the property was mutated in equal shares in favour of all the sons. The present plaintiff and his brother since deceased objected to the mutation but they were referred to a civil suit. Subsequently Ram Chand compromised with the present plaintiff and his brother. He received certain property from them but acknowledged the will to have been genuine. When Nand Lal died his share was mutated in favour of his son Mathra and when Mathra died his share was mutated in favour of his son Makhan. When Makhan died his share was mutated in favour of Mt. Dhan Devi. So far as the property in dispute is concerned it was in the possession of mortgagees at the time of the mutation. In 1903 it was redeemed by the present plaintiff and his brother and subsequently it was re-mortgaged and redeemed twice by plaintiff and his brother either jointly or separately. The plaintiff and his brother are shown in the record throughout as in possession, except when the land was under mortgage. In 1927-28 Mt. Dhan Devi was entered as in possession and this gave the cause of action to the present plaintiff.

The trial Court decreed the plaintiff's declaratory suit, holding that the will must be held to be proved both by the oral evidence led and by the presumption under S. 90, Evidence Act. It held that it was not proved that the will had remained void and inoperative. It was also held that there was no estoppel against the present plaintiff and the suit was not time-barred. On appeal the learned District Judge held that the four mutations in favour of Nand Lal, Mathra, Makhan and Mt. Dhan Devi showed that the will was treated as a dead letter by the legatees, that the possession of the land by the present plaintiff was as a co-sharer, and that the will was not acted upon in regard to the property in the other two villages. The compromise with Ram Chand was according to him a mere paper admission and Mt. Dhan Devi was not a party to that compromise. He refused to draw a presumption under S. 90, Evidence Act. He made no reference to the oral evidence and also did not decide the point decided by the trial Court, namely, that the property was self-acquired property of Bela Shah and was not ancestral. The learned District Judge also held that the cause of action had accrued in 1893 or 1894 and therefore the suit was time-barred. He held that the plaintiff had not brought a suit as regards the lands in Saharanpur and Khokhar and the present suit was only by way of "feeler." He therefore dismissed the plaintiff's suit. The plaintiff has come in second appeal.

The learned counsel contends that the learned District Judge has misunderstood the case. He contends that there are no valid reasons for refusing to draw the presumption under S. 90, Evidence Act, which had been drawn by the trial Court in his favour. He also contends that no decision had been given on the oral evidence led as to execution. He challenges the finding of limitation and contends that the will was never treated as a dead letter.

In reply the learned counsel for the respondent contends that the question of the will being treated as a dead letter is a question of fact because the learned District Judge really meant to hold that the plaintiff had abandoned or waived his title under the will. As regards the presumption under S. 90, Evidence Act, the learned counsel contends again that this is a matter of discretion and the reasons given by the learned District Judge are not prima facie unsound. As regards limitation he contends that there was no fresh cause of action and that therefore the suit was barred by limitation. The last point can be disposed of quite easily. It has several times been pointed out by this Court that denial of title does not necessarily mean that the plaintiff must bring his declaratory suit from the time of his first denial of title. This is perfectly clear in the case where the plaintiff is in possession of the property. Where the plaintiff is not in possession of the property nor is the defendant in possession of the property, it seems to me that the same principle applies and, therefore, a fresh cause of action accrued to the plaintiff when he had his possession of the property disturbed in 1927-28 by the mutation entry showing Mt. Dhan Devi in possession of a share. I therefore hold that the suit was not barred by limitation.

So far as the first point is concerned, about the will not being acted upon, the trial Court pointed out that the will itself showed that certain property had been given to Ram Chand and Nand Lal. There was no specification of what property had been given, and the recital itself, of course, was not evidence. But it is clear that Ram Chand at any rate compromised with the present plaintiff as regards the will. In the absence of evidence it is impossible to decide whether the will has or has not been acted upon *qua* the property in the other two villages. But assuming that it has not been acted upon I do not see how the plaintiff can be held to have abandoned or waived his rights even if this was the meaning of the learned District Judge in the somewhat cryptic remark about the will being treated as a dead letter not because of its not being acted upon with respect to the other properties but because objections were not taken to the successive mutations to Nand Lal's share. In the first place objection was taken to the mutation in favour of Nand Lal. To the other mutations the plaintiff was not bound to object as the property was in possession of the mortgagors. Plaintiff and his brother alone redeemed the mortgage in 1903 and thereafter they continued in exclusive possession of the property. Why then should they trouble about mutations which had taken place previously when the property was not in their possession and could not be taken possession of by them. I do not think from these facts it can be deduced that the plaintiff waived or abandoned his right under the will.

There remains the contention as to whether the presumption under S. 90 should or should not have been drawn. The facts have been given above and it seems to me that the endorsement of the Registrar leaves little doubt as to the execution of the will by Bela Shah. The plaintiff went into the witness box and and swore that the signature on the document was that of Bela Shah. I do not see why this evidence should be rejected, but whether this is so or not the presumption, in the circumstances, ought clearly to have been drawn. All that the learned counsel for the respondent could urge was that the silence of nearly forty years made it difficult for the present defendant to prove any objection she might have had, e.g., a disposing mind of the testator of the nature of the property whether it was joint Hindu family property or otherwise. As regards the disposing mind the onus lies on the person who propounds the will, and the only person hampered by it would be the plaintiff himself. As regards the property being joint Hindu family property this was not pleaded. The question whether the property was ancestral or non-ancestral was pleaded and was decided in favour of the plaintiff by the trial Court. The learned District Judge has not given any finding on this point. I therefore accept the appeal and hold that the suit is not barred by limitation, that in the circumstances the appellate Court acted without proper exercise of discretion in setting aside the discretion exercised by the trial Court in favour of the plaintiff as regards the presumption under S. 90 and that it is not proved on the record that the will was treated as a dead letter. The case must go back for decision on the other issues arising in the case. The pleadings clearly show that the plaintiff was put to proof of the will. A presumption under S. 90, only covered the question of execution, it could not cover the question of disposing mind. The learned District Judge will also decide the question of the nature of the property whether ancestral or self-acquired and will dispose of the case according to law. Costs will abide the event.

R.K. *Appeal accepted.*

✻ A. I. R. 1933 Lahore 56

JAI LAL, J.

Rura Mal—Petitioner.

v.

Mt. Parmeshari and *others*—Opposite Parties.

Civil Revn. Petn. No. 289 of 1932, Decided on 24th October 1932, against order of Dist. Judge, Ludhiana, D/- 30th March 1932.

✻ **Succession Act (1925), Ss. 384 and 388—Order refusing revocation of certificate—No appeal lies.**

Only an order granting or refusing a certificate or revoking a certificate is made appealable by S. 384 or S. 388 and an order refusing to revoke a certificate has not been made appealable, specially when the application for revocation does not contain a prayer for a succession certificate: *A. I. R.* 1920 *All.* 139, *Expl.* and *Dist.*

[P 56 C 2]

Badri Das—for Petitioner.

Mehr Chand Mahajan and *Abdul Haye*—for Opposite Parties.

Judgment

A succession certificate under the provisions of the Succession Act having been granted to Mt. Parmeshari, alleged to be the widow of Amar Nath deceased, to whom the debt in respect of which the succession certificate was granted was due, an application was made by Rura Mal under S. 383, Succession Act, for the revocation of the certificate on the main ground that Mt. Parmeshari was not the widow of Amar Nath and that he was not notified of the application for succession certificate made by her, as should have been done, he being the rightful heir of Amar Nath. The Senior Subordinate Judge who originally granted the succession certificate, declined to revoke it. Consequently, an appeal was preferred to the District Judge who however held that no appeal lay to him from the order refusing to revoke a succession certificate. Rura Mal has now presented this petition for revision in this Court, and, after hearing counsel on both sides, I am of opinion that this petition must fail. S. 384, which deals with the question of appeal in matters arising out of proceedings relating to grant of succession certificates, provides that an appeal shall lie to the High Court from an order of a District Judge granting, refusing or revoking a certificate under this part. S. 388 provides that where a certificate has been granted by a Court inferior to that of the District Judge, the appeal under S. 384 shall lie to the District Judge.

From what I have stated above, it would be observed that only an order granting or refusing a certificate or revoking a certificate is made appealable by that section and that an order refusing to revoke a certificate has not been made appeable. Mr. Badri Das on behalf of the petitioner however relies on *Sharifunnissa Bibi* v. *Masum Ali* (1). Mr. Mehar Chand Mahajan for the respondent questions the correctness of the view taken in that case. I do not however propose to express any opinion on this aspect of the case, because, in my opinion, even if the view taken in that judgment be held to be correct, the facts of that case were quite different to the facts of this case. In that case the person who applied for the revocation of the succession certificate also prayed for the grant of the same to him after the certificate granted to the respondent had been revoked. In the present case there is no such prayer made by the petitioner. In one paragraph of his application no doubt he says that he being the heir of the deceased is entitled to a succession certificate. That in my opinion is merely stated in order to establish his right to maintain the application for revocation of the succession certificate and not with a view to obtain a succession certificate. Under the circumstances, the view of the District Judge that no appeal lay to him is correct and that this petition must be dismissed with costs and I order accordingly.

R.K. *Petition dismissed.*

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(1) A I R 1920 All 139=56 I C 380=42 All 347.

A. I. R. 1933 Lahore 57

TEK CHAND, J.

Sardar Khan—Defendant—Appellant.

v.

Chaudhri Sadulla Khan and *others*—Plaintiffs—Respondents.

Second Appeal No. 185 of 1932, Decided on 6th July 1932, against decree of Dist. Judge, Jullundur, D/- 21st November 1931.

(a) Pre-emption—Suit for — Wajibularz — Entry in—Construction of—Pre-emptors recorded as ala-maliks— Vendees recorded as adna-maliks—Suit should be decreed.

In a suit for pre-emption the pre-emptor was recorded as talukdar in the revenue records and the expression was ordinarilly understood to mean superior proprietor. The vendees who were proprietors of the village were recorded as having definitely stated that their status was that of adna-maliks while that of plaintiff's ancestors was that of ala-maliks:

Held : that the suit should be decreed *Civil Appeal No.* 60 *of* 1911, *Foll.* [P 57 C 2]

(b) Evidence Act (1872), Ss. 13 and 42—Previous judicial decisions—Admissibility of.

Previous judicial decisions making mention of the status of a person claiming pre-emption are admissible in evidence under S. 13 as well as under S. 42. [P 57 C 2]

Achhru Ram—for Appellant.

Mohsin Shah—for Respondents.

Judgment

Defendants 1 to 3 sold the land in dispute to defendant 4 for Rs. 850. The plaintiff, claiming to be an ala malik in the village and describing the vendors and the vendee as adna maliks, brought a suit for pre-emption on the ground that his right was superior to that of the vendees. The suit has been decreed on payment of the full price. The vendee-defendant appeals. The sole point argued before me is whether the plaintiff-respondent has succeeded in establishing his right as a "superior" proprietor in the village. It is conceded that in the revenue records he is described as a talukdar, and it is also admitted that ordinarily that expression is understood in this provinces as meaning a superior proprietor. It is contended however that in this particular case the plaintiff, though described as a talukdar, does not occupy the status of a superior proprietor as the amount which is paid to him as talukdari is not levied in addition to the amount of land revenue payable by the proprietors to the Government, but is paid by Government to the plaintiff and the other talukdars out of the revenue assessed at ordinary rates on the proprietors. Prima facie there is some force in this contention but an examination of the order of the Commissioner, Jullundur Division dated 16th April 1849, the entry in the wajibularz of 1885, (Ex. P. B.) and para. 50 at pp. 85 and 86 of Purser's report on the Revised Settlement of the Jullundur district, 1885, shows that the talukdari payment is made to them in recognition of their rights as superior proprietors in this village. It is no doubt true that the amount is paid by Government out of the revenue collected by it from the proprietors, but as was pointed out by Colonel Beadon, Divisional Judge, Jullundur, in a similar case (Civil Appeal No. 60 of 1911):

> "this was merely an act of leniency on the part of the Government towards the adna-maliks. It did not alter the status of the talukdars who got their 5 per cent, not as muafidars, but solely because of their right as superior owners."

That case came up on appeal to the Chief Court and Kensington, J., agreed with the conclusion of the learned Divisional Judge holding that though the order of the Commissioner dated 16th April 1849, was capable of the interpretation with which the appellants seek to put on it:

> "the history of the case shows however that the allowance was granted in the distinct recognition of the superior proprietary rights."

Mr. Achhru Ram has attacked before me the soundness of this conclusion, but after hearing him at length and examining the materials on the record I am of opinion, if I may say so with all respect, that the decision of Kensington, J., was correct. It may further be stated that in the entry in the wajibularz (Ex. P. B.) the proprietors of the village are recorded as having definitely stated that their status was that of adna maliks and the status of the plaintiff's ancestors that of ala maliks. Mr. Achhru Ram contended that the previous judicial decision including those of Colonel Beadon and Kensington, J., to which reference has been made above were not admissible in evidence under S. 42, Evidence Act, and the lower Court was in error in holding that they were so admissible. After hearing him, however, I see no force in this contention. It is however not necessary to pursue the matter any further as Mr. Achhru Ram conceded that these judgments were, in any case, admissible under S. 13, Evidence Act. After carefully considering all that has been urged on behalf of the defendant-appellant I am of opinion that the decision of the lower Courts is correct. I therefore dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

✲ A. I. R. 1933 Lahore 58

TAPP, J.

Deputy Commissioner, Jhang—Petitioner.

v.

Devi Ditta and *another*—Plaintiff and Defendants—Opposite Party.

Civil Ref. Case No. 17 of 1932, Decided on 7th November 1932, referred by Deputy Commissioner, Jhang, D/- 12th May 1932.

✲ **(a) Limitation Act (1908), S. 14—Ignorance of law is not bona fide mistake.**

Ignorance of or inattention to, the law by persons who should be well aware of its provisions cannot be regarded as a bona fide mistake. The provisions of S. 14 should not be applied. [P 58 C 2]

(b) Punjab Alienation of Land Act (1900), S. 3 —Dayas are not Jats and members of agricultural tribe.

Dayas held not a subdivision of Jats and the alienor from that tribe held not a member of an agricultural tribe. [P 58 C 2]

Saunders—for Respondents.

Order

The facts relating to this reference by the Deputy Commissioner, Jhang under S. 21-A (2), Punjab Alienation of Land Act are briefly as follows: Devi Ditta a Chopra Khatri brought a suit against Ibrahim a Daya of Jhang for a declaration that the plaintiff was the owner and in possession of certain agricultural land with a share in the Shamilat acquired by purchase from the defendant a non-agriculturist for a consideration of Rs. 5,000. Mutation had been refused by the Revenue authorities on the ground that the sale contravened the provisions of the Alienation of Land Act. The suit was compromised and in accordance with the compromise the Subordinate Judge, 2nd Class, Jhang passed a declaratory decree on 12th January 1932 to the effect that plaintiff was owner of the land in suit and the defendant was a nonagriculturist. On 4th March 1932 the Deputy Commissioner preferred an application to the District Judge, Jhang but this was returned on the ground that as no appeal lay from a consent decree the application should be presented to the High Court. Accordingly on 12th May 1932, after expiry of the prescribed period of two months an application has been made to this Court with the prayer that the delay may be condoned under the provisions of S. 14, Lim. Act, as it arose out of a bona fide mistake of law.

Mr. Saunders who appears for Devi Ditta objects to any condonation of the delay and after consideration of the matter. I am constrained to uphold the objection. It should have been apparent to the Deputy Commissioner and his legal adviser, the Government Pleader, that no appeal would lie to the District Court and that consequently this would be one of those other cases provided for in sub-S. (2), S. 21-A, in which the application should have been made to this Court. Ignorance of or inattention to, the law in such a case by persons ,who should be well aware of its provisions cannot, in my judgment be regarded as a bona fide mistake. I am therefore not prepared to apply the provisions of S. 14, to the present application and hold it to be time barred.

As regards the merits the contention is that the alienor Ibrahim is a Jat agriculturist of which tribe Dayas are a sub division. Reliance is placed on (1) a statement prepared at the Settlement of 1904-05 of Mohammadan agricultural tribes. In this Dayas are shown as sub-division of Jats; (2) an extract from the pedigree table prepared at the Settlement of 1880 relating to Mauza Jandran in the Jhang Tahsil in which a certain family is described as Daya Jats; and (3) an extract from the pedigree table relating to the alienor Ibrahim prepared at the Settlement of 1924-25 in which the family is described as Daya Jats. I have referred to the Jhang District Gazetteer 1929 and do not find Daya even mentioned, let alone described as being a sub division of jats. There is also no instance of any alienation by a Daya Jat in the list of instances in appendix 2 of the Riwaj-i-am of the District prepared in 1929. I have also referred to Rose's Glossary of Punjab Tribes and Castes and do not find Dayas mentioned therein either separately or as a sub-division of Jats. In the circumstances I do not consider that the proof afforded by the three documents, cited above as to Dayas being a sub-division of Jats is, sufficient to establish that the alienor, Ibrahim is a member of an agricultural tribe, and that the alienation in favour of Devi Ditta contravenes the provisions of the Act. For the reasons given above I reject the application, parties bearing their own costs.

R.K. *Application rejected.*

A. I. R. 1933 Lahore 59

JAI LAL, J.

Azmat Ali and *others*—Plaintiffs—Appellants.

v.

Sadiq Ali and *others*—Defendants—Respondents.

Second Appeal No. 1013 of 1931, Decided on 14th July 1932, against decree of Dist. Judge, Delhi, D/- 26th February 1931.

(a) Custom (Punjab)—Sayyads are ordinarily governed by Customary law and not by Mahomedan law.

Sayyads should ordinarily be expected to follow their personal law and very strong evidence is needed to rebut the presumption in their case that they are governed by Mahomedan law. [P 60 C 1]

(b) Custom (Punjab)—Sayyads of Nangloi.

Sayyads of Nangloi in the Delhi Province are governed by Mahomedan law. [P 60 C 1]

Shamair Chand and *Mohammad Amin*—for Appellants.

Judgment

The parties to this litigation are Sayyads of Nangloi in the Delhi Province. The dispute is as to the estate of Karamat Ali deceased. The date of the death of Karamat Ali does not appear from the judgment of the District Judge. On his death his mother and widow suceeded to his estate in equal shares and on the death of the mother the widow got possession of the whole estate. She died in 1928 and mutation has been effected in favour of the defendant respondents who are the sons of a sister of Amjad Ali father of Karmat Ali. The plaintiffs appellants who are the descendants of the great-grand father of Karmat Ali instituted the suit out of of which this appeal has arisen for possession of the estate, alleging that they were entitled to succeed to it in preference to the defendants. An issue was framed by the trial Court which was found by the District Judge to be insufficient for the decision of this case and consequently four issues were framed and remanded to the trial Court. The first is whether the plaintiffs are collaterals of Karamat Ali; the second is whether the parties in matters of inheritance follow Customary law; the third is whether the defendants have a charge of Rs. 1,300 on the suit land and the fourth is, if the parties do follow custom, are the defendants entitled to succeed by virtue of a special family custom. It is the plaintiffs who alleged that the parties were governed by the customary law of the province but the Judge found that they followed the Mahomedan law. Issue 1 was decided in favour of plaintiff; issues 3 and 4 have not been decided. Now, if it is found that the parties are governed by the Customary law of the province, then it would be necessary also to decide the fourth issue, and if the fourth issue is decided against the defendants, then it would be necessary to decide issue 3. The learned District Judge has dismissed the suit merely on the finding that the parties are governed by the Mahomedan law. It does not appear from the record that it was the case of the defendants that the parties were governed by the Mahomedan law. On the other hand, the frame of issue 4 would indicate that they set up some special custom. It is contended on behalf of the appellants that even if the parties are governed by the Mahomedan Law the appellants are entitled to succeed in preference to the defendants. The Court has given no finding on this question. Though the question has not been raised in the issues, another important question arises in this case. On the death of Karamat Ali his mother and widow succeeded to his estate. This would ordinarily show that the parties are governed by the Customary law, but there may be special reasons why these two ladies were allowed to succeed and it does not therefore necessarily follow that the parties are governed by the Customary law. Under the circumstances it seems to me that the District Judge having found that the parties were nor governed by the Customary law of the province, the inference was inevitable that they were governed by the Mahomedan law.

The learned counsel for the appellants now wishes to discuss the question on which the appeal has been admitted. That question is whether the parties are governed by the Mahomedan law or by the Customary law. The appeal has been admitted on a certificate from the District Judge. Only four instances have been cited in which succession has been according to custom and not according to the personal law of the parties, but none of them relate to a contested case and in one a daughter was excluded from inheritance but there was a doubt whether she was a daughter or not. In another case a daughter was excluded, but the circumstances under which she was excluded are not specified. In the third case the estate in the hands of a widow was mutated on her death in favour of reversioners of her husband. It does not appear whether there was in existence any heir capable of contesting the mutation. In the fourth case Mubarak Ali succeeded to the estate of Umar Daraz Ali on the death of his widow. In that case also it is not shown whether there was any other person who was competent to contest the right to succeed. The instances therefore are inconclusive to prove the existence to the exclusion of the personal law of the parties. The parties as I have already stated are Sayyads who should ordinarily be expected to follow their personal law and very strong evidence is needed to rebut the presumption in their case that they are governed by the Mahomedan law. In spite therefore of the certificate granted by the District Judge, I am of opinion that he has reached the correct conclusion that the parties are governed by the Mahomedan law. That being so, it is not established that the appellants are entitled to succeed to the estate of the widow of Karamat Ali and their suit had been rightly dismissed. I dismiss this appeal but as there is no appearence on behalf of the respondents there will be no order as to costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 60

BHIDE, J.

Ram Lal Anand—Defendant— Appellant.

v.

Mrs. Longhran and *another*—Plaintiffs—Respondents.

Misc. Second Appeal No. 1132 of 1931, Decided on 30th May 1932, against order of Senior Sub-Judge, Lahore, D/- 26th March 1931.

Legal Practitioner—Client can sue counsel for rendition of accounts in respect of suits for which he was engaged.

Although there is no "general agency" for all suits between a counsel and his client, still the latter can sue the counsel for rendition of accounts in respect of the suits for which the counsel was engaged: *A. I. R.* 1927 *Mad.* 157, *Rel. on.* [P 60 C 2]

Devraj Sawhney—for Appellant.
Edmunds—for Respondents.

Judgment

This is an appeal from the order of Senior Subordinate Judge, Lahore, remanding a suit for retrial under O. 41, R. 23, Civil P. C. A preliminary objection as to limitation was urged. It was disposed of by my order dated 26th May 1932, and the appeal has now been heard on merits. The appeal arises out of a suit by Mrs. Longhran and another for rendition of accounts against Mr. Ram Lal Anand an Advocate. It was alleged in the plaint that Mr. Ram Lal Anand acted as standing counsel for the deceased Mr. Johnston of whom the plaintiffs are legal representatives. The trial Court held that there was no relation of principal and agent between Mr. Johnston and the defendant and dismissed the suit for rendition of accounts as untenable. The learned Subordinate Judge on the other hand held that the suit for accounts was maintainable as the relation between Mr. Johnston and Mr. Ram Lal was that of principal and agent. He therefore accepted the appeal and remanded the suit for decision of the other points arising in the case.

It has been urged on behalf of the appellant that there can be no "general agency" between counsel and his client and the agency being limited to each suit, no suit for rendition of accounts was maintainable. As pointed out by the learned Senior Subordinate Judge however even if it be held that there was no "general agency" for all suits there is no reason why a suit for accounts should not be maintainable in respect of the different suits for which the appellant was admittedly engaged. The ruling cited by the learned Senior Subordinate Judge namely, *Parthasarthy Appa Rao* v. *Subba Rao* (1), appears to me to be clearly in favour of the view taken by the learned Senior Subordinate Judge. It was next urged on behalf of the appellant that the plaint does not give particulars of the different suits for which the appellant was engaged; but this is a matter which can be considered on its merits and the plaint amended if necessary. The point of limitation will, no doubt, require particulars as regards the dates of the different suits to be given. The learned Senior Subordinate Judge, has however not gone into this question and it is open to the appellant to raise this question in the Court below. I see no ground to interfere with the order of remand and dismiss the appeal, but in view of the circumstances of the case I leave the parties to bear their costs in this Court.

S.N./R.K. *Appeal dismissed.*

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(1) A I R 1927 Mad 157=99 I C 456=50 Mad 249.

A. I. R. 1933 Lahore 61

BROADWAY AND BHIDE, JJ.

Sundar Singh and *others*—Defendants—Appellants.

v.

Ram Saran Das—Plaintiff—Respondent.

First Appeal No. 374 of 1925, Decided on 6th November 1931, against decree of Senior Sub-Judge, Lahore, D/- 12th November 1924.

(a) Civil P. C. (1908), O. 6, R. 2—Plea of accounts being mutual, open and current, if not pleaded cannot be argued — Practice, Pleadings.

The plea that an account is open, mutual and current, is a plea of facts and if not raised or put in issue, cannot be raised at the stage of arguments. [P 62 C 2]

(b) Limitation Act (1908), Art. 85—Account of rent not kept in separate book does not make it mutual, open and current—Accounts.

In a suit for rent by a lessor against a lessee the mere fact that the items of rent are not entered in a separate account book cannot be held sufficient to show that there was a mutual, open and current account between the parties. [P 62 C 2; P 63 C 1]

(c) Evidence Act (1872), S. 92—Letter containing some terms of lease orally agreed—Lease to be executed later—S. 92 does not apply nor does Registration Act (1908), S. 49.

A letter in the nature of a memorandum containing some of the terms of a proposed lease orally agreed upon of immovable properties for more than one year and showing that a lease embodying all the terms was to be executed later cannot attract the provisions either of S. 92, Evidence Act, or of S. 49, Registration Act. [P 63 C 2]

(d) Transfer of Property Act (1882), S. 116 — Tenant contumaciously holding over — Double rent by way of damages is proper—Contract Act (1872), S. 73.

Ordinarily the proper measure of damages in cases where a tenant contumaciously holds over is twice the amount of the rent payable by the tenant: 33 *P. R.* 1898; 5 *P. R.* 1904; 70 *P. R.* 1918; *A. I. R.* 1928 *Lah.* 554, *Foll. A. I. R.* 1921 *Bom.* 27 and *A. I. R.* 1924 *Cal.* 240, *Dist.* [P 64 C 1]

Durga Das, Norman Edmunds, Mela Ram and *Bhagwan Das*—for Appellants.

Badri Das, J. N. Aggarwal, Govind Das and *Duni Chand Gupta*—for Respondent.

Bhide, J.

Civil Appeals Nos. 374, 375 and 376 of 1925 are connected and can be conveniently disposed of together. They arise out of two out of five suits which were lodged by the plaintiff Rai Bahadur Ram Saran Das in connexion with a dispute which had arisen over the lease of the Mela Ram Cotton Mills, of which he is the proprietor, to the defendants. The material facts relevant for the purposes of these appeals can be briefly stated as follows. The defendants came to an oral agreement with the plaintiff in connection with the lease of the Mills for a period of five years at an annual rent of Rs. 30,000 and on 20th February 1917, a letter (Ex. P 2) was written to plaintiff by defendant Sundar Singh stating briefly the terms of that oral agreement. The letter recites that a formal document was to be drawn up and registered at the expense of the defendants, embodying the terms given in the letter as well as some others which had been agreed upon but were not mentioned in the letter. The defendants entered into possession of the Mills in pursuance of the agreement shortly thereafter, but the formal agreement was never drawn up or registered. Later on, it appears, that differences arose between the parties in connection with the management of the Mills and on 20th July 1920, the plaintiff sent a notice to the defendants through his counsel complaining of damage to the Mills and also of defendants' failure to get a formal lease executed and asking them to vacate the Mills by 31st August 1920. Defendants replied that they could not be ejected from the Mills before the expiry of the term of five years for which they had taken the Mills on lease. They denied that any damage had been caused to the Mills and as regards the execution of a formal lease, they stated that the matter had never been pressed by the plaintiff and no lease was drawn up simply because owing to the good relations existing between the parties the "idea had vanished from the hearts of both the parties."

The defendants having failed to vacate the Mills in pursuance of the notice served on them, the plaintiff refused to accept rent from them as his tenants and from 1st September 1920, the amounts remitted by them were treated by the plaintiff merely as deposits and allowed to remain as such to their credit in the Central Bank of India. Early in 1921 the plaintiff made unsuccessful attempts to obtain an injunction to restrain the defendants from working the Mills on the ground that they had failed to insure the Mills and that the boiler was in a dangerous condition. On 8th August 1921, he instituted his first suit for ejectment and recovery of Rs. 13,411-1-9 as arrears of rent or damages. This suit was based on the allegation that the defendants had stopped payment of rent from June 1921, owing to disputes between the parties and were liable to ejectment either as trespassers or as tenants who had forfeited the tenancy. Defendants raised certain preliminary objections urging, inter alia, that the plaintiff was bound to pay full Court-fees on the plaint as he was treating them as trespassers a position which they accepted in Court (vide statement of the counsel for the defendants before the issues dated 16th December 1921.) The plaintiff thereafter, paid full court-fees. On merits, the defendants denied that any amount was due to the plaintiff "on account of rent" and claimed on the contrary that a considerable amount was due to them from the plaintiff. They complained of the plaintiffs' failure to supply machinery, godowns and other articles according to the terms of the agreement and claimed a reduction in rent on that account. As regards the alleged failure to pay rent, they also pointed out that the plaintiff himself had refused to accept rent from 1st September 1920.

While the above suit was pending, the term of five years which had been originally agreed between the parties expired on 31st May 1922, but the defendants failed to vacate the Mills even then. The plaintiff gave telegraphic notice to the defendants on 24th July 1922, that he would charge enhanced rent at the rate of Rs. 10,000 per mensem from the date of the expiry of lease. Defendants however still refused to vacate the Mills claiming that they were entitled to proper and reasonable notice according to law and that as no such notice had been given prior to the expiry of the period of five years the lease stood extended by another year, i. e., up to 31st May 1923. The plaintiff thereupon instituted his second suit for ejectment on 25th August 1922. This was based on the allegation that the defendants had failed to vacate the Mills though the term of five years which had been originally agreed upon between the parties had expired and claiming Rs. 25,000 on account of arrears of rent up to 31st May 1922, and Rs. 29,000 for the subsequent period at the enhanced rate of Rs. 10,000 per mensem, with interest at Re. 1 per cent per mensem. Plaintiff also asked for an injunction immediately restraining the defendants from working the Mills. This injunction was granted by the trial Judge and the order was upheld by this Court. The defendants thereafter vacated the Mills.

The above mentioned two suits for ejectment and rent were disposed of together with one judgment by the trial Court as many of the questions of fact and law which arose were common to both the suits. The learned Senior Subordinate Judge, who tried the suits, has granted a decree for possession of the Mills in the second suit together with a sum of Rs. 37,000 including arrears of rent up to 31st May 1922, and damages at the enhanced rate of Rs. 5,000 per mensem for the subsequent period. He also allowed interest at six per cent per annum on the amount decreed with proportionate costs. In view of the decision in the second suit he considered it unnecessary to pass another decree for possession in the first suit. He decreed the claim for Rs. 13,411-1-9 on account of arrears of rent in that suit but disallowed costs on the ground that the plaintiff had acted with "unseemly haste" in instituting suits one after another and that but for the ill advised defence set up by the defendants as trespassers, this suit for possession had every chance of being thrown out. From this decision the present appeals have been preferred. The defendants alone have appealed from the decree in the first suit (vide Civil Appeal No. 375 of 1925,) while both the parties have appealed from the decree in the second suit (Civil Appeals Nos. 374 and 376 of 1925).

As regards the decree in the first suit only three points were urged by the learned counsel for the defendants viz., (1) There was a mutual, continuous, running account between the parties, and therefore the plaintiff could not sue for rent alone; (2) That the plaintiff having failed to supply machinery and other articles according to the terms of the lease, the defendants were entitled to a reduction of the rent. (3) That the plaintiff's claim for possession having been held to be frivolous and premature, the defendants should have been allowed costs.

As regards the first point, the learned counsel had to admit that no such plea was raised or put in issue. The contention was apparently raised in the Court below at the stage of arguments and was rightly disallowed by the learned Subordinate Judge. It was urged that the fact that there was a continuous running account is patent on the record. This contention seems to have no force. The question is one of fact and the plaintiff was certainly entitled to have a notice of the plea at the proper time if the defendants intended to rely on it. The mere fact that the items of rent are not entered in a separate account book cannot be held sufficient to show that there was a "mutual, open and current account" between the parties as urged on behalf the defendants. (The second and third contentions were overruled on consideration of the facts and the judgment proceeded.) On the above findings I would dismiss Appeal No. 375 of 1925 with costs. As regards the second suit, the dispute between the parties centred chiefly round the question of the necessity of notice before the expiry of five years and the enhanced rent claimed by the plaintiff after that period. The amount claimed on account of arrears of rent upto the expiry of five years is not now disputed. As to the first point, the defendant's position was that as no lease was executed and registered as originally contemplated the defendants became 'tenants from year to year' and were entitled to six months' notice terminating with the end of the year on the principle laid down in S. 106, T. P. Act, and as no such notice was given prior to June 1922 they were entitled to retain possession at any rate for another year, i. e., up to 31st May 1923. They contended that the letter dated 20th February 1917, relied upon by the plaintiff in which the terms of the oral agreement were recited was inadmissible in evidence owing to want of registration. They disputed their liability to pay enhanced rent on the ground that the plaintiff had failed to prove any loss sustained by him.

The position taken up by the defendants on the question of notice seems to my mind clearly untenable. It is common ground that there was at the outset an oral agreement between the parties as regards the lease of the Mills. It is also not disputed that the Transfer of Property Act not being in force in this Province, even an oral agreement of lease can be binding and that the execution of a formal document or its registration is not essential to its validity. In the present instance it was, no doubt, at first contemplated that a formal document should be executed and registered; but it does not appear that the lease was in any way dependent on the execution of such a document. The defendants were in fact let into possession at once and neither party apparently troubled about the matter for about three years. It was in the notice given on 20th July 1920, that the plaintiff apparently complained for the first time about the defendants' failure to execute a lease. The defendants themselves then stated in their reply to this notice that owing to the friendly relations which existed between the parties at first the idea had been abandoned. The position now taken up by defendants is obviously inconsistent with this reply. If the execution of a document were considered essential, the plaintiff could not have been expected to wait for three years and I see no reason to doubt that the defendants' reply represented the correct position.

The letter (Ex. P-2) relied upon by the plaintiff seems to be clearly in the nature of a memorandum. A perusal of the letter will suffice to show that it did not include all the terms and that a lease embodying all the terms was to be executed later. This letter cannot therefore attract the provisions either of S. 92, Evidence Act or of S. 49, Registration Act. It was urged that the present tense is used in the letter and that it does not merely recite what had happened in the past. But the letter must be read as a whole and it seems to my mind quite clear on such perusal that the letter is nothing more than a memorandum reciting the more important terms orally agreed upon. The letter Ex. P-2, shows that the term of the lease was five years. A feeble attempt was made by the defendants in the course of the evidence to prove that there was an understanding between the parties that the lease should be renewed for another five years unless six months' notice was given earlier. But no plea of the nature was put forward in the written statement and no mention of any such understanding is to be found in the memorandum Ex. P-2. It was urged that the defendants Hira Singh and Sundar Singh have deposed to this fact in the course of their evidence in Court while the plaintiff has not ventured to go into the witness-box to rebut their statements. But as no plea of this nature was put forward in the written statements and the plaintiff had already closed his case, there was no occasion for him to go into the witness box.

In view of the above finding no question of a "year to year" tenancy arises and it is unnecessary to discuss the principle as to notice embodied in S. 106, T. P. Act, on which the defendants have sought to rely. The idea of the execution and registration of a formal lease having been abandoned, the oral agreement arrived at between the parties stood and the term of the lease according to that agreement was five years. The lease being for a fixed term the defendants were clearly bound to vacate the Mills on the expiry of the term without any notice (cf. S. 111 (a), T. P. Act.) The next question for decision is that of damages. The learned Senior Subordinate Judge has found that the defendants' conduct in refusing to vacate the premises even on the exiry of the period of five years was "contumacious," and I have no hesitation in agreeing with this finding. Long before the expiry of the terms the relations between the parties had become strained and litigation had commenced since March 1921. Two suits for ejectment had already been instituted and defendants must have been fully aware that there could be no question of any renewal of the lease in the circumstances. The plea as to renewal of the lease raised by the defendants therefore seems to be frivolous. I have already held above that the defendants were bound to vacate on the expiry of the fixed term without notice; but even if any notice had been necessary they had ample notice ever since the commencement of the litigation in 1921.

The defendants' having "held over" contumaciously the plaintiff was clearly entitled to damages. The learned counsel for the defendants has urged that S. 73, Contract Act, lays down the only rule for assessing compensation for the breach of a contract and as the plaintiff has failed to prove any actual loss he is not entitled to any damages over and above the rent originally agreed upon. (His Lordship considered the evidence and held that the plaintiff had failed to prove the actual loss and that the lower Courts' dismissal of his claim for damages at Rs. 10,000 per mensem was correct and proceeded). The learned Subordinate Judge has assessed the damages at double the rent on the authority of *Ganga Ram* v. *Mt. Shib Devi* (1) and *Pirbhu Dial* v. *Ram Chand* (2). But the learned counsel for the defendants has urged that these authorities do not lay down the correct law, and that the plaintiff having failed to prove any further loss sustained by him on account of defendant's failure to vacate the premises, the proper measure of damages was the rent agreed upon between the parties and nothing more. In support of this contention the learned counsel has chiefly relied upon *Guru Shantappa* v. *Mallava* (3) and *Sundermull* v. *Ladhuram Kaluram* (4). The former ruling has no bearing on the present case, as no question of any damages for "contumacious" holding over of a tenancy arose in that case. In *Sundermull* v. *Ladhuram Kaluram* (4), the plaintiff claimed from a tenant, who had "held over" for a certain period after notice, damages under two heads viz: (i) mesne profits, (ii) rent at a higher rate which he had expected to derive from the new buildings which he intended to construct on the premises occupied by the tenant. The claim under (i) was not disputed. As regards (ii), it was held that no claim for damages on the basis of a breach of contract was maintainable, but that the claim could be treated as one in tort. It was held further that the measure of damages even in cases of tort is the loss which flows directly and in the usual course of things from the wrongful act. It may, however, be pointed out that the tenant in that case had refused to vacate on the ground that he was a lessee for a period of three years and though that claim failed there was no definite finding that he had held over wilfully and contumaciously' as in the present case. Consequently the question as to what is the proper measure of damages in cases where a tenant " contumaciously holds over" did not arise and was not discussed in that case.

The rulings on which the learned Subordinate Judge has relied are, on the other hand, directly in point and the law as laid down therein has been consistently followed in this province for a number of years: see in addition to the rulings relied upon by the learned Subordinate Judge *Madan Mohan Lal* v. *B. Barooah & Co.* (5), *Rure Khan* v. *Ghulam Mahomed* (6) and *Mul Raj* v. *Indar Singh* (7). The rule according to which double the normal rent is taken as a suitable measure of damages in such cases is taken from English Law. The matter is, no doubt, regulated by Statute in England (see 4 Geo. II, Ch. 28), but the rule has been held to be taken to be ordinarily a suitable guide in such cases in this Province. The rule is, of course, not inflexible and less or more may be awarded by way of damages according to circumstances: cf. *Mul Raj* v. *Indar Singh* (7); also *Narain Dass*

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(1) [1898] 33 P R 1898.

(2) [1904] 5 P R 1904=42 P L R 1904.

(3) A I R 1921 Bom 27=63 I C 240=45 Bom 1197.

(4) A I R 1924 Cal 240=83 I C 757=50 Cal 667.

(5) [1918] 70 P R 1918=44 I C 859.

(6) A I R 1924 Lah 643=75 I C 1034.

(7) A I R 1928 Lah 554=109 I C 90=9 Lah 576.

v. *Dharm Dass* (8), if there is evidence to justify such a course. There is no doubt that the defendants were making good profit and the contumacious manner in which they refused to vacate the premises even after the expiry of five years and resisted the present suit as long as they could by setting up frivolous pleas, such as that of a yearly tenancy, appears to have been due to this fact. Although the plaintiff failed to produce satisfactory evidence to prove the profit he could have made by working the mill, it may be fairly assumed in the circumstances that the profits would have been substantial. There had been already litigation between the parties before the expiry of the term of five years and the defendants must have foreseen the possibility of heavy damages being demanded from them; yet they chose to continue to occupy the premises and even a notice from the plaintiff threatening to charge rent at the rate of Rs. 10,000 per mensem failed to have any effect. In view of all the circumstances of this case I see no good reason to hold that the amount of damages awarded by the Subordinate Judge is excessive. No other points have been pressed. I would accordingly dismiss these appeals (Civil Appeals Nos. 374 and 376 of 1925) with costs.

Broadway, J.—I concur.

M.N. *Appeals dismissed.*

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(8) A I R 1932 Lah 275=138 I C 290=13 Lah 213.

✻ A. I. R. 1933 Lahore 65

JAI LAL, J.

Ram Chand and *others*—Defendants—Appellants.

v.

Ahmad Yar and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1282 of 1931, Decided on 26th October 1932, against order of Dist. Judge, Multan, D/- 22nd April 1931.

Provincial Insolvency Act (1920), S. 4—Insolvent cannot institute suit in ordinary Courts against receiver challenging liability of his property to be sold.

A stranger who claims the property taken possession of by the official receiver both against him and the insolvent can institute a suit to establish his right independently of S. 4. But the insolvent himself if amenable, so far as the question of title to the property or its liability to be sold is concerned, only to the jurisdiction of the insolvency Court. He cannot invoke the aid of the ordinary Courts to establish his right against the official receiver. [P 65 C 2]

Hargopal—for Appellants.

Judgment

This is an appeal by the Official Receiver of Multan against the order of the District Judge of Multan, remanding the respondent's suit under O. 41, R. 23. The brief facts are these: The respondent was adjudicated as insolvent and the Official Receiver took possession of his assets which included landed property. The respondent apparently is an agriculturist as that term is defined in the Punjab Alienation of Land Act. After the land had been sold by the Official Receiver the respondent filed a suit in the Court of the Senior Subordinate Judge of Multan for declaration that the land was not saleable by the Official Receiver and for other reliefs. The only question urged before me by the appellant's counsel is that the suit was not maintainable and that the only remedy of the respondent was to move the insolvency Court to obtain relief, if any, that he considered himself to be entitled to. The respondent has not appeared before me and consequently I have not had the benefit of hearing arguments in support of the other side of the case. I have however independently tried to find some authority on the point involved. The learned counsel for the appellant has not been able to cite a single authority which applies to the present case and I myself have not been able to discover any either in support of the appellant or of the respondent. There appears to be no case even under the English law directly bearing on the subject. The question therefore is one of first impression and after giving my careful consideration I have reached the conclusion that this appeal must succeed. It is true that a stranger who claims the property taken possession of by the Official Receiver both against him and the insolvent can institute a suit to establish his right independently of S. 4, Provincial Insolvency Act, as there is some authority which has laid it down that such a suit is maintainable. But in my opinion the general scheme of the Provincial Insolvency Act is such that the insolvent himself is amenable, so far as the question of title to the property or its liability to be sold is concerned, only to the jurisdiction of the insolvency Court. He cannot invoke the aid of the ordinary Courts to establish his right against the Official Receiver. Indeed in the eyes of law he has no interest left in his assets which vest in the Official Receiver. In this view of the matter this appeal is accepted and the order of the District Judge remanding the case is set aside and the plaitiff's suit dismissed with costs throughout.

R.K. *Appeal accepted.*

⁎ A. I. R. 1933 Lahore 66

HARRISON AND ADDISON, JJ.

Bhagwan Singh and *another*—Defendants—Appellants.

v.

Mt. Ishar Kuar and *other* —Plaintiffs —Respondents.

First Appeal No. 2759 of 1926, Decided on 8th November 1932.

⁎ **(a) Civil P. C. (1908), S. 11—"Litigating under same title" explained—Subject-matter of both suits need not be same.**

The phrase "litigating under same title" means litigating in the same capacity. If the parties are litigating in the same capacity it does not matter whether the transfer attacked in one case is a mortgage and in the other case a gift. The question is whether the matters directly and substantially in issue in the second suit were directly and substantially in issue in the previous suit. The subject-matters of the two suits need not be the same. [P 67 C 1, 2]

⁎ **(b) Civil P. C. (1908), S. 11—Res judicata applies to parties and their privies—But privy must claim under title arising subsequently to commencement of first suit.**

Res judicata not only affects the parties but their privies, that is, persons claiming under them. But in order that a decision in a suit between *A* and *B* may operate as res judicata in a subsequent suit between *A* and *C* it is necessary to show that *C* claims under *B* by a title arising subsequently to the commencement of the first suit. Thus a purchaser, mortgagee, lessee or donee of a property is not estopped by a decree obtained in a suit against the vendor, mortgagor, lessor or donor commenced after the date of the purchase, mortgage, lease or gift: 59 *I. C.* 808, *Foll*; 26 *P. R.* 1893 and 51 *P. R.* 1894, *Rel. on.* [P 67 C 2]

(c) Custom (Punjab) — Custom denied in riwajiam of 1865 and Mr. Kennaway's Customary Law of 1913—Onus is heavy on persons asserting custom—Right to make gift of husband's estate held not proved.

Where a custom is asserted that if a Jat widow remains in possession of her deceased husband's estate and lives in his house, she does not forfeit her rights even if she remarries or keeps a paramour and that she can validly make a gift of her late husband's estate to a son from her new husband or paramour in cases where there are no collaterals, but if such custom is denied in the riwajiam of 1865 and in Mr. Kennaway's Customary Law of 1913, the onus is heavy on the persons asserting the custom to show that the gift by such a widow is valid as these riwajiams afford strong evidence that the gift is invalid. [P 68 C 1]

Kishan Dayal and *Bhagwat Dayal*—for Appellants.

Mehar Chand Mahajan, *Partab Singh* and *Ajit Parshad*—for Respondents.

Addison, J.

Mt. Ishar Kaur and her sons instituted this suit for possession of 639 kanals 19 marlas of land along with some houses and trees, or in the alternative for a declaration that a deed of gift of the land and houses mentioned above, dated 2nd March, 1918, executed by Mt. Hukmi, defendant 1, in favour of Hira Singh, defendant 3, should not affect the plaintiff's reversionary rights after the death or remarriage of Mt. Hukmi. Bhagwan Singh was impleaded as defendant 2. Mt. Hukmi died on 5th June 1926 shortly before judgment was delivered.

The case for the plaintiffs was that the property originally belonged to one Moti, who died in 1886 and who was succeeded by his widow Mt. Hukmi, that Mt. Ishar Kaur, plaintiff 1, was the daughter of Moti, and that she and her sons, plaintiffs 2 to 4, were reversionary heirs entitled to question alienations of the estate made by the widow who was not a full owner. It was said that Bhagwan Singh and Mt. Hukmi contracted an illicit intimacy shortly after Moti's death and that Hira Singh defendant was their son. It was contended that Mt. Hukmi had no right to make a gift in his favour and that it was not binding on the plaintiffs. It was further alleged that Mt. Hukmi had on a previous occasion mortgaged 398 kanals 3 marlas of the land in suit to defendant 2 Bhagwan Singh for Rs. 5,500. The plaintiffs instituted a suit on 25th April 1911 attacking this alienation and they were finally successful in obtaining a decree to the effect that the mortgage in question would not affect their reversionary rights except to the extent of Rupees 1,000, that sum representing a former encumbrance. In that suit the defence was that Moti was not a Jat but a Sadh, that plaintiff 1 was not the daughter and plaintiffs 2 to 4 were not the grandsons of Moti and that the plaintiffs had no right to impeach any alienation by the widow. All these defences were repelled.

The defendants have again set up these same defences and they have further urged that the gift dated 2nd March 1918 was one within the power of Mt. Hukmi. The plaintiffs pleaded that the defences urged in the previous suit could not be urged again by reason of res judicata. On these pleadings the only issues which need be mentioned are the following: (3) Was Moti Das a Jat and did he follow agricultural custom ? (4) Is plaintiff 1 the daughter and are plaintiffs 2 to 4 the grandsons of Moti Das ? (5) Have plaintiffs a right to impeach the alienation of the property in suit by defendant 1 ? (6) Is the gift dated 2nd March 1918 a valid one ? (9) Is the decision in the suit *Mt. Hukmi, appellant,* v. *Mt. Ishar Kaur,* decided by the District Judge on 14th April 1924 res judicata in the present suit ? The learned Senior Subordinate Judge First Class has held that issues 3, 4 and 5 are res judicata by reason of the previous litigation and he has further held that the gift in question has not been proved to be valid according to agricultural custom. As Mt. Hukmi had died shortly before judgment he gave the plaintiffs a decree for possession of the land in suit, subject of course to payment of the sum of Rs. 1,000 made payable by the decree in the first suit. Against this decision the defendants have appealed.

Before us two question only were agitated, namely, (1) whether the defendants were debarred from raising the defences mentioned in issues 3 to 5 by reason of the decision in the first case and (2) whether the gift to Hira Singh in 1918 was valid. It was stated by the learned counsel for the appellants that the matters covered by issues 3 to 5 were fully in issue in the first suit. He contended however that the parties were not litigating under the same title in the two suits in that the title litigated in the first suit was the title of the mortgagee while in the second suit the title litigated was the title of the donee. To this it was replied that the title litigated in the suits was not that of the mortgagee or of the donee but in both cases it was the title of the donor-mortgagor. It seems to me that the argument advanced on behalf of the appellants has no force. The contention appears to mean that the subject-matters of the two suits are not the same. That of course does not matter. S. 11, Civil P. C., runs:

> "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such issue has been subsequently raised and has been heard and finally decided by such Court."

It has always been held that the phrase "litigating under the same title" means litigating in the same capacity. If the parties are litigating in the same capacity it does not matter whether the transfer attacked in one case is a mortgage and in the other case a gift. The question is whether the matters directly and substantially in issue in the second suit were directly and substantially in issue in the previous suit. This is admittedly the case here.

Further, res judicata not only affects the parties but their privies, that is, persons claiming under them. But in order that a decision in a suit between *A* and *B* may operate as res judicata in a subsequent suit between *A* and *C*, it is necessary to show that *C* claims under *B* by a title arising subsequently to the commencement of the first suit. Thus a purchaser, mortgagee, lessee or donee of a property is not estopped by a decree obtained in a suit against vendor, mortgagor, lessor or donor commenced after the date of the purchase, mortgage, lease or gift. This principle is discussed in *Madu* v. *Umar Din* (1) and *Sham Sunder* v. *Bhairon Pershad* (2), where a quotation from Mr. Bigelow's treatise on Estoppel is given, namely:

> "An assignee is not estopped by judgment against the assignor in a suit by or against the assignor alone, instituted after the assignment was made, though if the judgment had proceeded after the assignment the case would have been different . . . . judgment bars those only whose interest is acquired after the suit excepting of course the parties."

A case practically on all fours with the present case is reported as *Indraj* v. *Ranji Lal* (3). There *N*, the widow of *H*, adopted one *J*. Plaintiffs, claiming as reversioners of *H*, brought a suit for a declaration that the adoption should not affect their reversionary rights in the estate of *H* and obtained a decree. Subsequently *N* made a gift in favour of *I*. Plaintiffs again brought a declaratory suit contesting the validity of the gift. It was held that the question of plaintiffs' relationship to *H* was res judicata in the subsequent suit, inasmuch as *I* was claiming under *N*, who was a party to the previous suit, and was bound by the decree passed in that suit. In the case before us the defendants have pleaded that the plaintiffs were not the daughter and grandsons of Moti, that Moti was not a Jat who followed agricultural custom and that the plaintiffs therefore had no right to impeach the alienation in question. These matters have already been decided against Mt. Hukmi from whom Hira Singh donee derives title and under whom he claims. It follows that it was properly decided that issues 3 to 5 could not be raised again by reason of res judicata.

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(1) [1893] 26 P R 1893.
(2) [1894] 51 P R 1894.
(3) [1921] 59 I C 808.

It was further argued on behalf of the appellants that Mt. Hukmi was only a formal party in the first suit and that therefore her assignee was not bound. This argument was also taken in *Indraj* v. *Ranji Lal* (3). The fact is that the action brought by the plaintiffs in the first suit challenged the right of the widow to make an alienation except for the usual necessity as she held only a widow's estate. Mt. Hukmi was a defendant. The relationship of the plaintiffs, etc., was denied. These matters therefore became matters of controversy between the plaintiffs on the one side and the defendants on the other. The issues were tried and finally determined by the Court with the result that the plaintiffs were held to be the daughter and grandsons of Moti, that Moti was a Jat and followed agricultural custom and that the plaintiffs could impeach the alienation of the widow. Obviously Mt. Hukmi could have preferred an appeal against this judgment as her rights in the property were effected. It follows, as already said, that the trial of these issues is clearly barred by virtue of S. 11, Civil P. C. It is impossible to hold as advocated by the learned counsel for the appellants that Hira Singh must be held bound by the decision in the first suit only to the extent that the widow had no power to mortgage the exact area in suit in the first case. As already pointed out, this is merely an attempt to argue that the subject-matter of the two suits must be exactly the same.

The only other point argued was issue 6 as to whether the gift dated 2nd March 1918 was a valid one. A large number of witnesses have been examined by the defendants. They have asserted that if a Jat widow remains in possession of her deceased husband's estate and lives in his house, she does not forfeit her rights even if she remarries or keeps a paramour and further that she can validly make a gift of her late husband's estate to a son from her new husband or paramour in cases where there are no collaterals. It is admitted that these witnesses are deposing to the existence of a custom which is denied in the riwajiam of 1865 and in Mr. Kennaway's Customary Law of 1913. The onus was thus heavy on the defendants to show that the alleged gift by Mt. Hukmi is valid as these riwajiams afford strong evidence that the gift was invalid. We have been taken through the evidence and, in our opinion, it is worthless. There are some 76 witnesses on behalf of the defendants and 39 on behalf of the plaintiffs. There are influential people appearing as witnesses on both sides. As stated by the learned Subordinate Judge, First Class, it is not difficult to procure witnesses on either side in such cases. An attempt was made to prove two instances of the alleged custom. The alleged donee in the case of one of them is still alive and was not produced. The other instance deposed to was referred to by only a few witnesses and no attempt was made to produce copies of the revenue entries regarding it or of the revenue mutations effecting it. It is sufficient to say that the evidence adduced does not rebut the strong presumption arising from the statements of custom recorded in the riwaj-i-ams.

No other point was argued. We therefore dismiss the appeal with costs.

R.K. *Appeal dismissed.*

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* A. I. R. 1933 Lahore 68

TAPP, J.

Chandu Lal-Rati Ram—Defendant—Appellant.

v.

Molu Mal-Benarsi Das—Plaintiff—Respondent.

Second Appeal No. 405 of 1932, Decided on 2nd November 1932, against decree of Addl. Dist. Judge, Hissar, D/- 24th November 1931.

*** Hindu Law—Joint family—Business by elder brother—No presumption that younger brother was his partner.**

The mere fact that a person is the younger brother of the person carrying on business and that they constituted a Hindu joint family raises no legal presumption that the former is a partner in a business carried on under the names of his father and elder brother. The onus of proving it is on the person alleging him to be a partner. [P 69 C 1]

Nanak Chand Pandit—for Appellant.

Shamair Chand and *Muhammad Amin*—for Respondent.

Judgment

The firm of Molu Mal-Banarsi Das brought the suit out of which this second appeal has arisen against the firm of Chandu Lal-Rati Ram for recovery of Rs. 868 being principal and interest due on account of the price of cotton seeds. Rati Ram and Khushi Ram were alleged to be partners in the firm. Rati Ram did not appear while Kushi Ram denied that he was a partner. The trial Court dismissed the suit holding that there was no satisfactory evidence to show that the amount claimed was due and that Khushi Ram was a partner in the firm of Chandu Lal-Rati Ram. On appeal the learned Additional District Judge has reversed these findings and granted the plaintiff firm a decree against which this second appeal has been preferred.

The lower appellate Court in setting out the points for determination has correctly propounded the question whether Rati Ram and Khushi Ram were partners in the firm of Chandu Lal-Rati Ram. But in deciding the point it has wrongly held that it was for Khushi Ram to prove that he was not a member of the said firm. The onus was on the plaintiff firm and rightly so, to prove that Kushi Ram was a partner in the firm. The mere fact that Khushi Ram is the younger brother of Rati Ram and both are the sons of Chandu Lal, and that they constituted a Hindu joint family raises no legal presumption that Khushi Ram is a partner in a business carried on under the names of his father and elder brother. I may observe that there is no proof on the record that Khushi Ram is the younger brother of Rati Ram. As remarked in para. 234 (4) on p. 263 of Mulla's Principles of Hindu Law, 7th Edn., 1931, there is no presumption that a business carried on by a member of a joint family is a joint family business.

Mr. Shamair Chand, the learned counsel for the plaintiff-respondent firm, admits that the onus lay on the plaintiffs to prove that Khushi Ram was a partner in the firm and has asked me to go through the evidence and decide whether the onus has been discharged. I have done so and agree with the trial Court that the partnership was not established. The question as to whether the amount claimed is due is purely one of fact which cannot be disturbed in second appeal. The lower appellate Court allowed interest in accordance with mercantile usage and as the amount involved is so petty, being only a few rupees, it is not worthwhile considering it. For the above reasons I accept the appeal in part by discharging Khushi Ram from liability under the decree which will affect Rati Ram alone. I leave the parties to bear their own costs.

R.K. *Appeal partly accepted.*

A. I. R. 1933 Lahore 69

TAPP, J.

Chuni Lal—Appellant.

v.

Mt. Attar Kaur and *another*—Respondents.

Misc. Second Appeal No. 723 of 1930, Decided on 21st November 1932, against order of Dist. Judge, Amritsar, D/- 23rd February 1932.

(a) Custom (Punjab)—Widow—Re-marraige—Life interest is forfeited—Exception among Jats.

In the absence of custom re-marriage of a widow causes a forfeiture of her life interest in her first husband's estate which then reverts to the nearest heir of her husband. An exception to this rule is however recognized among Sikh Jats of the Punjab Province where the widow marries her first husband's brother. [P 70 C 1]

(b) Custom (Punjab)—Widow—Re-marriage—Deceased leaving two widows—Re-marriage by one—Her name retained in revenue records—She is not in adverse possession to her co-widow—Reversioner's rights are not affected.

A co-widow in consequence of her re-marriage forfeits her right to take the property of the other co-widow by survivorship on the death of the latter. It therefore reverts to the reversioner. [P 70 C 2]

Where a person dies leaving two widows and one of them re-marries the whole estate of the deceased passes to the other widow and the mere retention of the re-married widow's name in the revenue records would not place her in adverse possession of her share *qua* the co-widow and owing to her intervening between the estate and the reversioner the latter's rights would not be affected; *A. I. R.* 1929 *Lah.* 327, *Dist.* [P 70 C 2]

Harnam Singh—for Appellant.

Shambu Lal Puri—for Respondents.

Judgment.—The question arising for determination in this second appeal is whether certain agricultural land vests in the Official Receiver as the representative of Teja Singh who was adjudicated an insolvent on 25th January 1927 or whether it is the property of Mt. Atar Kaur, respondent-objector. The property originally belonged to one Thakur Singh who died prior to 1915 leaving two widows Mt. Atar Kaur (respondent) and Mt. Indar Kaur and a son named Chattar Singh. The last named died in 1915 and the estate of Thakur Singh was mutated in favour of the two widows jointly. The insolvent Teja Singh is a cousin and reversioner of Thakur Singh and married his widow Mt. Atar Kaur on 30th November 1915. Two days prior to this marriage, i. e., on 28th November, Teja Singh executed an agreement whereunder he abandoned his reversionary rights in the estate of Thakur Singh in consideration of his marriage with Mt. Atar Kaur. Mt. Indar Kaur, the other widow, having died on 22nd December 1926 the whole property devolved by survivorship on Mt. Atar Kaur who is shown as the owner and in possession in the revenue papers. On the Official Receiver proceeding against the property Mt. Atar Kaur preferred an objection and the insolvency Court upheld the objection on the ground that Mt. Atar Kaur having married the brother of her deceased husband (which he is not) had not forfeited her life estate. The agreement mentioned above was also relied on as depriving Teja Singh of his reversionary right.

On appeal by the Official Receiver the learned District Judge affirmed the order of the insolvency Court but on somewhat different grounds. Now on the death of Thakur Singh his two widows succeeded jointly and on the death of Mt. Indar Kaur, the respondent, Mt. Atar Kaur would take the whole estate by surviorship provided her re-marriage with Teja Singh did not entail forfeiture of her own share: paras. 12 and 13 of Rattigan's Digest, Edn. 11. In para. 32 of the Digest, it is remarked that in the absence of custom the re-marriage of a widow causes a forfeiture of her life interest in her first husband's estate which then reverts to the nearest heir of her husband. An exception to this rule is now well recognised among Sikh Jats of the Province where the widow marries her first husband's brother, but this exception would not govern the present case as Teja Singh is the cousin of Thakur Singh. The learned District Judge on the authority of *A. I. R.* 1929 *Lahore* 327, held that where a widow after remarriage continues in possession of her deceased husband's land and is entered in the revenue papers as in possession thereof, she acquires by adverse possession absolute title to the widow's estate. Consequently as the proceedings against Mt. Atar Kaur commenced more than 12 years after her remarriage, she had acquired adverse possession of the widow's estate against Teja Singh and the Official Receiver who now represents him. The correctness of this view is however open to doubt as it seems to overlook the fact that in the presence of the other widow Mt. Indar Kaur the forfeiture arising out of the remarriage of Mt. Atar Kaur could not affect the reversionary rights of Teja Singh. The whole estate of Thakur Singh passed to Mt. Indar Kaur and the mere retention of Mt. Atar Kaur's name in the revenue records would not place her in adverse possession of her share *qua* the co-widow and owing to her intervening between the estate and the reversioner the latter's rights would not in my judgment be affected. Assuming however that Mt. Atar Kaur for the reasons stated remained in adverse possession of her share *qua* both Mt. Indar Kaur and Teja Singh, I fail to see how this possession can extend to the share of Mt. Indar Kaur who as mentioned above only died in 1926. The conclusion reached by the learned District Judge as to Mt. Atar Kaur being entitled to retain this share is in my opinion wrong.

In view however of the agreement entered into by Teja Singh and which I think should be enforced, I do not consider it necessary to definitely decide whether as against him Mt. Atar Kaur has acquired adverse possession in respect of her half share. Teja Singh, and as representing him the Official Receiver have no claim to this half of the property. As regards the other half which was unaffected by the agreement it is clear that Mt. Atar Kaur in consequence of her re-marriage forfeited her right to take this by survivorship on the death of, Mt. Indar Kaur and it therefore reverted to Teja Singh and through him now vests in the Official Receiver. I accept the appeal to the above extent with half costs throughout in favour of the Official Receiver.

R.K. *Appeal allowed.*

✻✻ A. I. R. 1933 Lahore 70

HARRISON AND ADDISON, JJ.

Baij Nath and *others*—Defendants—Appellants.

v.

Rattan Lal—Plaintiff — Respondent.

First Appeal No. 2798 of 1928, Decided on 16th November 1932, against decree of Sub-Judge, First Class, Delhi, D/- 5th November 1928.

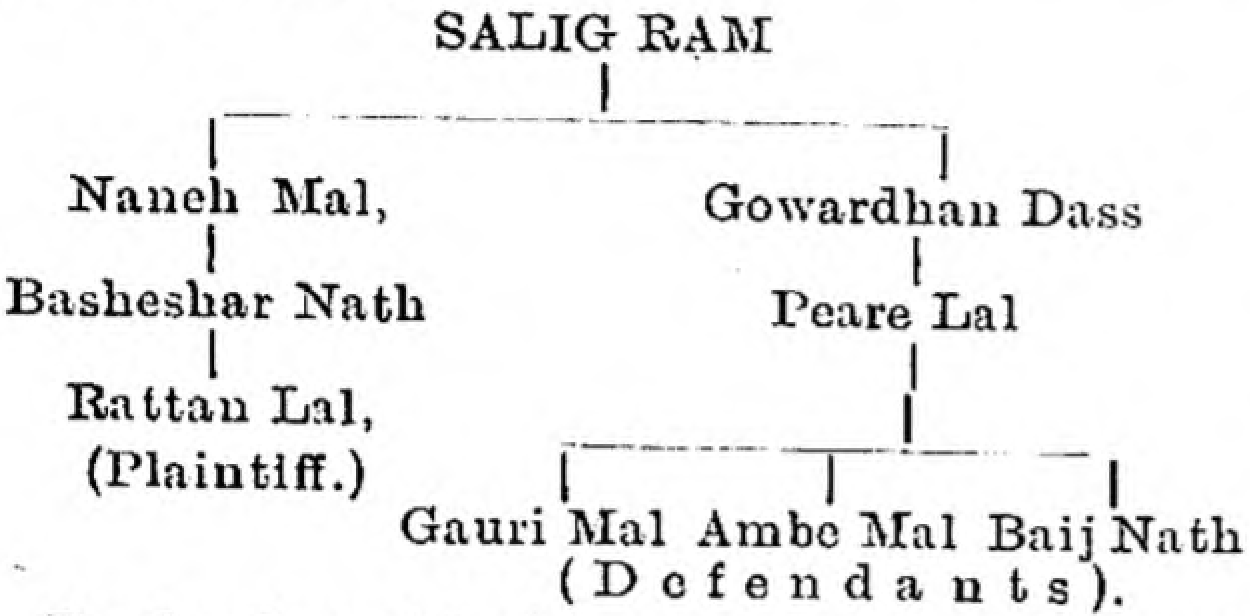
✻✻ Hindu Law—Adoption—Widow—Power given by will—Boy to be chosen by four executors—Boy chosen by one executor only—Adoption is invalid.

Where the testator gives the widow power to adopt a son to himself provided that the boy has been chosen from a good family in the brotherhood by the executors and a probate of the will is taken out by all the executors, the adoption of a boy chosen by only one of them without the concurrence of the others is invalid and against the authority of the deceased husband: *A. I. R.* 1915 *P. C.* 7, *Dist.*; 12 *M. I. A.* 350 and *A.I.R.* 1930 *P. C.* 242, *Rel. on.* [P 72 C 2; P 73 C 1]

Kishan Dayal, Bishen Narain and *Bhagwat Dayal*—for Appellants.

Nawal Kishore, Ajit Parshad and *Mehar Chand Mahajan* — for Respondent.

Addison, J.—The following pedigree-table is necessary in order to understand the facts of this case:



Basheshar Nath was the brother of the three defendants in the suit, i. e.. Peare Lal was his father. He was however adopted by Naneh Mal, who separated from Peare Lal. This adoption was contested in the trial Court, but it was admitted before us that he was duly adopted. The minor plaintiff Rattan Lal claims to be the adopted son of Basheshar Nath. He was found by the trial Judge to be the validly adopted son of Basheshar Nath and a preliminary decree was therefore granted him for partition of his half share in the suit property as well as for accounts. Against this decision the defendants have preferred this appeal. The only questions argued before us in the appeal were the factum and the validity of the adoption of Ratan Lal by Basheshar Nath's widow. Basheshar Nath died of cholera on 26th April 1909. He left a will dated 25th April 1909, by which he appointed four executors, namely, Peare Lal, his natural father, Peshi Mal, Mul Chand and Bashambar Nath. In para. 5 of that will he stated as follows:

> "After my death the aforesaid executors shall be competent to choose a boy from a good family in the brotherhood and have him adopted by my wife on my behalf."

In para. 5 of the plaint it is alleged that, according to the directions of Basheshar Nath contained in the will Mt. Sarswati, his widow, adopted the plaintiff in 1911 while the ceremonies in connexion with the adoption were also performed in 1913. In the pleas the allegations contained in para. 5 of the plaint were totally denied. Further plaintiff's counsel stated before issues on 3rd December 1927, that the plaintiff was adopted in or about September 1911 by the widow. It is obvious that para. 5 of the plaint is badly worded for it does not make clear how the plaintiff could have been adopted in 1911 and the ceremonies performed in 1913. In particular it is not stated when the all important ceremony of giving and taking was performed: *Balak Ram High School, Panipat* v. *Nanunmal* (1). The plaintiffs' witnesses have deposed that Piare Lal brought Ratan Lal when an infant some ten months old from Matan and kept him in the house until the formal giving and taking took place some two years latter. This, of course, means that there was no adoption in 1911, but that the adoption took place in 1913; for without giving and taking there can be no adoption. On the other hand, Peare Lal applied in the Court of the District Judge, Delhi, on 27th October 1911, to be appointed the guardian of Ratan Lal, adopted son of Basheshar Nath. It was stated in this petition that the adoption was completed on 25th September 1911, a fact now admitted to be incorrect. This petition was not decided on the merits, but was allowed to be dismissed in default. There are discrepancies in the statements of the witnesses as to who placed the child in the lap of Basheshar Nath's widow and on other points. But in my opinion, the evidence is sufficient to establish that the plaintiff was taken to the joint house of Peare Lal and the widow of Basheshar Nath, when he was an infant and that the formal adoption, evidenced by the giving and taking took place in 1913 in the presence of members of the brotherhood. I therefore hold the factum of the adoption proved and consider that the words about adoption in 1911 in para. 5 of the plaint must be freely construed to mean that the boy was brought to the house in 1911, while the formal adoption took place in 1913. This may also explain why Peare Lal did not pursue his petition to be appointed guardian of the child, but allowed it to be dismissed in default.

The much more difficult question of the validity of the adoption must now be decided. Three of the executors named in Basheshar Nath's will applied for probate of that will in the Court of the District Judge, Delhi. Peare Lal, the fourth executor filed a caveat and resisted the grant of probate. He however added that if probate was granted it should be granted to him jointly with the three executors applying for probate. This was agreed to. After a strenuous contest the validity of the will was upheld and probate granted to all four executors on 30th July 1910. It is in evidence that after that the executors instituted suits, took accounts and prepared lists of property. Two of the executors Peshi Mal and Basheshar Nath (P. Ws. 13 and 14) have stated that afterwards they left the management of the estate to Peare Lal. Further, Peshi Mal has stated that he was present at the adoption of the child and that it was Peare Lal who, in accordance with the provisions of the will, brought the plaintiff from Matan and had him adopted by the widow. But there is nothing in his evidence to the effect that he was consulted in advance or that he agreed to the adoption of this boy, unless this can be presumed from his presence at the giving and taking. The other executor Bashambar Nath was not present at the adoption and has not stated that he was consulted about the choice of this boy or that he agreed to it. He too has clearly said that it was Peare Lal who chose the boy from the members of his own family. There is no evidence of any kind about the fourth executor, Mul Chand, and it is not known whether he was present, whether he was consulted before the adoption, whether he knew about it or whether he acquiesced in it. The other witnesses emphasize the fact that it was Peare Lal alone who had the boy adopted.

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(1) A I R 1930 Lah 579=128 I C 511=11 Lah 503.

Sundar Singh (P. W. 16) has said that Peare Lal brought him to be adopted by the widow, as the will directed Peare Lal and the widow, to make the adoption. Rangi Mal (P. W. 17) deposed that Peare said that he had brought the boy. Panna Lal (P. W. 20) stated that the plaintiff was adopted, having been brought by Peare Lal according to the wishes of Basheshar Nath. Mani Mal (P. W. 21) said that Peare Lal brought a boy who was adopted. Even Sukhan Lal (P. W. 30), who is the father of the plaintiff, had deposed that it was Peare Lal who brought him for adoption and had him adopted by the widow. He too, makes no mention of the other executors. Another very important fact in this connection is the will of Mt. Saraswati, widow of Basheshar Nath, dated 30th October, 1920, in which occur the following words:

> "After the death of my husband, I the testator, according to his instructions and with the consent of Peare Lal, my husband's uncle, have adopted Rattan Lal in the name of my husband."

There is no escape therefore from the conclusion that the only one of the executors who chose the boy and had him adopted by the widow was Peare Lal. Though the implied consent of one of the other executors, namely, Peshi Mal, may be deduced from his presence at the giving and taking it is clear that he took no active part of any kind. As regards Mool Chand there is no evidence of implied or expressed consent and the same remark is true of Bishambar Nath whose own statement as a witness makes it clear that he had nothing to do with it. It remains therefore to find out the meaning of para. 5 of Basheshar Nath's will. The words have been given above. In my judgment they give the widow power to adopt a son to Basheshar Nath provided that the boy has been chosen from a good family in the brotherhood by the executors. At the time of Basheshar Nath's death his wife was 15 or 16 years old and this restriction upon her power of adoption was obviously made in the interest of her husband so that a proper child should be adopted into the family. Some argument was addressed to us on behalf of the appellants that the power of adoption was given jointly to the executors and the widow, but I do not think that the clause bears that construction.

In *Pudum Singh* v. *Koeroodey Singh* (2) their Lordships of the Privy Council said that an authority conferred upon a widow to adopt by a husband must be strictly carried out as the adoption is for the benefit of the deceased husband and not for that of the widow. Their Lordships said the same thing in *Rajendra Prasad Bose* v. *Gopal Prasad* (3). In that case the authority was to the widow to adopt with the permission of her deceased husband's father, who died before the adoption was made. After his death the widow adopted a son to her husband. It was held that she had no power to do so and that the adoption was invalid. In another case the authority was to the effect that the widow and two persons, who were made joint executors along with her, should adopt a son to the testator. It was held that this was not a valid authority as the authorization must be in favour of the widow alone though her power might be restricted by requiring the consent of the other executors. It was held that the authority would not bear the latter construction and the adoption was thus invalid: *Amrito Lal* v. *Surnomoyee* (4).

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(2) [1867-69] 12 M I A 350 (P C).

(3) A I R 1930 P C 242=127 I C 743=57 I A 296=10 Pat 187 (P C).

This subject is also discussed in para. 454 of Mulla's Hindu Law, 7th Edn. Another case which may be referred to is *Bal Gangadhar Tilak* v. *Shrinivas Pandit* (5). In that case five trustees were appointed by a Hindu testator who gave power to his widow to adopt a son with their consent and advice. One of the executors declined to act and probate of the will was taken out by the other four. It was held that the consent of the declining trustee was not necessary and that the adoption made with the consent of the other four trustees was valid. In the case before us all four executors took out probate while the consent of only one, namely, Peare Lal was taken to the adoption of the plaintiff. Even assuming the presence of Peshi Mal at the ceremony of giving and taking is enough to prove his implied consent to the selection, it is clear that the other two executors who took out probate were not consulted and that the adoption was made by the widow with the express consent of Peare Lal alone.

The will of the husband must be strictly construed as it was meant to restrict the widow's power of adoption. Under the authority of the husband the executors had to choose the boy and not Peare Lal alone. In fact, if it had not been for the appointment of the three other executors in the first instance, Peare Lal might have succeeded in getting the will shelved, as he strenuously contended during the probate proceedings that it had not been duly executed. This is not a case in which one of the executors did not take out probate as in *Bal Gangadhar Tilak* v. *Shrinivas Pandit*. (5). All did so. All therefore had to concur in choosing the boy, and this they did not do. It follows that the adoption was invalid and against the authority of the deceased husband. For the reasons given, I would accept the appeal and dismiss the suit. As the appellants have had to give up their contention that Basheshar Nath was not validly adopted to Naneh Mal and as they have failed to disprove the factum of the plaintiff's adoption, I would leave the parties to bear their own costs throughout.

Harrison, J.—I agree.

R.K. *Appeal allowed.*

✻ A. I. R. 1933 Lahore 73

BHIDE, J.

New Delhi Theatres, Ltd. — Defendants—Petitioners.

v.

Kailash Chand and *others*—Plaintiffs—Opposite Parties.

Civil Revn. No. 655 of 1932, (formerly Civil Appeal No. 1563 of 1932), Decided on 15th November 1932, against order of Senior Sub-Judge, Delhi, D/- 18th October 1932.

(a) Civil P. C. (1908), S. 151 and O. 39, R. 2—Appeal.

Where order purports to be passed under S. 151 and does not appear that the Court considered at all the provisions of O. 39, R. 2. an appeal from such order is incompetent. [P 74 C 1]

(b) Civil P. C. (1908). Ss. 94 and 151 and O. 39, R. 2—Breach already committed—Injunction though cannot be granted under O. 39, R. 2, Court can grant it in its inherent powers.

Where the breach of contract has already taken place and there is no prayer in the suit to restrain the defendant from committing any other injury but the suit is one for specific performance of the alleged contract, order under S. 151 can be passed. The Court has inherent power to act ex debito justitiae even in cases not covered by the provisions in the Code: *A. I. R.* 1920 *Lah.* 436; *A. I. R.* 1923 *Lah.* 144 and *A. I. R.* 1927 *Lah.* 833, *Rel. on.* [P 74 C 2]

✻(c) Civil P. C. (1908), S. 151 and O. 39, R. 2—No danger of irreparable injury—Compensation is damages possible—Injunction should not be granted under S. 151.

Where there is no danger of any irreparable injury and the plaintiffs can be easily compensated by the award of damages a Court has no power to grant any injunction in the exercise of inherent jurisdiction. The fact that the defendants had disobeyed the temporary injunction issued at the commencement of the suit is no justification for the grant of the injunction. [P 75 C 1]

(d) Practice—Revision.

Memo of appeal was treated as petition for revision. [P 74 C 1]

Jagan Nath Aggarwal and *Kishen Dial*—for Petitioners.

Badri Das and *Mehr Chand Mahajan* for *Kailash Chand*—for Respondents.

Judgment.—The plaintiffs in this case claim to have obtained a lease of the Imperial Theatre at New Delhi from the proprietor, Sardar Sobha Singh, while the theatre was still under construction. Possession was to be delivered to the plaintiffs on completion of the building about October 1932. In August 1932, the plaintiffs instituted the present suit alleging that Sardar Sobha Singh was contemplating leasing the theatre to others and praying for a declaration of their rights as lessees and for an injunction restraining the defendant Sardar Sobha Sinhg from leasing the theatre to anyone else. An application for a temporary injunction for the same purpose was made along with the plaint and was granted on 26th August 1926. It transpired thereafter that the defendant Sardar Sobha Singh had already granted a lease to Mr. Sumer Chand and others. The plaintiffs thereupon amended the plaint so as to implead the latter as defendants. After the plaint was amended, the plaintiffs made a further application under S. 151, Civil P. C., praying for an injunction restraining the defendants from holding any cinema or theatrical performances in the premises in dispute pending the disposal of the suit. This application has been granted and from this decision, the defendants have preferred an appeal.

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(4) [1900] 27 Cal 996=27 I A 128=4 C W N 549=7 Sar 633 (P C).

(5) A I R 1915 P C 7=29 I C 639=42 I A 135=39 Bom 441 (P C).

A preliminary objection is raised that no appeal is competent inasmuch as the order purports to be passed under S. 151, Civil P. C., in the exercise of the inherent jurisdiction of the Court. There is ample authority in support of the proposition that no appeal is competent from an order passed under S. 151, Civil P. C., (see inter alia. *A. I. R.* 1924 *Lah.* 487; *A. I. R.* 1928 *Lah.* 802; *A. I. R.* 1929 *Lah.* 245; *A. I. R.* 1930 *Lah.* 789; *A. I. R.* 1927 *Mad.* 335 and *A. I. R.* 1929 *Pat.* 232). The learned counsel for the appellant urged that the order is, in substance, one under O. 39, R. 2, Civil P. C., but the order purports to be passed under S. 151, Civil P. C., and it does not appear that the Court considered at all the provisions of O. 39, R. 2, Civil P. C. I accordingly uphold the preliminary objection. But although an appeal is incompetent, there is no good reason why the memo of appeal should not be treated as a petition of revision as requested and I shall treat it as such For the purposes of revision, the only point requiring consideration is whether the learned Subordinate Judge had any power to pass the order in question in the exercise of "inherent jurisdiction." The learned counsel for the appellant urges that there being specific provisions in O. 39, R. 2, Civil P. C., applicable to a case of this kind, the Court had no right to resort to "inherent jurisdiction." I do not think however the provisions of the rule are applicable to the suit as it now stands. O. 39, R. 2, applies when the "suit is for restraining the defendant from committing a breach of contract or other injury of any kind." In the present instance, the breach of contract has already taken place and there is no prayer in the suit to restrain the defendant from committing any other "injury." The suit as it now stands is for specific performance of the alleged contract between the plaintiffs and Sardar Sobha Singh.

The next contention put forward was that in view of the provisions of S. 94, Civil P. C., temporary injunctions can be issued to prevent the ends of justice being defeated only "if it is so being prescribed," i. e., only when the case comes within the provisions of the Code (i. e., for example, in the cases provided for in O. 39, Rr. 1 and 2,) and if the present case is not covered by the rules, the Court could not grant any injunction in the exercise of inherent jurisdiction. This view appears to have been taken by the High Court of Madras in some cases: see *A. I. R.* 1928 *Mad.* 491 but this Court has held that the Court has inherent power to act ex debito justitiae even in cases not covered by the provisions in the Code: see *Manohar Lal Mahabir Parshad* v. *Jai Narain Babuba Lal* (1), *Kanshi Ram* v. *Sharaf Din* (2) and *A. I. R.* 1927 *Lah.* 833. In view of these authorities I overrule this contention.

I have next to consider whether the order passed in the exercise of inherent jurisdiction was justifiable in the circumstances of the case. As regards this, it has been pointed out in *Manohar Lal Mahabir Parshad* v. *Jai Narain Babuba Lal* (1) and *A. I. R.* 1927 *Lah.* 833 that it is well settled that when the jurisdiction of the Court is invoked under this section, i. e., S. 151, Civil P. C., and it is called upon to act ex debito justitiae and to grant an injunction, it is necessary for the plaintiff to establish a strong prima facie case that there is no other remedy open to him to protect himself and that if the injunction asked for is not granted, irreparable injury or inconvenience would result. Now the learned Subordinate Judge has held that plaintiffs in this case have made out a prima facie case, but as regards the other requirements, the following findings will speak for themselves:

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(1) A I R 1920 Lah 436=55 I C 403.
(2) A I R 1923 Lah 144=73 I C 909.

> "Ordinarily an interim injuction is issued, if the injury complained of is likely to cause irreparable loss or damage to the petitioner. In this case as the possession has admittedly been transferred to the defendants, the question of irreparable injury to the plaintiffs cannot possibly arise because first of all as the building is to be used for the same purpose for which it was leased out to the plaintiffs, there is no question of deterioration of the property by the defendants' user of it. Secondly, the injury to be caused to the plaintiffs can easily be compensated by award of damages in case of ultimate success of their suit. Again as the plaintiffs cannot be put in possession of the premises without a decree to that effect in their favour, the injury complained of as to the non-user by the plaintiffs cannot be remedied by the injunction prayed for by them. But as already observed there are "prima facie" reasons to believe that the delivery of possession was made after the issue of the previous injunction by the Court to defendant 1 and non-issue of the injunction would amount to allowing the defendants to defy the order of the Court and to take undue advantage of that defiance which would apparently amount to an abuse of the process of the Court."

It would thus appear that the learned Subordinate Judge himself found that there was no danger of any irreparable injury and the plaintiffs could be easily compensated by the award of damages. On these findings it must be held in view of the authorities referred to above that the learned Subordinate Judge had no power to grant any injunction in the exercise of inherent jurisdiction; for the conditions for the exercise of that power do not exist. The learned Subordinate Judge seems in fact to have been influenced too much by his belief that the defendants had disobeyed the temporary injunction issued by him at the commencement of the suit. But the learned Judge had ample power to take action against the defendants, if they were found guilty of wilful disobedience. In my opinion this was no justification for the grant of the injunction, prayed for by the plaintiffs. The learned counsel next stated that the plaintiffs have another cinema theatre and that they have been put to loss owing to the Imperial Theatre being leased to the defendants (New Delhi Theatres Co.); but this again does not seem to be relevant and cannot be considered to be any justification for the grant of the injunction prayed for. On the learned Subordinate Judge's own findings the grant of the injunction under S. 151, Civil P. C., was in my opinion not justified. I therefore accept the petition for revision and set aside the injunction. In view of all the circumstances however I leave the parties to bear their costs.

R.K. *Petition accepted.*

A. I. R. 1933 Lahore 75

TEK CHAND, J.

Mathra Das and *others*—Appellants.

v.

Amin Chand and *others*—Respondents.

Second Appeal No. 2274 of 1929, Decided on 19th October 1932, against decree of Dist. Judge, Ambala, D/- 27th May 1929.

(a) Limitation Act (1908), Art. 11-A—Sale under mortgage-decree—Objection disallowed—Suit need not be brought within one year—Civil P. C. (1908), O. 21, R. 58.

Article 11 (1) does not apply unless there has been an attachment in the manner prescribed by the Code and therefore where the property has been sold under a mortgage-decree, there can be no attachment within the meaning of O. 21, R. 58 and a suit to contest an order passed on an objection to such a sale need not be filed within one year: *A. I. R.* 1928 *P. C.* 139; 58 *P. R* 1918, and *A. I. R.* 1920 *Lah.* 214, *Rel. on.* [P 76 C 1]

(b) Transfer of Property Act (1882), S. 74—Puisne mortgagee not party to suit by prior mortgagee—Suit for redemption by former—He is liable for interest up to date of redemption but credit should be given for profits recovered by prior mortgagee—Mortgage.

Where a puisne mortgagee, not party to mortgage-decree by prior mortgagee, claims to ignore that decree as not binding on him and wants to redeem the prior mortgage, he is liable to pay interest up to the date when the plaintiff is allowed to redeem the mortgage. Credit should however be given for the profits from the mortgage property recovered by the prior mortgagee till that date. [P 76 C 2]

Vishnu Datt and *Badri Das*—for Appellants.

Shamair Chand, *Fakir Chand* and *Asa Ram Aggarwal*—for Respondents.

Judgment. — The property in suit, which consists of a house situate in Ambala City, originally belonged to one Shankar. On 22nd February 1918, Shankar mortgaged it to Mathra Das, defendant 1, for Rs. 600. The principal sum was to bear interest at 14 annas per cent per mensem, payable six monthly. It was stipulated that in case of default, compound interest at Re. 1-9-0 per cent per mansem, will be charged. On 1st March 1920, Shankar raised a further loan of Rs. 400 from Mathra Das mortgagee on the same security, the condition as to interest being the same as in the prior mortgage. The mortgagor has admittedly paid Rs. 200 towards the principal sum secured on the additional mortgage. On 13th January 1922, Shankar created another mortgage on the same house in favour of Chhajju Singh, who has died during the pendency of this litigation and is represented by his son Amin Chand respondent. In October 1923, Mathra Das brought a suit on foot of his mortgages against the mortgagor. To this suit Chhajju Singh, the puisne mortgagee, was not made a party. The suit was decreed, the decretal amount being fixed at the principal sum secured by the two mortgages of Rs. 600 and Rs. 200 respectively, and compound interest at 14 annas per cent per mensem on the first mortgage, and simple interest at 14 annas on the second, up to the date of the satisfaction of the decree. In execution of this decree Mathra Das took proceedings for the sale of the mortgaged property. In these proceedings Chhajju Singh filed an objection urging that the property should be sold subject to his mortgage charge. The objection was disallowed and the property was sold and the sale confirmed on 17th March 1925. The auction-purchaser was a third party, but he transferred his rights to Mathra Das decree-holder.

On 30th March 1927, Chhajju Singh instituted the present suit for redemption and offered payment of the decretal amount to Mathra Das. The suit was decreed by the trial Court, the redemption money being fixed at Rupees 1,230-8-0 and being made payable on 11th March 1929. Mathra Das appealed to the District Judge but the appeal was dismissed. On second appeal a number of points were raised in the memorandum of appeal but Mr. Badri Das has confined himself to two questions only. His first contention is that the suit having been instituted more than one year after the date of the dismissal of the objection filed by Chhajju Singh, plaintiff, it is barred under Art. 11 (1), Limitation Act. In my opinion this contention is without force and was rightly rejected by the Courts below. It is settled law that Art. 11 (1) does not apply unless there has been an attachment in the manner prescribed by the Code: *Muthiah Chetty* v. *Palaniappa Chetti* (1). It has also been held that in cases where the property has been, or is sought to be, sold under a mortgage-decree, there can be no attachment within the meaning of O. 21, R. 58, Civil P. C., and a suit to contest an order passed on an objection to such a sale need not be filed within one year: *Ratan Lal* v. *Bala Parshad* (2) and *Tarachand* v. *Raj Kishore* (3) and the rulings cited therein. I hold therefore that the suit is within time.

The second contention raised is that the learned Judges of the Courts below have erred in fixing the amount payable on redemption at Rs. 1,230-8-0 which was the amount found due till 17th March 1925, when the sale in execution of Mathra Das' mortgage-decree was confirmed. The plaintiff in the present case however claims to ignore that decree as not binding on him, and has been granted a decree on that basis. Mr. Fakir Chand for the respondent admits that in the present case interest should be calculated up to the date when the plaintiff was allowed to redeem the mortgage. This date is 11th March 1929. Compound interest at 14 annas on the sum of Rs. 600 and simple interest on Rs. 200 from 17th March 1925 up to 11th March 1929, should therefore be added to the amount fixed by the lower Courts. This sum comes to Rupees 497-13-9. From this amount must be deducted the rent of the house for four years for which Mathra Das decree-holder was in possession. There are no materials on the record to assess the rental value of the house but, in order to avoid a remand, both parties agreed before me that it may be fixed at Rs. 4 per mensem or Rs. 192 for four years. Deducting this sum the balance due comes to Rs. 305-13-9. I therefore accept the appeal and direct that the amount fixed by the lower Court as payable by the plaintiff to Mathra Das be enhanced by Rs. 305-13-9. Having regard to all the circumstances I leave the parties to bear their own costs in this Court and the Court of the District Judge.

R.K. *Appeal accepted.*

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(1) A I R 1928 P C 139=109 I C 626=55 I A 256=51 Mad 349 (P C).

(2) [1918] 58 P R 1918=44 I C 986.

(3) A I R 1920 Lah 214=55 I C 895.

A. I. R. 1933 Lahore 76

JAI LAL, J.

Bura Mal—Appellant.

v.

Nur Ilahi and *others*—Respondents.

Second Appeal No. 1757 of 1931, Decided on 16th March 1932, against decree of Addl. Dist. Judge, Lyallpur, D/- 20th July 1931.

Northern India Canal and Drainage Act (1873), S. 68—Omission to give notice vitiates order under S. 68.

If the Divisional Canal Officer omits to serve notice on any of the parties interested in the inquiry his proceedings must be held to be vitiated on account of that defect and his order must be set aside. But it is still open to the Divisional Canal Officer to pass a proper order after notice to all the parties interested as required by law. [P 77 C 1, 2]

Badri Das—for Appellant.

Mehr Chand Mahajan—for Respondents.

Judgment.—This is a second appeal against the decree of the Additional District Judge, affirming the decree of the Subordinate Judge, whereby a suit instituted by the respondents was decreed. It appears that acting under S. 68, Northern India Canal and Drainage Act, 1873, the Divisional Canal Officer settled the mutual rights of the parties to this litigation in respect of the use of water on an application having been made to him by some of the defendants. Originally the rights of the parties had been settled in 1909 and after an infructuous attempt to have the same altered some time in 1919 they were altered in 1928, but some of the defendants being dissatisfied again moved the Divisional Canal Officer to consider their objections and that officer passed the order which is the subject-matter of this litigation, on 30th June 1929. Both the Courts below are agreed that on the merits the order was not justified. It appears however from the judgment of the Additional District Judge that he considered that the Divisional Canal Officer had given no reasons in support of his order, whereas an examination of the order shows that reasons are given. The respondents' counsel contends that what the learned Additional District Judge meant was that the Divisional Canal Officer had not given any good or adequate reasons, or in any case fresh reasons which would justify his setting aside the previous order of 1928. The question however is not material at this stage because, in my opinion, the decree of the Additional District Judge can be supported on another ground. He has found that no notice was given to two of the respondents before the order in question was passed by the Divisional Canal Officer.

Now S. 68 clearly provides that such officer shall give notice to the other persons interested and on a day to be named in such notice he will proceed to enquire into the matter in dispute and after such enquiry shall pass his order which is to remain in force till set aside by a decree of the civil Court. S. 69 provides that the officer concerned may exercise all such powers connected with the summoning and examining of witnesses as are conferred on civil Courts by the Code of Civil Procedure and every such enquiry shall be deemed to be a judicial proceeding. It is therefore obvious that if the Divisional Canal Officer omits to serve notice on any of the parties interested in the enquiry his proceedings must be held to be vitiated on account of that defect. The conclusion of the Additional District Judge that no notice was given to two of the plaintiffs is a finding of fact, which I am unable to disturb on this second appeal. On this short ground therefore the decree must be maintained. As I have stated already, I am rather doubtful whether the Additional District Judge really appreciated that the Divisional Canal Officer had given reasons in support of his order, but whether those reasons are sound or otherwise, is not a question before me at this stage. I may add that the persons to whom notice was not given by the Divisional Canal Officer were clearly interested in the result of the enquiry. In the plaint they have alleged that the order has injuriously affected them and I am unable to hold otherwise on the present record.

The appeal therefore shall be dismissed. The Additional District Judge has remarked that:

> "It would be open to the defendants aggrieved by this order to reagitate the question of wara bandi and have same settled according to law."

This view of the Additional District Judge is correct and it is still open to the Divisional Canal Officer to pass a proper order after notice to all the parties interested as required by law. The plaintiffs have succeeded on a technical ground which was due to the omission of the Divisional Canal Officer to follow the proper procedure. Under the circumstances I leave the parties to bear their own costs throughout.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 77

ABDUL QADIR, J.

Harnam Singh—Appellant.

v.

Sadhu Singh—Respondant.

Second Appeal No. 12 of 1932, Decided on 13th April 1932.

Custom (Punjab) — Alienation — Alienee himself antecedent creditor—Necessity must be shown by alienee.

Where the alienee himself is the antecedent creditor it is not only incumbent on him to prove the existence of the prior debts due to him but also the necessity for those debts. But where the debt is in favour of a third party and original bahi is produced to prove it and it is also proved that payment of that item had been made to him by the alienee, mere relationship between the antecedent creditor and the third party will not make that item fictitious: 65 *P. R.* 1900, (*F. B.*); **14 *I. C.* 477 and *A. I. R.* 1927 *Lah.* 113,** *Rel. on.* [P 78 C 2]

Mohammad Tufail—for Appellant.

Fakir Chand and *Chandar Gupta*—for Respondent.

Judgment.—Buta Singh, now deceased, mortgaged his ancestral land to Sadhu Singh for Rs. 520 under a registered mortgaged-deed on 31st March 1927. His son, Harnam Singh, has, after his death brought a suit for possession of the mortgaged land, alleging that the defendant has taken forcible possession of it, asserting himself to be a mortgagee. He alleged in the alternative that in any case the mortgage was without consideration and necessity and therefore ineffective against his reversionary rights. The consideration for the mortgage included the following six items:

(a) Due to the mortgagee on a bond dated 28th September 1929, in his favour	Rs. 165
(b) due to the mortgagee on a bond dated 9th August 1926	Rs. 68
(c) due to the mortgagee on a bond dated 22nd November 1925	Rs. 55
(d) left with the mortgagee for payment to Santa Singh, a previous creditor,	Rs. 132
(e) cash paid before the Sub-Registar	Rs. 80
and (f) taken for expenses of the deed.	Rs. 20

The trial Court held that, as in the case of items (a), (b) and (c) the mortgagee was himself the antecedent creditor, it was incumbent on him to prove necessity for these items, and as he did not do so they were disallowed. The item of Rs. 132 was allowed because the payment was proved to have been made by the mortgagee to Santa Singh, a previous creditor. Items (e) and (f) were also disallowed and the plaintiff was given a decree for possession of the land in suit on payment of Rs. 132 only. The parties were allowed to bear their own costs.

Against the above decree, an appeal was filed by Sadhu Singh, mortgagee, who urged that the suit of the plaintiff was dishonest and should have been dismissed, while Harnam Singh filed cross-objections, asking for the sum of Rs. 132 to be disallowed as Santa Singh was the brother-in-law of the defendant and was acknowledging the payment of a fictitious debt. The learned District Judge followed a decision of the Punjab Chief Court, in *Sadhu Singh* v. *Chimna Ram* (1), and held that the previous debts were incurred for necessity, even if he was himself the antecedent creditor, in a case where a "previous debt" came within the definition of a "just debt." Holding that the debts in question in the suit were not tainted with immorality and had not been incurred as an act of wanton waste or reckless extravagance, he allowed items (a), (b) and (c), and also upheld the decision of the trial Court with regard to item (d) for Rs. 132. He also allowed items (e) and (f), that is, cash paid before the Sub-Registrar and the expenses of the registered deed and dismissed the plaintiff's suit with costs throughout. Against this decision the plaintiff Harnam Singh has preferred a second appeal, through Mr. Mohammad Tufail, who has addressed me on his behalf. I have heard Mr. Faqir Chand for the respondent. Mr. Tufail refers to *Devi Ditta* v. *Saudagar Singh* (2), which lays down that the onus of proof of the validity of an alienation of ancestral land by a male proprietor always lies, in the first instance, on the alienee, whether he be a third party or a person whose debts have been paid off by the alienation. He also refers to *Mangal Singh* v. *Dula* (3), where a Division Bench of the Chief Court held that if the alienee himself is the antecedent creditor, he is bound to prove necessity in respect of all previous debts. Reference is also made by him to a more recent authority, *Hari Singh* v. *Harnam Singh* (4), in which a Division Bench of this Court again emphasized the principle that:

> "where the alienee himself is the antecedent creditor it is not only incumbent on him to prove the existence of the prior debts due to him but also the necessity for those debts."

On the basis of these authorities the counsel for the appellant attacks items (a), (b) and (c), for which he says the only proof adduced is the recital in the bonds executed by the mortgagor, Buta Singh, in favour of Sadhu Singh. It is argued that mere recitals in bounds cannot take the place of proof. Item (d) (of Rs. 132) is attacked on the ground that that debt was in favour of Santa Singh, brother-in-law of Sadhu Singh. So far as this last item is concerned, I see no reason to take a different view with regard to it from that taken by both the Courts below. The debt was in favour of a third party. The original bahi Nawan executed by Buta Singh in the bahi of Santa Singh (dated 25th Katak Sambat 1983) was produced in Court and the entry has been accepted as genuine by the Courts below. Payment of that item to Santa Singh has also been proved and there is no reason why mere relationship between Santa Singh and the mortgagee should necessarily make this item fictitious. Besides this the finding of the lower appellate Court on this point is a finding of fact, based on evidence accepted by it as sufficient and must be taken to be conclusive and not liable to be disturbed in second appeal. The same is my view with regard to items (b) and (c). The lower appellate Court has accepted these items were for necessity, mainly beause in the case of each of these items there was an older bond, which was discharged by the execution of a new bond, plus a small item borrowed in addition to this old debt. Its findings, with regard to these items, must also be accepted as final.

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(1) A I R 1929 Lah 397=116 I C 898.

(2) [1900] 65 P R 1900=22 P L R 1900 (F B).

(3) [1912] 14 I C 477.

(4) A I R 1927 Lah 113=100 I C 269.

The only item which, I think, has not been correctly allowed by the lower appellate Court is item (a) amounting to Rs. 165. The bond relating to this item is Ex. D-2 dated 28th September 1926. It was originally for Rs. 140 and the item as it stands, presumably includes interest. This is alleged to have been taken in cash by Buta Singh from Sadhu Singh. It is mentioned in the bond that the money was taken for the expenses of litigation connected with the land of Chanda Jat. No proof supporting this recital has been adduced and the Court below has asserted the mere recital in the bond as sufficient. I think it was for the mortgagee, who was also the antecedent creditor, to prove necessity as to this item, which he failed to do, and therefore this item should be disallowed. Having allowed items (b), (c) and (d), I see no reason why the cash paid before the Sub-Registrar and the expenses of the deed should not be allowed. The result is that I accept the appeal of the plaintiff Harnam Singh to this extent: that I set aside the decree of the lower appellate Court dismissing his suit and substitute for it a decree for possession of the land in suit, against the defendant, on payment by him of Rs. 355. In view of the fact that none of the parties has entirely succeeded in the suit, they will bear their own costs throughout.

K.N./R.K. *Order accordingly.*

A. I. R. 1933 Lahore 79

TAPP, J.

Ghisa Ram—Plaintiff—Petitioner.

v.

Bhiwani Sirsa Chamber of Commerce, Ltd.—Defendant—Opposite Party.

Civil Revn. No. 413 of 1932, Decided on 8th November 1932, against decree of Senior Sub-Judge, Hissar, D/- 13th April 1932.

Arbitration Act (1899), S. 19—Arbitration clause — Civil Court's jurisdiction is not ousted.

An arbitration clause in the contract does not oust the jurisdiction of the civil Courts. S. 19 only provides for power to stay proceedings where there is a submission and the section itself indicates that where parties to a contract have agreed to refer disputes arising out of the contract to arbitration, legal proceedings may be taken by one party against the other and the party sued can at a certain stage of the proceedings apply to the Court to stay them. [P 79 C 2]

Ram Lal Anand—for Petitioner.

Shamair Chand and *Qabul Chand*—for Opposite Parties.

Judgment.—The plaintiff-petitioner Ghisaram obtained a decree against the defendants-respondents described as the Bhiwani Sirsa Chamber of Commerce Limited. One of the issues raised in the case was whether the suit could not proceed on account of an agreement between the parties to refer disputes arising between them to arbitration. The trial Court decided this issue against the defendants-respondents, but on appeal by them the learned Senior Subordinate Judge held that according to the terms of the contract relied on by the plaintiff himself it was obligatory for him at least to try to settle the matter in dispute by arbitration before resorting to a civil suit and his suit therefore could not proceed. The learned Senior Subordinate Judge accordingly accepted the appeal and dismissed the suit with costs in both Courts.

Now there was absolutely no obligation on the plaintiff-petitioner to refer the matter in dispute between him and the defendants-respondents to arbitration and any such clause in the contracts would not oust the jurisdiction of the civil Courts. The learned counsel for the defendants-respondents has referred to S. 19, Arbitration Act of 1899 in support of the view taken by the lower appellate Court. This section however only provides for power to stay proceedings where there is a submission and the very enactment of this section indicates that where parties to a contract have agreed to refer disputes arising out of the contract to arbitration, legal proceedings may be taken by one party against the other and the party sued can at a certain stage of the proceedings apply to the Court to stay them and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, etc., may make an order staying the proceedings. The view taken by the learned Senior Subordinate Judge is therefore quite wrong and accepting the petition I remand the appeal for disposal on the merits. The petitioner will be allowed his costs in this Court.

R.K. *Case remanded.*

✲ A. I. R. 1933 Lahore 80

HARRISON AND ADDISON, JJ.

Mt. Iqbal Begum— Plaintiff —Applicant.

v.

Mt. Syed Begum and *others* — Defendants—Opposite Parties.

First Appeal No. 2001 of 1925, Decided on 13th October 1932, against decree of Sub-Judge, First Class, Lahore, D/- 5th May 1924.

✲(a) **Mahomedan Law—Succession—Applicability — Distinction between Sunnis and Shias exposed—Deceased held to be Shia.**

Broad-minded men belonging to either sect tolerate and even respect the observances of the other. The visiting of the shrine and the making of offerings is not entirely confined though very much commoner, among the Sunnis than among the Shias. Distinction between the two sects exposed and the deceased held to be a Shia. [P 80 C 2; P 82 C 1]

(b) **Mahomedan Law—Succession—Sunni or Shia—Burden of proof.**

The burden to prove that the deceased was a Shia is on the person alleging him to be not Sunni but Shia. [P 81 C 1]

Niaz Ali and *Mehr Chand*—for Applicant.

G. M. Din and *S. M. Saddozai*—for Opposite Parties.

Harrison, J.—This is a suit brought by Mt. Iqbal Begum, a sister of the late Hakim Amin-ud-din, against her brother's widow and daughters, claiming 5/24th of the property left by him. The claim is based on Mahomedan law and the decision thereof depends upon the view taken of the evidence produced on both sides on the all-important question whether the late Hakim was a Shia or a Sunni. Various ancillary reliefs have been claimed. With these we are not concerned as the learned Subordinate Judge, who disposed of the case, dismissed the claim, finding that the late Hakim was a Shia and not a Sunni and therefore the suit. must fail in its entirety. In his judgment he has marshalled the evidence under various heads and disposed of the various points raised and it is not necessary for us to add very much to what he has written. The evidence is, as might be expected, conflicting and counsel for the unsuccessful plaintiff has dealt at length with the various points involved. The matter is not as simple as might appear at first sight, for whereas there is very definite distinction between the two rival sects, in practice the differences have with time ceased to be quite as marked as they were originally, and it is in evidence, and has been found by the Subordinate Judge, and we agree with him, that broad-minded men belonging to either sect tolerate and even respect the observances of the other. The main distinction in doctrine is that whereas the Sunnis accept all those who actually held the office of Caliphs after the decease of the holy prophet, the Shias look upon the first three Caliphs, namely, Abu Bakr, Umar, and Usman, as usurpers, and on all occasions repudiate them, and where a man is inclined to be ultra orthodor or fanatical, he even indulges in abuse of their memeory. The Sunnis, it should be added, believe that the first Caliph, Abu Bakr, who was the father-in-law of the holy prophet, was appointed by him. This appointment is not admitted by the Shias to have ever taken place. In addition to this great difference of opinion regarding the Caliphs, the Sunnis accept and reverence as the chief of Saints one Abdul Qadir of Baghdad, who is known by various other synonyms such as Ghaus-i-Azam and Ghaus-i-Pak, This man is said to have written a well-known treatise in which he described the Shias as hypocrites.

In consequence of this, Shias not only refuse to recognize him as a great saint but repudiate him in much the same way as they do the first three Caliphs. There are however some Shias who hold that he was not the author of the treatise and therefore pay respect to his memory. As a development of the recognition and reverence of Abdul Qadir the Sunnis are in the habit of making offerings to and celebrating his memory and these are described as the "Ghiarwain,," he being in the eleventh generation from the prophet and eleven being taken as a holy number on that account. In addition to reverencing this saint's name and making offerings in his memory, the Sunnis have accepted various other saints of whom the most important, certainly so far as Lahore is concerned, is Data Ganj Bakhsh Sahib whose shrine is well known in this neighbourhood. People are in the habit of making offerings both in cash and in kind at that shrine and they worship in the mosque attached thereto. It may be here stated that all mosques are open to the members of all sects of the Mahomedan religion and there is no such thing as a Sunni or a Shia mosque, though the majority of the worshippers at any particular mosque may belong to one or other sects either generally or at various times.

This brings us to the evidence led by both sides. The burden was rightly put upon the defendants to prove that the deceased Hakim was a Shia. In order to do so they produced both oral and documentary evidence, the most important of the latter being a speech D-1, which he is shown to have been made at the time that funds were being raised for the opening of the Shia College in Lucknow. He went as a representative of the Shias of the Punjab, it is said, and in that speech as reported though he did not baldly state "I am a Shia or I am a Sunni," he clearly indicated that he was speaking as a Shia to his Shia brothers and trying to induce them to assist the foundation and endowment of the College. Certain entries were produced showing that he attached significance to the observance of the Muharram Sharif and it may be taken as a truth, which is accepted by both sides, that although the celebration of the Muharram is in no way confined to one sect or the other, Shias would be more likely to spend money than Sunnis at the time of this celebration. He used to take an active part in the ceremonial, inasmuch as it was his practice to beat his breast and to exhibit his distress at the history of the martyrdom of the Prophet's grandson Hussain.

The third document purports to be the draft of a will produced by Barkat Ali, Munshi of the late Hakim, and reliance was placed on this as showing that the person who had it written and signed it must have been a Shia, inasmuch as it transgresses the Sunni rule as to inheritance. This is true, and it not having been shown that the signature is not genuine, the document stands for what it is worth as supporting the defendants' case, inasmuch as it shows that at the time when this document was written the late Hakim, who was a trained lawyer, behaved as a Shia would have done. In addition to this documentary evidence several witnesses have been produced and the learned Subordinate Judge has placed reliance more especially on the evidence of four men, Sheikh Nur Mohammad, Extra Assistant Commissioner, Sheikh Abdul Majid, Vakil, Khan Sahib Maratib Ali Shah and Hakim Ahmad Shuja. The last two are near relations of Hakim Aminuddin and the first two were in a position to know his views. They give very definite evidence and the Subordinate Judge has placed great reliance upon them. In addition, we may mention two witnesses, the late Nawab Fateh Ali Khan, head of the Qazilbash family and Khan Walayat Hussain, Extra Assistant Commissioner. The Nawab was the head of the leading Shia family of the province and he gives very positive evidence to the effect that the late Hakim was a Shia. Similarly Khan Walayat Hussain gives clear and definate evidence.

As against this evidence oral and documentary, we have the following facts which are established by the evidence of the plaintiff. The late Hakim did visit the shrine of Data Ganj Bakhsh. Not only did he visit the shrine but he presented offerings on more than one occasion and this is fully established by the evidence of his own diary. In addition to making offerings to this shrine, he also on one and possibly on more occasions observed the Ghiarwin ceremony in the memory of Abdul Qadir Jillani. A large number of witnesses including men of position have appeared who state quite definitely that he was a Sunni and that they were in a position to know what views he held. Finally, there is the sheet-anchor of the plaintiff's case which consists of a statement made on oath in the Court of the Senior Subordinate Judge of Lahore in 1920, which is as positive as words can be, that he, the Hakim, is a Sunni and further that Shias do not visit shrines and make offerings, which it is clearly proved he himself had done and made. This statement was made in a civil case in which two rival sects of Shias were claiming the managership of certain wakf property. Not only did the late Hakim describe himself as a Sunni but he also described the principal defendant in that case as being a Sunni also which he was not. The learned Subordinate Judge has taken the only possible view of this statement consistent with his finding that the late Hakim was a Shia and it is a discrediting fact that he committed perjury on that occasion. Such is the evidence produced by both sides and it has to be seen which is more reliable.

The plaintiff naturally lays particular stress on the statement made in open Court on the fact that the late Hakim was in the habit of visiting the shrine of the Sunni saint Data Ganj Bakhsh, that he made offerings there and that he also observed the Ghiarwin. Counsel contends that in addition to visiting his shrine, it may be taken as a certain inference that he also worshipped in the adjoining mosque and if he did so, he presumably followed the celebrant, who was a Sunni, in prayer. Now even if this assumption or presumption be made, by itself it would not be conclusive proof that the late Hakim was a Sunni, for we have it on the authority of no less a person than Nawab Fateh Ali Khan himself that on the *Id* day he, the head of the Shia sect, visits the Badashahi mosque and takes part in the service conducted by a Sunni Imam. It is true that an attempt has been made to explain this away and to say that it was in a political capacity that the late Nawab took part in this religious service but he does not say so himself and the fact remains. In addition to the oral evidence and the evidence described above, the plaintiff lays great stress on the admitted fact that the corpse of the late Hakim was washed in accordance with the Sunni ceremonial and that a Sunni ceremonial washer as well as a Sunni Imam officiated at his funeral. The explanation offered by the defendants is that the late Hakim was married to a Sunni wife, his history being that he was the son of a Sunni father and a Shia mother. This explanation, in our opinion, explains what happened and we do not attach any importance to the details of his funeral and the fact that Sunni ceremonial was observed. The case for the plaintiff therefore may be said to rest mainly on the statement made in Court and the conduct of the Hakim in visiting the shrine and making offerings. The visiting of the shrine and the making of offerings is not, as stated by reliable witnesses, entirely confined, though very much commoner, among the Sunnis than among the Shias.

On the other side, it must be remembered that the burden was on the defendants and not on the plaintiff and it has to be seen whether that burden has been fully discharged. We have (1) oral evidence, (2) speech made at Lucknow Conference (3) the draft and (4) other less important documentary evidence. Their documentary evidence lends strong support to the plaintiffs' case but even if the whole of the documentary evidence be ignored, the weight and value of the oral evidence is such as in our opinion to establish affirmatively and beyond all possible doubt that the late Hakim was a Shia. We have been very much impressed by the evidence of the six witnesses we have named, namely, the four selected by the Subordinate Judge and Nawab Sahib and Khan Walayat Hussain. We consider their evidence to be absolutely independent, true and reliable and it is unnecessary for us to say any more, and we are absolutaly convinced that in spite of his having on one occasion untruthfully represented himself in open Court as a Sunni, the late Hakim was a Shia. This disposes of both appeals which are dismissed with costs.

R.K. *Appeals dismissed.*

A. I. R. 1933 Lahore 82

BROADWAY, C. J. AND AGHA HAIDAR, J.

The Alliance Bank of Simla—Decree-holder—Petitioner.

v.

Ram Chand Baij Nath and *another*—Insolvents—Opposite Parties.

Civil Misc. Petn. No. 523 of 1932, Decided on 18th November 1932, for revision of former application dismissed by High Court on 2nd March 1931, for leave to appeal to His Majesty in Council against decision of Shadi Lal, C. J., and Agha Haidar, J., reported in *A.I.R.* 1930 *Lah.* 855 (2).

Civil P. C. (1908), S. 109—Remand order in insolvency—Application for leave to appeal dismissed for want of final order—Adjudication annulled and hence no order passed by lower Court on remand order—Application for leave already dismissed cannot be revived.

Where an application for leave to appeal to the Privy Council from an order of remand in an insolvency proceedings has been dismissed on the ground that there was no "final order" as contemplated by S. 109 (a) and on the remand order reaching the Court below it holds that as the insolvency proceedings had been annulled, the Crurt was functus officio and could not pass any order. The application for leave to appeal which has been dismissed can not be revived and no leave can be granted on the same. [P 8; C 1]

Badri Das—for Petitioner.

Mehr Chand Mahajan—for Opposite Parties.

Agha Haidar, J.—The matter before us arose originally out of certain insolvency proceedings wherin Mt. Jai Lagi appeared as an objector. She relied upon a compromise and pleaded that the house in dispute belonged to her and the insolvents had no interest in it. Her objection was sustained by the Insolvency Judge, Malik Ahmad Yar Khan, by his order dated 17th April 1925, and she was allowed to file the said compromise in Court, although it was not registered. The matter was taken up by the applicant Bank in appeal to the learned District Judge who held that, as the compromise was not registered, it was not admissible in evidence and, on this ground, he allowed the appeal and rejected Mt. Jai Lagi's objection in respect of the house. Mt. Jai Lagi appealed to this Court, and it was decided by an order dated 14th April 1930, that the compromise, on which Mt. Jai Lagi relied, did not require registration because it was substantially incorporated in the decree of the Court. The case was remanded, as a certain important issue had been left undecided by the lower appellate Court. Mr. Badri Das, the learned counsel for the Bank, was not satisfied with this order and made an application to this Court for leave to appeal to the Privy Council. This matter was disposed of on 2nd March 1931, and the application of the Bank was dismissed on the ground that there was no "final order" as contemplated by S. 109 (a), Civil P. C. In the meantime the remand order reached the Court below, and the case was ultimately dealt with by Mr. Purshotam Lal, Subordinate Judge, on 9th April 1932, who held that, as the insolvency proceedings had been annulled, the Court was functus officio and could not pass any order.

Mr. Badri Das has now put in a fresh application and has asked us in fact to revive the application which had already been dismissed by this Court under its order dated 2nd March 1931. The position taken up by Mr. Badri Das is that, now that the Court below has finally disposed of the matter, the order of Court dated 14th April 1930, remanding the case has become "final" and therefore he was entitled, as a matter of right, to the certificate for leave to appeal to His Majesty in Council under S. 109 (a), Civil P. C. This position is untenable. In the first place, the present application is hopelessly barred by limitation, the normal period of 90 days having expired long ago. Secondly, having regard to the provisions of S. 109 (a), Civil P. C., an appeal shall lie to His Majesty in Council from any decree or final order passed on appeal by a High Court. There has been no appeal to us from the order of Mr. Purshotam Lal and therefore the provisions of S. 109 (a) have no application. It is difficult to understand how, in view of certain proceedings taken in the trial Court on remand, the application for leave to appeal, which had been dismissed by us, can be revived and leave granted on the same. The position is somewhat anomalous, but no law or precedent has been brought to our notice by the learned counsel in support of his application. Under these circumstances the application is dismissed with costs.

R.K. *Application dismissed.*

A. I. R. 1933 Lahore 83

HARRISON, J.

Nur Din and *others*—Defendants—Appellants.

v.

Allah Din and *others*—Plaintiffs—Respondents.

Second Appeal No. 1204 of 1931, Decided on 14th March 1932, against decree of Addl. Dist. Judge, Lahore, D/- 21st May 1931.

Limitation Act (1908), Art. 97—"Date of failure of consideration"— Significance explained.

The plaintiffs were occupancy tenants and effected a mortgage in favour of one of the landlords and put him in possession. A suit was brought by other landlords and the mortgage was set aside as having been made without their consent. This decree was executed and the mortgagors were formally put in possession. In spite of this the mortgagees remained in possession and claimed to have recently been dispossessed and sued for the money lent urging that the suit was within three years of their actual abandoning and leaving the land.

Held: that in a suit of this sort it was for the plaintiffs to show that they had come to Court within three years of time beginning to run against them. In the above case the date on which consideration failed under Art. 97, which governed this case, was the date on which the plaintiffs ceased to be in possession as mortgagees under the instrument or in other words, the date from which their possession became that of trespassers as opposed to their holding under an existing title. That when the plaintiff obtained possession and was subsequently dispossessed time began to run from the date of dispossession. That the words "date of failure of consideration" meant that the date to be taken was the date on which plaintiff ceased to derive any benefit from the transfer. [P 84 C 1]

Mehtab Singh—for Appellants.

Mohan Lal Seth—for Respondents.

Judgment.—The only question to be decided in second appeal is whether the suit is within time, it being a suit by a mortgagee to recover the money lent by him. The suit was dismissed by the trial Court and decreed on appeal. The plaintiffs claimed possession but this was disallowed in both the lower Courts and the question has not been raised again. The facts are simple. The plaintiffs are occupancy tenants and effected a mortgage in favour of one of the landlords and put him in possession. A suit was brought by other landlords and the mortgage was set aside as having been made without their consent. This decree was executed and the mortgagors were formally put in possession. In spite of this the mortgagees, as they themselves say in the plaint, remained in possession "jabrun." They claim to have recently been dispossessed and sue for the money lent, urging that the suit is within three years of their actual abandoning and leaving the land. The question therefore would appear to be whether dispossession is to count from the date on which admittedly they ceased to be mortgagees and in possession as such, or from the date when they ceased to occupy the land as trespassers. This is by no means an easy question. But the decision of the appeal is simple enough for the plaintiffs have wholly failed to prove the date of their dispossession, and in a suit of this sort it is for them to show that they have come to Court within three years of time beginning to run against them. The suit must therefore fail, but as the question has been discussed at length I think I should give an opinion, obiter as it may be, that the date on which consideration failed under Art. 97, which in my opinion governs this case, is the date on which they ceased to be in possession as mortgagees under the instrument; or in other words the date from which their possession became that of trespassers as opposed to their holding under an existing title. I have not been able to find a case exactly on all fours.

It is clear enough that when the plaintiff has obtained possession and is subsequently dispossessed time runs from the date of dispossession. I cannot find that it has been decided that, if he remains on as a trespasser, time runs from the date of his ceasing to be a trespasser and leaving the land, or from the date of his becoming a trespasser. The words "date of failure of consideration" show that the date to be taken is the date on which plaintiff ceased to derive any benefit from the mortgage. They ceased to be mortgagees on the date on which the decree was executed and the mortgagors were restored to possession, and the fact that they remained on as trespassers does not affect the running of time, for it cannot be said that their possession as trespassers was a benefit derived from the covenent though it followed immediately in time and on the cessation of that benefit, namely, the possession as mortgagees. I dismiss the appeal with costs.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 84

JAI LAL, J.

Bhagwan Sahai—Plaintiff—Appellant.

v.

Bhuria and *others*—Defendants—Respondents.

Second Appeal No. 1693 of 1931, Decided on 16th March 1932, against decree of Dist. Judge, Hissar, D/- 16th May 1931.

Limitation Act (1908), Arts. 66 and 132—Mortgagor to redeem when previous mortgage would be redeemed—No time specified for payment of mortgage-debt— Time runs from date of mortgage.

Where the mortgagor states that he would pay the mortgage money at the same time when he discharges the previous mortgage, a condition like this does not amount to specifying a day for payment within the meaning of Art. 66. Where the mortgagor states that he would redeem the mortgage at the same time when he redeems the first mortgage which was an independent transaction and which did not merge in the new transaction, a suit by the mortgagee for recovery of the mortgage debt by sale of the mortgaged property brought after 12 years after the execution of the second mortgage is barred by time as the period of limitation, in cases where no date is specified for payment, commences from the date of the mortgage: 139 *P. R.* 1889, *Ref.* [P 84 C 2; P 85 C 1]

Gullu Ram—for Appellant.

Nanwa Mal—for Respondents.

Judgment.—This appeal is against the decree of the District Judge of Hissar, dismissing the plaintiff's suit which was based on a simple mortgage for Rs. 50. The dismissal is on two grounds, first that the plaintiff mortgagee should have pleaded the present mortgage in a previous suit for redemption instituted by the mortgagor and secondly that this suit is barred by time. The view of the District Judge on the first point appears to be erroneous but it is not necessary for me to examine the matter in detail because in my opinion his view that the suit is barred by time is correct. The mortgage-deed is dated 13th February 1894, and it recites a previous mortgage for Rs. 200 in lieu of which the mortgaged land was in possession of the mortgagee. On the date of this mortgage, i. e., 13th February 1894, the mortgagor borrowed a further sum of Rs. 50 and agreed to pay interest thereon and stated that he would redeem the mortgage at the same time when he redeems the first mortgage. It is clearly an independent transaction. The previous mortgage was kept still alive and was considered to be separate from this fresh mortgage. In other words the previous transaction did not merge in the new transaction. In *Bahadur Lal* v. *Gaman* (1) it was held that a condition like the present, where the mortgagor states that he would pay the mortgage money at the same time when he discharged the previous mortgage, did not amount to specifying a day for payment within the meaning of Art. 66, Lim. Act.

It is conceded that at the most the period of limitation for a suit for recovery of the mortgage debt by sale of the mortgaged land as in this case is 12 years from the date specified for payment and if no such date is specified, from the date of the mortgage. As in this case no date was specified, the period of 12 years commenced from the date of the mortgage which is 13th February 1894. It has not been shown that in the case of the previous mortgage the date of payment had been expressly fixed by the parties. It seems that it was open to the mortgagee to recover his money in the case of a previous mortgage also at any time, and therefore the payment could have been enforced by the mortgagee at any time after 13th February 1894. The limitation therefore expired after the expiry of 12 years from that date. On this ground the decree of the District Judge is correct. I dismiss the appeal with costs.

K.N./R.K. *Appeal dismissed.*

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(1) [1889] 139 P R 1889.

A. I. R. 1933 Lahore 85

BROADWAY, C. J.

Allah Dad—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1014 of 1932, Decided on 25th November 1932, case reported by Addl. Sess. Judge, Gujranwala, D/- 5th July 1932.

Punjab Municipal Act (3 of 1916), Ss. 3 (5) and 219—Effecting crude repairs is not erecting building.

Where a person effects some crude repairs to the existing walls he cannot be said to have erected a building within S. 3 (5) and no offence within S. 219 is committed. [P 87 C 2]

Ram Lal Anand I—for Petitioner.

Facts.—The petitioner Allah Dad has been fined Rs. 30 and in default has been sentenced to simple imprisonment for one month, under S. 219, Punjab Municipal Act 3 of 1911. The allegation on behalf of the Municipal Committee, Gujrat, was that he has erected a serai, even when sanction was refused by the Committee and that he failed to demolish the building, in spite of a notice having been served on him. It is alleged that even originally the serai in question was built, in the beginning of 1929 in spite of the Municipal Committee having refused sanction. It is admitted that in this case we are not concerned with that matter. That action of the petitioner, who owns the site of the serai, was followed by some litigation, which also is immaterial for our purposes. For the purposes of this case the allegation is that Mela Ram (P. W. 3), Mistri of the Municipal Committee, made a report (Ex. P. E.) on 23rd April 1931, that the petitioner had built the serai "against the sanction conveyed on his plan." After the last words there were subsequently interpolated the words "without the sanction of the Committee." On this the Municipal Committee gave a notice on 2nd September 1931, to the petitioner to demolish the building. It being reported by Muhammad Hussain peon (P. W. 4) that the petitioner refused to receive service of the notice, substituted service was effected on 4th September by a notice being posted on his residence. The building not being demolished pursuant to that notice, resolution No. 916 was passed by the Municipal Committee on 16th November 1931 that Bihari Lal, Sanitary Inspector, was authorised "to file suit." This resulted in the present prosecution. Bihari Lal, aforesaid, is P. W. 1 in the case. The only other witness for the Municipality, i. e., for the prosecution is the Secretary of the Committee (P. W. 2).

Report.—Lengthy arguments have been addressed to me in this case, and various points have been raised on behalf of the petitioner. Most of them however are not necessary, in my view, for this reference.

The most important point, on the strength of which I find this reference necessary, is that the so-called building in question constituted only "repairs" and not "erection" or "re-erection" of the building. This is the plea of the petitioner and it was taken in the lower Court as well. In connection therewith, at the suggestion of the petitioner, I inspected the spot on the 20th instant, in the presence of the petitioner, his counsel and the Secretary Municipal Committee. The Secretary alone has been appearing in the case on behalf of the Committee. The serai involves a very large area. Only in its front, which opens on the main road which leads from the city to the railway station, there are certain rooms on either side. In the middle there is a gate and the rest of the space in the front is mostly lying in the shape of a gap, except that on a part of it there stand portions of a damaged wall. Reference may be made to the plan (Ex. P. B.), which the petitioner presented to the Municipal Committee seeking permission to build portions of the walls, which had been domolished by floods and which are shown in pink colour in that plan. This permission was refused. There are only three portions shown in pink, which were to be built. The front portion has not yet been built at all. The dispute centres only round the other two portions, one being in the north-western corner and the other being in the southern wall. Leaving the rooms, referred to above, the whole of the remaining site behind them is lying vacant, being only enclosed by wall. The whole length of the front, i. e., eastern side is 259 feet; west 236; south 228; and north 136. It would thus be seen that it is a very large plot. The portions of the walls, said to have been re-erected, are 36 plus 16 (not 20 as shown in the plan)=52 feet at the north-western corner and about 80 feet on the south. This might be compared with the total lengths of the walls.

What is more important is the way in which the portions of the walls have been set up. The original height of the northern and western walls is 12 feet and that of the southern 14 feet. All these walls are thicker up to a height of 5½ feet, whereas the depth of the wall is lesser above that level. A look at the portions in dispute seemed to show that the original foundation had not been damaged by the floods. It also seemed as if the water had passed through the thicker portion, which as above stated, is 5½ feet high. thus washing away lime mortar. There is no satisfactory proof on behalf of the Municipal Committee that even the portions in dispute were rebuilt so far as the lower 5½ feet are concerned. There was only a general statement by Mistry Mela Ram (P. W. 3). The appearance of the walls on the spot showed that they had not been rebuilt. Then what has been done by the petitioner is only that some loose old bricks have been piled in both the places above the original height of 5½ feet, to a height of about 2 feet only. The said loose bricks have been put there in quite an irregular and uneven fashion. A look at them convinced me that the object was to prevent the people from scaling over the walls, which had been left in those portions only 5½ feet high. It is in evidence that theatrical companies etc., have occasionally been giving performances within that enclosure. I would not call this piling of loose bricks to a height of 2 feet, without the use of any mortar whatsoever, as even repairs, what to say of erection or re-erection.

This being the state of affairs, I need hardly discuss the definition of erecting or re-erecting a building as given in S. 3 (5); and the definition of a "building" is given in S. 3 (2) of the Act. On behalf of the Municipal Committee I was referred to the commentary on the Municipal Act by Lala Hari Chand (2nd Edn.) at pp. 26 and 27 under the heading of "Construction of Walls," while the learned conusel for the petitioner referred me to the same commentary at pp. 28 and 29 under the heading "Reconstruction and Repairs." I have read through the same. No doubt the definition of "building" includes a wall, still it is a question of fact whether there have been only repairs or whether the building has been erected or re-erected. It would be recalled that we are not concerned with the original building having been erected without permission. That matter was set at rest by the previous litigation and that building was not got demolished by the Muncipal Committee. Nor are we concerned with the merits of the Committee's refusal to permit the portions that had been demolished by flood, and are shown in the plan (P. B.) to be rebuilt. On pp. 28 and 29 of Lala Hari Chand's book we have got that

> "where repairs are made to a house, which do not effect its stability, they constitute repairs pure and simple; but if they are of a substantial character, intended to add to the stability of the building they amount to re-construction. So if the repair is of an ordinary and casual character it is not re-construction of any portion of the building."

Again a little below, it is observed on p. 29 that

> "in each case it is a question of fact whether the partial works done with reference to a building are mere repairs or are re-construction of a portion of the building."

The nature of what was done by the petitioner, as was found by me on the spot, leaves no doubt in my mind that if at all the petitioner only made some repairs to portions of the damaged wall. We have to compare the length and the height of the portions in question to the length and the height of the entire wall, as also the original make of the wall and the make of the portions in dispute. The original wall, as appeared on the spot, was nicely and regularly built, whereas now only loose bricks have been piled up unevenly to a height of about two feet above the original walls 5½ feet high in the specified portions, In my opinion this casual piling of bricks as a temporary measure does not even deserve the name of repairs. It is interesting to note that in resolution 340 dated 17th October 1929, (Ex. P. C.), it was mentioned that the petitioner had given an application "to repair the serai" and the Sanitary Sub-Committee reported "that the applicant should not be allowed to repair the building." It can hardly be gainsaid that no permission of the Municipal Committee was needed for repairs. No doubt the petitioner applied; but then his idea appears to have been to build up the walls afresh regularly as the original walls were. Even in that case, it seems, as is contended by the petitioner's counsel, no permission of the Municipal Committee was needed and the petitioner applied because he appears to have been so advised. That question is immaterial. I find, as a fact, that what has been effected by the petitioner might at best constitute only partial repairs to the original building but that it would not constitute erection or re-erection of the building. I consider that the question whether a certain act of building constitutes merely "repair" or amount to "erection" or "re-erection" is a question of law, and therefore the revision is competent on this ground.

As already stated it is needless to go into other matters. I might however casually refer to one or two other matters. One is as has been pointed out by the petitioner's counsel, and has also been referred to by me above, that the resolution concerning the present prosecution was somehow passed by the Municipal Committee in the words that the Sanitary Inspector was "authorised to file suit." It was therefore contended that there was no sanction for a criminal prosecution. I find that the recommendation of the Sub-Committee about this resolution, which appears on the same paper above the resolutions, is in the words: *"Hasb zabta muqadma banane ki safarish ki jati hai."* This is dated 2nd November while the resolution is dated 16th November 1931. I think the resolution only shows bad English of the Secretary or other official, who recorded the resolution. He seems to have sought to translate the words "muqadma banana," which he did, as filing a suit. In this connexion it is also noteworthy that the notice in question referred to Ss. 172 and 175, Municipal Act, and therefore also what could be under contemplation was a criminal prosecution and not a civil suit. I therefore do not consider this objection as forceful. One of the other points raised was that the notice requiring demolition was not given within six months of the commencement of the building, as was required by law. The Committee relied on the report (Ex. P. E.) of Mistri Mela Ram (P. W. 3) dated 23rd April 1931, from which date, it was found by the lower Court, the notice, which was dated 2nd September 1931, was within time. It is however rightly pointed out that Mela Ram reported in the words *"tamir kar li hai."* It was only in his statement in Court, made on 18th February 1932, that he explained by saying that he reported when the work commenced. However this also is not so important. On my first ground however that the act of the petitioner which is objected to by the Committee, amounts only to "repairs," if at all, and does not consitute "erection" or "re-erection" of a building, I find that no sanction of the Committee was necessary under the law, and therefore it was not incumbent on the petitioner to demolish those portions of the wall pursuant to the notice of the Committee. Thus he not having contravened any lawful direction of the Committee and the sanction of the Committee having been unnecessary, the conviction of the petitioner under S. 219, Punjab Municipal Act, is bad and illegal. I therefore recommend to the High Court that the conviction of the petitioner and the sentence passed upon him be set aside.

Order.—It has been found by the learned Sessions Judge, after an inspection of the serai in question, that all that the petitioner had done was to effect some rather crude repairs to the existing walls. On this finding no offence against the Municipal Act was committed and I therefore set aside the conviction and sentence.

R.K. *Conviction set aside.*

A. I. R. 1933 Lahore 88

ABDUL QADIR, J.

Ghulam Mohammad— Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 285 of 1932, Decided on 10th August 1932.

Mahomedan Law—Marriage—Sunni —Option of puberty—Formal order of Quazi or Court is not necessary—Penal Code (1860), S. 494.

No formal order of Quazi or of Court is necessary to repudiate the marriage by option of puberty amongst Sunnis. Expression of disapproval of the marriage and an intention to repudiate the same after puberty and absence of consummation are sufficient and after such disapproval the girl is not guilty of bigamy if she marries another husband: 19 *Cal.* 79, *Rel. on.* [P 88 C 2]

Quaere.—Whether repudiation can be established merely by the fact of the second marriage? [P 88 C 2]

Mohammad Amin—for Petitioner.

Ram Lal, Asst. Legal Remembrancer—for the Crown.

Judgment.—Ghulam Mohammad and Mt. Gulab Bano were convicted of bigamy, under Ss. 494 and 109, Penal Code, and sentenced to rigorous imprisonment for one year each. They appealed, and the Sessions Judge dismissed the appeal of Ghulam Mohammad, but partly accepted that of Mt. Gulab Bano, reducing her sentence to simple imprisonment for 15 days and a fine of Rs. 75 or 6 months' simple imprisonment in default of payment of fine. The two petitioners have separately applied to this Court for revision of the order of the learned Sessions Judge. The facts briefly are that Mt. Gulab Bano, when she was a little girl of about 7, was given in marriage to Maula Dad, complainant, on 21st November 1920, by her mother. Her father was dead. When she was about 16 or 17, she put in an application to the Deputy Commissioner of her district claiming some landed property left by her father. She also made an allegation in that application that she had been made to go through a form of marriage when quite young, that she knew nothing about it and that she was not prepared to accept it and declared that she wanted to enter into marriage with a husband of her own choice. This application is dated 17th November 1930. Some eight or nine months after this, she married Ghulam Mohammad. Maula Dad filed a complaint against Ghulam Mohammad and Mt. Gulab Bano under Ss. 494 and 109, Penal Code.

It is urged on behalf of Mt. Gulab Bano that a marriage like the one mentioned in this case could be ratified or repudiated by the minor at her option after she attains puberty, and as, according to the findings of the trial Court, consummation of the marriage with Maula Dad had not taken place when she was married to Ghulam Mohammad, it must be held that she had done nothing to ratify her first marriage. It was further argued that it was not necessary to repudiate a marriage of this kind by a formal order of the Quazi or a Court of Justice and reliance was placed on her application of 17th November to show that she declared her intention of repudiating her earlier marriage before she contracted her marriage with Ghulam Mohammad. The case of ***Badal Aurat*** v. ***Queen-Empress*** (1) was cited as an authority in favour of this plea, but the learned Sessions Judge distinguished this case on the ground that the doctrine was of one Shiah law and did not apply to Sunnis and held that no repudiation by Mt. Gulab Bano was proved and that therefore both she and Ghulam Mohammad were guilty of bigamy.

In the revision before me, the same argument is pressed again by Malik Mohammad Amin, who invites attention to a passage in the body of the Calcutta judgment at p. 83, which runs as follows:

> "Both schools give to the minor an absolute power either to ratify or to cancel the unauthorized marriage. The (Hanafi) Sunni law presumes ratification when the girl after attaining the age of puberty has remained silent and has allowed the husband to consummate the marriage"

The counsel wants me to draw an inference that the principle applies to both schools of Mahomedan law, and under the Sunni law the silence of a young girl, if she allows her husband to consummate the marriage is given as the test of a tacit ratification on her part; but as admittedly no consummation of her marriage with Maula Dad has taken place in the present instance, it cannot be reasonably said that there had been any ratification on the part of Mt. Gulab Bano of her marriage with him. It is argued that in the absence of any ratification by her she was at liberty, after she had attained her puberty, to repudiate that marriage and she has done so. It is not necessary in this case to go into the question whether repudiation can be established merely by the fact of the second marri-

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1. (1892) 19 Cal 79.

age, because the facts enumerated above prove something more than that. It appears that the first husband must have come to know eight or nine months before Mt. Gulab Bano's second marriage, that she was repudiating her marriage with him. The girl seems to have made no secret of the fact that she was not prepared to accept the contract which purported to have been made on her behalf by her mother when she was a little girl. I am referred in this connexion to p. 375 of Ameer Ali's Mahomedan law, Vol. 2, Edn. 5, where the legal position on this point under Mahomedan law is made clear. The learned commendator observes:

> "It does not follow from this that if a woman who has exercised the option were to contract another marriage, believing that she was entitled to do so, she would make herself liable to punishment under the Criminal law."

I think the decision in *Badal Aurat* v. *Queen-Empress* (1), as well as the passage in Mr. Ameer Ali at p. 375, Vol. 2, of his Mahomedan Law, help the petitioners in this case. I accept the petitions for revision and acquit the petitioners. They will be released forthwith and the fine of Mt. Gulab Bano, if paid, shall be refunded.

B.R./R.K. *Revision allowed.*

✻✻ A. I. R. 1933 Lahore 89
Special Bench

TEK CHAND, ABDUL QADIR AND MONROE, JJ.

Ghulam Muhammad—Petitioner.

v.

The Crown—Opposite Party.

Civil Ref. No. 32 of 1932, Decided on 12th December 1932.

✻✻ Stamp Act (1899), Art. 57—Surety bond given under Civil P C., S. 55 (4)—Only personal obligation incurred by surety—Additional duty under Stamp Act is not necessary—Court-fees Act (1870), Sch. 2, Art. 6.

A surety bond given in pursuance of an order under Civil P. C., S. 55 (4) in which the surety incurs only a personal obligation falls under Art. 6, Sch. 2, Court-fees Act, and not under Art. 57, Stamp Act; and hence no additional stamp duty is payable under the Stamp Act: *A.I.R.* 1929 *Lah.* 205, *Expl.*; *A.I.R.* 1925 *Cal.* 906 (*FB*), *Ref.* [P 90 C 1,2]

Quære—**Whether security bond under Civil P. C., O. 41, R. 6 is liable to duty under Stamp Act?** [P 90 C 2]

Carden Noad—for the Crown.

Tek Chand, J.—**This is a reference by the Financial Commissioner, Punjab, asking us to decide whether a certain security bond, which had been filed by one Ghulam Muhammad in the Court of the Subordinate Judge, Mianwali, in the course of proceedings in execution of a decree, obtained by firm** Uttam Chand-Piara Ram against Hasham Shah, was properly stamped with a court-fee stamp of eight annas only.

It appears that several decrees had been passed by civil Courts against Hasham Shah and in execution of some of these decrees warrants for his arrest had been issued. He was accordingly arrested and when he was produced before the executing Court he expressed his intention to apply to be declared an insolvent. On this

> "the Subordinate Judge passed an order under S. 55 (4), Civil P. C., requiring the judgment-debtor to furnish security to the satisfaction of the Court that he will within one month apply to be declared an insolvent and that he will appear, when called upon, in any proceeding upon the decree in execution of which he had been arrested."

In accordance with this order one Ghulam Muhammad filed in the Court a security bond in the following terms:

> "I Ghulam Muhammad, son of Nur, caste Jati resident of Wandha S. Sher Zaman Wala, Dakhl, Birookhel, Tahsil and District Mianwali, declare as follows: 'The judgment-debtor has been brought here under warrants of arrest and has been asked to give a security for Rs. 500. I stand surety for the said judgment-debtor and hold myself responsible and hereby promise that the judgment-debtor will attend the Court on all dates of hearing till the case is decided and that he shall file within the prescribed period a petition in the Court of the Senior Subordinate Judge, Mianwali, for being declared an insolvent. If the judgment-debtor fails to comply with any of these conditions, I shall pay without any objection the amount decreed against him. Therefore this bond has been executed as a surety bond."
>
> 7-10-1931. (Sd.) Ghulam Muhammad.

The bond bore a court-fee stamp of eight annas only. The Subordinate Judge accepted the bond and released the judgment-debtor so as to enable him to take appropriate proceedings for his adjudication as an insolvent.

Some time after, the execution record was examined in the Collector's office and it was thought that in addition to the court-fee stamp of eight annas, which had been affixed already on the security-bond, it was liable to additional stamp duty under Art. 57, Sch. 1, Stamp Act. The matter was brought to the notice of the Subordinate Judge, who disagreed with this view, and expressed the opinion that the bond did not fall under Art. 57, but had been properly stamped with a court-fee of eight annas only. The Collector referred the case, through the Commissioner, to the Financial Commissioner, who was inclined to agree with the Subordinate Judge, but having regard to certain observations in a Single Bench judgment of this Court, reported as *A. I. R.* 1929 *Lah.* 205 he has made a reference to this Court under S. 57, Stamp Act.

At the hearing before us there was no appearance by or on behalf of the surety, the decree-holder, or the judgment-debtor, but the learned Government advocate appeared for the Crown. After hearing him and examining the terms of the security-bond, I have no hesitation in holding that it was properly stamped with a court-fee of eight annas and that no additional fee under the Stamp Act was payable on it. Art. 6, Sch. 2, Court-fees Act, prescribes a court-fee of eight annas on a

> "bail-bond or other instrument of obligation given in pursuance of an order made by a Court * * under any section of * * the Civil Procedure Code, 1908, and not otherwise provided by this Act."

It is conceded that there is no other provision in the Court-fees Act relating to a bond of this kind and therefore it clearly fails under Art. 6 of the Act. It will have been noticed that in executing the bond in question the surety incurred a personal obligation only, and that he did not hypothecate any moveable or immovable property. Now a perusal of the various sections and articles of the Stamp Act would show that it does not contain any provision for levy of a stamp duty on a personal bond of this kind. Art. 40 cannot possibly apply as no property was mortgaged by the surety. It seems to me that Art. 57 is equally inapplicable as it prescribes the

> "duty payable on a security bond or mortgage deed executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof, or executed by a surety to secure the due performance of a contract"

The learned Government Advocate admitted before us that in the present case the bond had not been executed for any of the purposes mentioned in this article. The only other provision in the Stamp Act in which reference is made to bonds is the residuary Art. 15, which prescribes the duty leviable on a "bond not being a debenture and not being otherwise provided for by this Act or by the court-fees Act." As pointed out already, a bond of the kind before us is provided for in Art. 6 of the court-fees Act and, therefore, it is not liable for any additional duty under Art. 15. As stated above, the learned Financial Commissioner was inclined to take this view, but he felt that a contrary opinion was possible by reason of certain observations, which are to be found in *A. I. R.* 1929 *Lah.* 205. In that case a security-bond had been executed in pursuance of an order of a Court for stay of execution proceedings under the Code of Civil Procedure. The security offered was personal and no property, moveable or immovable was charged. The learned Judge held, and if I may say so with all respect correctly, that the only duty leviable on the bond was a court-fee of eight annas under Art. 6, Sch. 2 of Act 7 of 1870, and that it did not require any stamp under the Stamp Act. The decision therefore was correct so far as it went. The learned Judge however further observed that a security-bond executed under O. 41, R.6 (2), Civil P. C., was liable to duty under Art., 57, Stamp Act, as well as under Art. 6, Sch. 2, Court-fees Act, even though the bond was a simple one and no property had been hypothecated. The bond which was before the learned Judge had not been executed under O. 32, but was one under O. 41 and therefore his observations were merely obiter, and, as pointed out by the learned Government Advocate, they are certainly not in accord with the decision of the Full Bench of the Calcutta High Court in re: *Reference from the Munsif Habigani* (1), which was cited with approval in an earlier part of the judgment. I do not consider it necessary to discuss this matter at length as the security-bond with which we are concerned was not executed under O. 41, R. 6. It will suffice to say that as at present advised, I fail to see how Art. 57, Stamp Act, can apply to a personal bond executed under that Rule. In my opinion, the case reported as *A. I. R.* 1929 *Lah.* 205 should be taken to have decided the only point which was actually before the learned Judge and which, I have no doubt, was correctly decided, and that the observations in that judgment relating to bonds other than those executed in pursuance of an order of a Court for stay of execution proceedings were merely obiter and should be treated as such.

My answer to the reference therefore is that the only duty leviable on the bond in question was a court-fee of eight annas only and that it did not require to be stamped under the Stamp Act.

Abdul Qadir, J.—I concur.

Monroe, J.—I concur.

S.R./R.K. *Reference answered.*

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(1) A I R 1925 Cal 906=89 I C 289=53 Cal 101 (FB).

✻ A. I. R. 1933 Lahore 91

BHIDE, J.

Mt. Radha—Plaintiff—Appellant.

v.

Ajudhia Parshad and *others* — Defendants—Respondents.

Second Appeal No. 541 of 1932, Decided on 16th November 1932, against preliminary and final decrees of Dist. Judge, Hissar D/- 21st November 1931.

(a) Punjab Alienation of Land Act (1900), S. 2 (3)—Mortgagee rights.

Mortgagee rights in land fall within the definition of "land": 12 *P. R.* 1911 and 39 *P. R.* 1916, *Rel. on.* [P 92 C 1]

✻ **(b) Transfer of Property Act (1882), S. 95—Co-mortgagor paying whole mortgage becomes charge-holder—Entry in revenue records as mortgagee of other co-mortgagor makes no difference.**

Where a co-mortgagor has paid the whole of mortgage, his position is that of a "charge-holder" and not of a mortgagee although he is entered in the revenue records as a mortgagee of the other co-mortgagor's share after the payment. [P 92 C 1]

(c) Limitation Act (1908), Arts. 144 and 148—Co-mortgagor redeeming whole mortgage—Suit by other co-mortgagors is governed by Art. 144 and not by Art. 148—For adverse possession former must claim exclusive title.

The position of a co-mortgagor who redeems the whole of the mortgaged property is that of a charge holder and that a suit by another co-mortgagor for possession of his share is governed by Art. 144 and not by Art. 148. The possession of such co-mortgagor becomes adverse only when there is any open assertion of an exclusive title by him: *A. I. R.* 1920 *Lah.* 234; *A. I. R.* 1931 *Lah.* 744 and 136 *I. C.* 264, *Foll.* [P 92 C 1]

(d) Cosharer — Adverse possession—Claim must be open and to other's knowledge.

When a title by adverse possession is set up by one cosharer against another, there must be proof of the adverse claim having been set up openly to the knowledge of the other cosharer concerned *A. I. R.* 1927 *Lah.* 886; *A. I. R.* 1930 *Lah.* 251: and *A. I. R.* 1931 *Lah.* 339, *Rel. on.* [P 92 C 2]

Kishan Dial—for Appellant.

Shamair Chand and *Nanwan Mal*—for Respondents.

Judgment.—This second appeal arises out of a suit for redemption of a mortgage .The material facts may be briefly stated as follows: Two brothers named Ajudhia Parshad and Harjas mortgaged about 5 bighas, 5 biswas (pakka) (=33 bighas and 3 biswas kacha) of land in favour of one Mansukh for Rs. 300 by a deed dated 18th January 1887. Subsequently the whole of the mortgage money was paid by Ajudhia Parshad in 1907. Thereupon his own share was shown as redeemed and he was entered in the revenue record as the mortgagee of the remaining half, instead of the original mortgagee. A little later he again mortgaged part of the land in favour of Tullia and Shiv Singh, sons of the original mortgagee Mansukh, and sold the same to them in January 1913. Another portion of the property was mortgaged by him to one Dhani Ram, father of defendant 3. On 8th July, 1929, Mt. Radha, as the legal representative of Harjas, who was one of the original mortgagors, instituted the present suit for redemption of her share. The defendants resisted the suit on various grounds disputing inter alia her locus standi to redeem the land and pleading adverse possession and limitation. The trial Court passed a decree in plaintiff's favour, but the District Judge modified the decree in appeal, holding that the suit had become time-barred in respect of that part of the property which had been sold. A decree for redemption was granted with respect to the rest of the property only. From this decree a second appeal has been preferred by the plaintiff Mt. Radha. The main contentions have been put forward on behalf of the appellant viz. (1) that the learned District Judge was wrong in holding that the position of Ajudhia Parshad was not that of a mortgagee but of a mere charge-holder; and (2) that the suit was not time-barred even if the position of Ajudhia Parshad was that of a charge-holder.

As regards the first point the learned District Judge has held that Ajudhia Parshad being a comortgagor and he having paid the whole of the mortgage, his position was that of a "charge-holder" and not of a mortgagee. It is true that he was entered in the revenue records as a mortgagee of the plaintiff's share after this payment, but the learned District Judge was of opinion that the entry did not represent the correct legal position and was made by the Patwari and the Revenue Officer according to their own notion thereof. The finding of the learned District Judge in this respect was arrived at after a consideration of the evidence on the point, and I do not think it can be interfered with in second appeal. But apart from this it appears that the transfer of mortgagee rights in the land by Tulli and Shiv Singh in favour of Ajudhia Parshad would have been void under the Punjab Alienation of Land Act, as the transferors were members of an agricultural tribe while Ajudhia Parshad was not and the transfer was not sanctioned by the Deputy Commissioner. It has been held that mortgagee rights in land fall within the definition of "land" as given in the Punjab Alienation of Land Act: *Asa Singh* v. *Buta* (1) and *Karam Ilahi* v. *Gulab Rai* (2). There is no doubt that the whole mortgage-money was paid by Ajudhia Parshad and in the circumstances the learned District Judge's view that the position of Ajudhia Parshad was really that of a co-mortgagor, who has redeemed the whole of the property seems to be correct. There is ample authority in support of the proposition that the position of a co-mortgagor who redeems the whole of the mortgaged property is that of a charge-holder and that a suit by another co-mortgagor for possession of his share is governed by Art. 144 and not by Art. 148, Lim. Act,: see *Basanta* v. *Dhanna Singh* (3). The present suit would therefore be governed by Art. 144.

The next point for consideration is the starting point for limitation. Under Art. 144 the period of limitation begins to run when the possession of the defendant becomes adverse. It has been held in two recent Division Bench rulings of this Court that when a co-mortgagor redeems the entire property, as in this case, his possession becomes adverse only when there is any open assertion of an exclusive title by him: see *A. I. R.* 1931 *Lah.* 744; *Ganda Ram* v. *Munshi Ram* (4). In the present instance, the learned District Judge has held that defendant 2 was in adverse possession since 1913 when part of the property was sold to him and therefore the present suit instituted in 1929 was barred with respect to that portion. On behalf of the appellant it is urged that it has not been shown that plaintiff had any knowledge of the sale of 1913. This contention seems to me to be correct. There is ample authority for the proposition that when a title by adverse possession is set up by one cosharer against another, there must be proof of the adverse claim having been set up openly to the knowledge of the other cosharer concerned: cf. *A. I. R.* 1927 *Lah.* 886; *A. I. R.* 1930 *Lah.* 251; *A. I. R.* 1931 *Lah.* 339. The same principle would, I think, govern the present case. The plaintiff in this case is a woman. The land in dispute was already under mortgage with defendant 2 and his brother. It is true that Ajudhia Parshad redeemed it in 1907, but he soon mortgaged a portion of it again in favour of defendant 2 and his brother and subsequently sold the same to them. Ajudhia Parshad had half share in the Khasra numbers then sold. The plaintiff was not present at the time of the mutations and there is nothing to show that she had any knowledge of this transaction or the adverse claim set up by Ajudhia Parshad. On the other hand, defendant 2 and his brother who had originally held the land under mortgage must have been fully aware of the fact that Ajudhia Parshad was not the sole owner of the khasra numbers a fact which was also clear from the entries in the revenue records. I am therefore of opinion that defendant 2 has failed to show that his title to plaintiff's share in khasra No. 1374-77, which were sold by Ajudhia Parshad to defendant 2 and his brother in 1913, has been perfected by adverse possession.

The learned Judge of the trial Court found that Rs. 574-8-0 were due to defendant 2 on account of improvements made by him. This finding is one of fact and is not challenged. The decree granted by the learned District Judge in favour of Gopal (defendant 3) is not also challenged. I accordingly accept this appeal, modify the decree of the learned District Judge so far as defendant 2 is concerned and grant plaintiff a decree for redemption for her half share in khasra Nos. 1374 to 1377 on payment of the proportionate share of the mortgage-money viz., Rs. 89 (Rs. 150—Rs. 61 payable to Gopal, defendant 3, as decreed by the learned District Judge), plus Rupees 574-8-0 by way of compensation. The decree against Gopal (defendant 3) as passed by the learned District Judge, will stand. The amount thus due to defendants 2 and 3 will be paid within three months of this date, i. e., on or before 15th February 1933, in the trial Court. If the payment is not made the suit will stand dismissed with costs. If the payment is made plaintiff will get her costs throughout. Defendant 3, will however not be liable for plaintiff's costs in this Court.

R.K. *Decree modified.*

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1. (1911) 12 P R 1911=9 I C 396.
2. (1916) 39 P R 1916=33 I C 960.
3. A I R 1920 Lah 234=55 I C 450.
4. (1931) 136 I C 264.

A. I. R. 1933 Lahore 93

BHIDE, J.

Raghbar Dayal and *others*—Defendants—Appellants.

v.

Firm Piare Lal-Bhora Mal and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 646 of 1932, Decided on 21st November 1932, against order of Dist. Judge, Hissar, D/- 22nd January 1932.

(a) Contract Act (1872), S. 230—Principal unregistered corporation—Servants of corporation are still not personally liable—Civil P. C. (1908), O. 29, R. 1.

The mere fact that a committee is not a registered body and has no independent existence in law, cannot make the servants of the committee personally liable. Although the Association as such cannot be sued, its members will be jointly liable: 14 *P. R.* 1891, *Rel. on.* [P 93 C 2]

(b) Contract Act (1872), S. 213—Principals more than one—Servant is liable to account to them jointly.

When an agent is appointed by more than one principal he is liable to them jointly. He is not bound to account to them separately to any one of them and if he does so, he is not thereby absolved from his liability to others. [P 94 C 1]

(c) Civil P. C. (1908), O. 1, R. 13—Parties necessary—Objection taken but not joined—Suit should be dismissed.

Where the objection as to non-joinder of necessary parties is taken at the very outset and the plaintiffs do not implead them, the suit must be dismissed: *A. I. R.* 1923 *Mad.* 337 and *A. I. R.* 1931 *P. C.* 229, *Ref.* [P 94 C 1]

Kishen Dial—for Appellants.

M. A. Khan—for Respondents.

Judgment. — On 23rd July 1928, 17 firms including the plaintiffs formed an association called Tijarati Satta Committee for entering into forward contracts for delivery of wheat. The Association was not registered. It was agreed that any member of the Association, who entered into a forward contract, should deposit Rs. 25 per every hundred maunds of wheat purchased or sold, with the Treasurer of the Association. The Association was dissolved on 27th September 1928. Thereafter plaintiffs instituted a suit for recovery of Rs. 1,935 alleged to have been deposited by them in respect of the transactions entered into by them. It was alleged by the plaintiffs that no settlement had been made in respect of the transactions as the Association was dissolved before the "due dates." The suit was instituted against defendants 1 to 5, who were the servants of the Association. Defendants 1 and 2 were treasurers, defendant 3 was an auditor while defendants 4 and 5 were accountants. Defendants raised various objections, pleading inter alia, that they were merely servants of the Tijarati Satta Committee, with whom the deposits had been made and were therefore not personally liable; and secondly that the suit should have been for accounts and against all the members of that Committee. The trial Court upheld the latter objection and dismissed the suit. On appeal however the learned District Judge held that the suit was maintainable against the defendants and remanded the case for decision of the remaining issues. From this decision the defendants have preferred a second appeal.

The learned counsel for the appellants concedes that the Tijarati Satta Committee was not a registered company and had no legal entity. He however contends that the suit should have been brought against all the 17 firms who had entered into the agreement referred to above. Although the Association was not a legal entity, it is urged that the defendants must be looked upon as servants of the 17 firms. It is not disputed that the defendants were the servants of the 17 firms and were responsible to them and that the deposits were paid to the defendants in their capacity as servants of these firms and not in their personal capacity. The question for consideration therefore is whether in the circumstances plaintiffs can sue the defendants for refund of the deposits paid by them. The learned counsel contends that they cannot, and in support of this contention, he has cited a number of authorities.

It seems clear that the mere fact that the Tijarati Satta Committee was not a registered body and had no independent existence in law, cannot make the defendants, who were admittedly mere servants, personally liable. Although the Association as such could not be sued, its members will be jointly liable. In *Jan Mahomed* v. *Changa* (1), it was held that although an unincorporated club could not be sued as such, its members could be jointly sued. There was really no privity of contract as between the plaintiffs and the defendants who were merely servants of the 17 firms. The agreement was within this group of 17 firms and defendants were agents of this group. The learned District Judge has held that the defendants are liable to render accounts to any one of these firms but this view does not seem to be correct. According

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1. (1891) 14 P R 1891.

to law when an agent is appointed by more than one principal, he is liable to them jointly. He is not bound to account to them separately to any one of them and if he does so, he is not thereby absolved from his liability to others: cf. Bowstead on Agency, 8th Edn., p. 127; Katiar's Law of Agency (edition of 1928) pp. 564 and 565; Halsbury's Laws of England (edition of 1907), Vol. I, p. 159; *Jagdip Prasad Sahai* v. *Mt. Rajo Kuer* (2) and *Kadir Buksh* v. *Raichernessa Shahebani* (3). In the present case, the deposits were admittedly made by the plaintiffs in respect of a number of transactions entered into by them. Some of these transactions were between members of the Association. The plea of the defendants was that these as well as other transactions were settled under the instructions of the members of the Tijarati Committee. The learned District Judge seems to have understood that defendants were guilty of misfeasance or malfeasance but this does not seem to have been really the case of the plaintiffs. The question whether anything is due to the plaintiffs cannot in the circumstances be determined without taking account of all the transactions and joining the remaining 16 firms as parties.

In my opinion the view of the trial Court on the above point was correct. The objection as to non-joinder of necessary parties was taken at the very outset and as the plaintiffs did not implead them, the suit as framed against defendants 1 to 5 must be dismissed: cf. *A. I. R.* 1923 *Mad.* 337; *Naba Kumar* v. *Radhashyam Mahish* (4). I accordingly accept the appeal and setting aside the decree of the learned District Judge dismiss the suit with costs throughout.

R.K. *Appeal accepted.*

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2. A I R 1923 Pat 464=75 I C 1022=2 Pat 585.
3. (1920) 62 I C 766.
4. A I R 1931 P C 229=134 I C 654 (P C).

A. I. R. 1933 Lahore 94

TEK CHAND AND MONROE, JJ.

Nathu and *others*—Plaintiffs—Appellants.

v.

Uttam Singh and *another*—Defendants—Respondents.

First Appeal No. 2604 of 1927, Decided on 9th May 1932, against decree of Senior Sub-Judge, Kangra, D/- 12th July 1927.

Punjab Tenancy Act (1887), S. 77 (3), Cl. (o)—S. 77 (3), Cl. (o) does not apply to suits between two sets of co-owners, one resisting right of another to use joint land in particular manner without payment of dues to him—Such suit can be instituted in civil Court—Jurisdiction—Civil and Revenue.

Clause (o), Sub-S. (3), S. 77 contemplates a dispute of the nature described in the clause between a "land-owner" and a person who does not hold that position in respect of the land in question. It does not apply to a suit between two sets of co-owners of the same land one of whom resists the right of the other to use the joint land in a particular manner without payment of certain dues to him. Such a suit if instituted in a civil Court is properly instituted. [P 94 C 2]

Kishan Dayal and *Faqir Chand*—for Appellants.

Achhru Ram and *Bhagwat Dayal*—for Respondents.

Tek Chand, J.—The plaintiffs-appellants brought a suit in the Court of the Senior Subordinate Judge, Kangra, for a declaration that since times immemorial they have been grazing their sheep and goats without payment of any grazing dues over the village shamilat and have been passing them through the village without payment of dues known as kotwali kirat, that they are entitled to graze and pass their flock in future and that the defendants have no right to receive any grazing dues or the dues known as kotwali kirat from them. In the plaint it was alleged that the plaintiffs were proprietors in the village like the defendants and possessed the same rights in the shamilat as the defendants. The learned Senior Subordinate Judge has dismissed the suit on a preliminary objection by the defendants that the civil Court had no jurisdiction to try it under S. 77 (3) (o), Punjab Tenancy Act.

It is admitted that both parties are co-proprietors in this village and the land, for the use of which the defendants claim the dues in question, is the common land of the village. The suit is therefore between two sets of co-owners of the same land, one of whom resists the rights of the other to use the joint land in a particular manner without payment of certain dues to him. In my opinion Cl. (o), sub-S. 3, S. 77 does not apply to a suit of this kind. It contemplates a dispute of the nature described in the clause between a "land-owner" and a person who does not hold that position in respect of the land in question. I hold therefore that the suit was properly instituted in the civil Court and has been wrongly dismissed. I would accordingly accept the appeal, set aside the judgment and decree of the learned Senior Subordinate Judge and remand the case to him for decision on merits. Court-fee on this appeal will be refunded, other costs will be costs in the case.

Monroe, J.— I agree.

R.M./R.K. *Appeal allowed.*

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* A. I. R. 1933 Lahore 95

ADDISON AND AGHA HAIDAR, JJ.

Ghulam Ali—Plaintiff—Appellant.

v.

Inayat Ali and *another*—Defendants—Respondents.

First Appeal No. 328 of 1927, Decided on 23rd November 1932, from decree of Senior Sub-Judge, Gujranwala, D/- 23rd December 1926.

(a) Mahomedan Law — Mother—Guardian entering into agreement for her minor sons—Pecuniary liability saddled on minors under the agreement—Agreement is not binding on sons.

An agreement to recoup a person for the expenses which he might incur in defending an action entered into by a Mahomedan mother as guardian of her minor sons is not binding upon the minors as their mother has no authority under the law to enter into any contract whereby the minors would be saddled with any pecuniary liability. [P 96 C 1]

* **(b) Contract Act (1872), S. 70—*A* having one half share in property in previous litigation brought against *A*, *B* and *C*, defending that litigation to safe-guard his interest—*A* bringing present suit against *B* and *C* for contribution—*A* can succeed neither in law nor in equity—Contribution.**

Where out of the three defendants *A*, *B* and *C* in a previous suit *A* was interested in the disputed property in that litigation to the extent of one-half and in order to safe-guard his interest he had to fight out the case in the best way he could, if incidentally and without any special effort on his part *B* and *C* derived any advantage, it cannot be said that *A* had done something for the benefit of *B* and *C* for which they would be bound in law or equity to make a proportionate re-imbursement. Even if *B* and *C* had refused to be benefited by *A*'s conduct, *A* would have still gone on with his defence; under such circumstances *A* is not entitled to any such equity as underlies provisions of S. 70: *A.I.R.* 1927 *Lah.* 842; *A.I.R.* 1914 *Lah.* 334; *A.I.R.* 1932 *Mad.* 189 and *A.I.R.* 1931 *Mad.* 51, *Rel. on.* [P 96 C 1, 2]

Ram Lal Anand I—for Appellant.

Abdul Karim—for Respondents.

Agha Haidar, J.—On 30th June 1914, one Tafazzul Hussain and others brought a suit for a declaration and injunction against Ghulam Ali Ramzan Ali and Sher Ali, alleging that certain land was wakf and the defendants had no right to alienate it. Ghulam Ali is the present plaintiff and Ramzan Ali's two sons Faiz Ali and Hadayat Ali are defendants 1 and 2, while Sher Ali is represented by his two minor sons, Inayat Ali and Rahmat Ali, defendants 3 and 4. This suit was dismissed on 10th March 1917. There was an appeal to the High Court which was dismissed on 12th December 1922. During the pendency of the appeal Ramzan Ali and Sher Ali died and their sons, namely, defendants 1 and 2 and defendants 3 and 4, were brought on the record as their legal representatives. The taxed costs of the litigation which terminated on 12th December 1922 amounted to Rs. 1,315-8-0. The share of the plaintiff Ghulam Ali in the property involved in the suit was one-half, while Ramzan Ali and Sher Ali had one-fourth share each. The plaintiff Ghulam Ali brought the present suit against the defendants, claming a sum of Rs. 5,200 on the basis of an oral agreement alleged to have been entered into between the fathers of the defendants and the plaintiff and of another agreement Ex. 1. subsequently executed by Faiz Ali defendant 1 for himself and as guardian of his minor brother, Hadayat Ali, defendant No. 2 and by Mt. Hussain Bibi, the mother and guardian of defendants 3 and 4, on 14th November 1922, in favour of the plaintiff, promising to re-imburse him for the costs of the litigation. The defence of the defendants, so far as it is necessary for the purpose of this appeal, was that the plaintiff had been spending money for his own benefit in the previous suit, and that the agreement (Ex. P-1) dated 14th November 1922, was not enforceable against defendants 3 and 4. It may be mentioned here that defendants 1 and 2, during the pendency of the suit in the Court below, entered into a compromise with the plaintiff and, as against them, the suit has been dismissed by the trial Judge. In order to make his suit directly appealable to the High Court as a first appeal, the plaintiff has included all kinds of impossible demands in the claim and has thus arrived at the valuation of Rs. 5,200. The suit has been dismissed and the plaintiff has come up in appeal to this Court.

The learned counsel for the appellant urged that, while the previous suit was pending in the trial Court, Ramzan Ali, and Sher Ali, who were in straitened circumstances, promised to recoup the plaintiff for the expenses which he might incur in defending the action. There is however no proof of this agreement and the learned counsel did not press it seriously. He however strongly relied upon the agreement (P-1) dated 14th November 1922, under which the mother of defendants 3 and 4 acting as their guardian, agreed to re-imburse the present plaintiff for all the money that he might spend in prosecuting the appeal in the High Court. The learned Senior Subordinate Judge held that the alleged agreement (P-1) was not binding upon the minors as their mother had no authority under the law to enter into any contract whereby the minors would be saddled with any pecuniary liability. He has also held that the intelligent execution by Mt. Hussain Bibi of the document was highly doubtful and, in all probability, the lady was made to put her thumb mark upon it, while she was away from her home, without understanding its contents. Nothing has been brought forward in the course of the argument which would justify this Court to reverse the findings of the Court below on the question of law and fact involved therein.

The learned counsel for the appellant first urged that the plaintiff was entitled to recover from the respondents Rs. 2,600 but ultimately confined his claim only to the proportionate share of the amount representing the costs awarded to the successful plaintiff in the previous suit. He has placed reliance upon the provisions of S. 70, Contract Act, and has quoted a number of authorities, some of which no doubt seem to lend some support to his contention. The learned counsel for the respondents has invited our attention to a decision of this Court reported as *Rahman* v. *Dillu, A. I. R.* 1927 *Lah.* 842, which followed *Abdul Wahid Khan* v. *Shalukha Bibi* (1) and *Dulla Singh* v. *Khazana* (2), and laid down that there was no provision of law under which a plaintiff can successfully maintain a suit for contribution against his co-heirs for expenses incurred by him in a litigation against third parties, even if such co-heirs had derived the benefit of the plaintiff's successful conduct of that litigation. I may also quote here a case reported as *Vyraperumal Mudaliar* v. *Alagappa A. I. R.* 1932 *Mad.* 189, which lays down that "there is no general principle of law that, where one person get some advantage from the act of another, a right of contribution towards the expense for that act arises on behalf of the person who has done it."

In *Sampath* v. *Rajah of Venkatagiri, A. I. R.* 1931 *Mad.* 51, it was held that under S. 70 it must be shown that the person benefited has had the opportunity of accepting or rejecting the benefit. Now, in the present case the plaintiff was interested in the disputed property in the previous litigation to the extent of one-half. His defence was the same as that of his co-defendants. It was his interest to defeat the plaintiffs and, in order to secure this object, he had to fight out the case in the best way that he could. He had to produce evidence and engage counsel in his own interest and, if incidentally and without any special effort on his part the defendants derived any advantage, it cannot be said that the plaintiff had gone out of his way and had done something for the benefit of the contesting defendants in the present case, for which they would be bound in law or equity to make a proportionate re-imbursement. In fact even if the defendants had refused to be benefitted by the plaintiff's conduct of his defence the plaintiff would have all the same gone on with his defence in order to succeed against the plaintiffs in the previous suit. I do not think, having regard to the nature of the case, that the plaintiff is entitled to any such equity as underlies the provisions of S. 70, Contract Act. In my judgment the trial Judge was justified in dismissing the plaintiff's claim. I would therefore affirm the decree passed by him and dismiss this appeal. Having regard to all the circumstances of the case I would order that the parties should bear their own costs in this Court.

Addison, J.—I agree.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 96

TEK CHAND, J.

Shamshad Ali Khan—Complainant—Petitianer.

v.

Mohammad Amin Khan and *others*—Accused—Opposite Parties.

Criminal Misc. Case No. 130 of 1932, Decided on 27th July 1932.

Criminal P. C. (1898), S. 526—Witnesses examined after 9 p.m.—Case was transferred.

Where the Magistrate examined some of the witnesses for the complainant after 9 p.m., the case was transferred to another Magistrate and his attention was drawn to the circular letter to the effect that no new case should be taken by the subordinate Courts after 4 p. m.: *A. I. R.* 1929 *Lah.* 702, *Rel. on.* [P 97 C 1]

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(1) [1894] 21 Cal 496=21 I A 26 (P C).

(2) A I R 1914 Lah 384=25 I C 542=61 P R 1914.

Order.—After examining the record and reading the explanation submitted by the Magistrate I withdraw the case from the Court of Chaudhri Mohammad Anwar Khan, Magistrate, First Class, Rohtak, and direct the District Magistrate to assign it to any other Magistrate for trial at the headquarters. The Magistrate has admitted in his explanation that he examined some of the witnesses for the complainant after 9 p. m., as he was busy during the day in discharging other executive duties in connexion with the visit of certain troops. The directions of this Court as contained in its circular letter No. 2167-G, dated 2nd April 1924, addressed to all District and Sessions Judges and District Magistrates are quite clear that no new cases should be taken by the Subordinate Courts after 4 p. m: see also in this connexion *Mt. Dayawanti* v. *Bita Nand* (1). The Magistrate states that he was unaware of the contents of this circular letter. This discloses a highly unsatisfactory state of affairs and I have no doubt that the District Magistrate will take steps now to bring the circular to the notice of all Magistrates in his District.

R.K. *Case transferred.*

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1. A I R 1929 Lah 702=1929 Cr C 216=119 I C 327=30 Cr L J 1048.

A. I. R. 1933 Lahore 97

TEK CHAND, J.

Ramjas Mal-Binj Raj—Defendant—Appellant.

v.

Sheoji Ram-Ganga Ram— Plaintiff—Respondent.

Second Appeal No. 17 of 1929, Decided on 11th July 1932, against decree of Dist. Judge, Hissar, D/- 21st September 1928.

Negotiable Instruments Act (1882), S. 76 (d) —Drawer settling accounts with drawee and taking back all amounts due—Payee need not present hundi for payment and case comes within S. 76 (d).

Where the drawer of hundis payable at sight after 61 days has settled his accounts with the drawees long before the suit by the payee and has taken back all the money that was due by them to him the drawer does not suffer any damage from the payee's failure to present the hundis for payment on maturity and the case falls within exception (d), S. 76. The payee is entitled to sue the drawer for the recovery of the amount due on the hundis. [P 98 C 1]

Shamair Chand—for Appellant.

Duni Chand Gupta—for Respondent.

Judgment.—On 22nd July 1923, firm Ramjas Mal-Binj Raj of Sirsa drew three hundis for Rs. 600, Rs. 400 and Rs. 400 respectively on firm Ganesh Das-Ganga Ram of Bhiwani, payable to firm Sheoji Ram-Ganga Ram of Sirsa. All the three Hundis were payable at sight after 61 days. On 26th August 1926 the payee, firm Sheoji Ram-Ganga Ram, brought a suit against the drawer, firm Ramjas Mal-Binj Raj, for recovery of Rs. 1,900 on the allegation that the hundis were duly presented for payment on maturity but were dishonoured by the drawee. The plaintiff also claimed interest at the rate of 12 per cent per annum on the principal sum secured on the hundis. The defendant admitted execution of the hundis but pleaded that they were without consideration, and further that the plaintiff had not presented them for payment on maturity nor had he given any notice of dishonour to the drawer, and consequently he was not entitled to recover anything from the defendant. The trial Judge found that the hundis were executed for consideration but holding that they had not been presented nor had any notice of dishonours being given to drawers dismissed the suit. On appeal the learned District Judge has affirmed the findings of the trial Court that the hundis had been drawn for consideration and that the plaintiff had failed to prove that they were duly presented on maturity or that the fact of dishonour was notified to the drawers. He has held however that the facts on the record established beyond doubt that the case fell within the exception contained in Cl. (d), S. 76, Negotiable Instruments Act, under which presentment for payment is not necessary as against the drawer if the drawer could not suffer damage for want of such presentment. Applying this rule of law to the fact found, the learned District Judge has decreed the suit for Rs. 1,650, allowing interest at 6 per cent on the principal amount.

The defendant has preferred a second appeal to this Court and on his behalf Mr. Shamair Chand has contended that the learned District Judge ought not to have relied on the exception mentioned in Cl. (d), S. 76, Negotiable Instruments Act, in view of the fact that in his pleadings the plaintiff had not stated that his case fell within that exception. He further contended that the point was not covered by the issues framed by the trial Court and the evidence led at the trial, and that the learned District Judge ought not to have set up an entirely new case for the plaintiff. In my opinion this contention is devoid of force. It is no doubt true that the "exception" was not pleaded in so many words in the plaint, but it is clear that issue 6 as framed by the trial Court was comprehensive enough to cover the point and the judgment of the trial Court shows that the point was specifically argued before him. The statement of the defendant himself, as recorded on 29th August 1927, shows that he has settled his accounts with the drawees in September 1923 and had taken back all the money that was due by them to him.

Further, Lala Pyare Lal, pleader, to whom a commission was issued to examine the defendant's books, stated on oath before the trial Court that there was an entry in the books of the defendant that he had realised Rs. 2,039 from the drawees' firm Ganesh Das-Ganga Ram on 29th September 1923. There was therefore ample material on the record on which the learned District Judge could come to a finding that the drawer could not, and did not, suffer any damage from the plaintiff's failure to present the hundis for payment of maturity. In order to put the matter beyond doubt I asked Mr. Shamair Chand to state what evidence his client would be able to produce in case a remand was ordered by me. The learned counsel frankly expressed his inability to state that any further light could be thrown by additional evidence on this vital issue. The finding that the hundis had been executed for consideration was not assailed before me, as indeed it could not be in view of the clear evidence on the record. I hold therefore that the learned District Judge came to a correct conclusion that the plaintiff's case fell within exception (d) of S. 76, Negotiable Instruments Act, and that the plaintiff is entitled to sue the defendant for the recovery of the amount due thereon. Lastly Mr. Shamair Chand urged that no interest should have been allowed on the principal sums secured by the hundis in the circumstances of the case. I see no reason to accept this contention as the defendant had the use of the plaintiff's money for such a long time. The rate of interest at 6 per cent per annum, allowed by the lower Court is by no means unreasonable and was calculated in accordance with the provisions of S. 80 of the Act. The appeal fails and is dismissed with costs.

R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 98

JAI LAL, J.

Mrs. A. F. DeSouza of Mussoorie —Intervener.

v.

Elino Frank and *another* — Respondents.

Misc. Petn. No. 575 of 1932, Decided on 14th October 1932.

Divorce Act (1869), S. 16—Decree nisi for dissolution on allegations of wife's adultery and want of collusion or connivance—Application by intervener challenging correctness of allegations in petition for dissolution —Notices issued on parties but deliberately avoided—Decree nisi was set aside and prosecution of husband ordered under Penal Code (1860), S. 193.

Proceedings were started at the instance of the husband for the dissolution of marriage on the ground of wife's adultery. It was also alleged that there was no collusion or connivance between the parties. The statements were again repeated before the Court and an order nisi was passed. Before order absolute could be passed an application was made by a stranger as an intervener under S. 16 alleging that the application for dissolution was presented in consultation and active help of the wife and the adulterer. The application was supported by affidavit and documentary evidence. Notices issued on the parties and warrant against the husband, but service was deliberately avoided.

Held: that under the circumstances, the only course left open was to dismiss the application for the dissolution of the marriage and to set aside the decree nisi, and a complaint be instituted against the husband under S. 193, Penal Code, and under such other section as may be applicable to his case. [P 99 C 1, 2]

Bodh Raj Sawhney—for Intervener.

C. H. Carden Noad, Govt. Advocate—for King's Proctor.

Order.—On an application, dated 20th October 1930, made by Elino Frank (Francisco), son of Isaco Francisco, who was at the time of the application residing at 79, Jhoke Road, Ferozepore, after issuing the usual notices, I granted a decree nisi for the dissolution of the petitioner's marriage with Winnifred Frank (Francisco) on 6th March 1931. The application, dated 20th October 1930, was verified on 18th October 1930, by the petitioner Elino Frank, and in that application he alleged that his wife, Winnifred Frank, had committed adultery with the second respondent, J. Evangelista, and that as soon as the petitioner saw respondent 1, his wife, misbehaving with respondent 2, he turned her out of his house and that since then respondent 1 had been living with respondent 2, and had borne two children to him. The petitioner further added that

"he was absolutely upset at this behaviour of his wife and his health so failed him that he was unable to do any work for a long period and had to remain in hospital,"

that since then respondent 1 had never lived with the petitioner and that the petitioner had not been able to present the application earlier as he could not arrange for money to defray the expenses required for the same and that he was not keeping good health. He further added that there was no collusion or connivance on the part of the petitioner in the conduct or misbehaviour of respondent 1 with respondent 2. On 6th March 1931, the petitioner made a statement in my Court in which he repeated the statements made in the petition and amplified it and again repeated the allegation that there was no collusion between him and his wife and that he had not in any way induced his wife to have intercourse with respondent 2, nor had he connived at the affair. In pursuance of this petition and the statement made by the petitioner I granted the decree nisi on 6th March 1931. The case was to come up before me after the expiration of six months with a view to make the decree absolute. On 10th October 1931. an application was made by Mr. Shamair Chand, Advocate, on behalf of the petitioner to make the decree nisi absolute and I issued notices to the parties concerned.

In the meantime on 18th July 1931 an application was made by a Mr. A. F. DeSouza of Mussoorie, acting as an intervener, under S. 16 of the Act 4 of 1869, alleging that the statements made by the petitioner, Elino Frank, in support of his petition for the annulment of his marriage were false and that the petition had been filed in consultation and with the active help of both the respondents. It is further alleged that, in spite of the misbehaviour of respondent 1 with respondent 2 to the knowledge of the petitioner, all, that is to say, the petitioner and the two respondents, have been living together as one family; and in support of her allegations the intervener has made mention of several facts in her application and has also produced certain documents. This application by the intervener is supported by an affidavit. I have issued several notices to the petitioner and the two respondents, also warrants for the arrest of the petitioner, but it appears that they have been deliberately evading service. Under the circumstances, the only course left open to me is to dismiss the application for the dissolution of the marriage and to set aside the decree nisi, passed by me on 6th March 1931. I further direct, under S. 476, Criminal P. C., that a complaint be instituted against the petitioner Elino Frank (Francisco) under S. 193, Penal Code, and under such other section as may be applicable to his case. The learned Government Advocate, who has appeared before me in these proceedings on behalf of the King's proctor, will be requested to prepare a complaint and submit it for my signature. The complaint shall be filed in the Court of the District Magistrate of Lahore.

R.K. *Order accordingly.*

A. I. R. 1933 Lahore 99

TEK CHAND, J.

Gandu Mal — Decree-holder —Petitioner.

v.

Taj Din and *another*—Judgment-debtor—Opposite Parties.

Civil Revn. No. 298 of 1931, Decided on 4th March 1932, against order of Sm. C. C. Judge, Lahore, D/- 9th April 1930.

(a) Civil P. C. (1908), O. 21, Rr. 92, 89, 90 and 91—Objections under R. 90 dismissed—Sale must be automatically confirmed—Decree-holder's absence is immaterial.

When a sale has taken place in execution of a decree and either no application has been filed under Rr. 89 and 90 or 91, O. 21, or such an application has been dismissed, the Court has no option but to confirm the sale under R. 92. If the judgment-debtor having filed objections under R. 90 fails to prosecute them, these objections must be dismissed in default, and an order confirming the sale automatically passed. For this purpose the presence of the decree-holder is not legally necessary: *A. I. R.* 1930 *Nag.* 134, *Rel. on.* [P 100 C 2]

(b) Civil P. C. (1908), O. 21, R. 92—Sale not confirmed in spite of R. 92—Order is revisable—Civil P. C. (1908), S. 115.

If a sale has taken place in execution of a decree and the executing Court in disregard of the imperative rule of procedure laid down in R. 92, declines to confirm the sale the order is liable to be set aside on revision by the High Court under S. 115: 20 *Cal.* 8 (*P. C.*) and 92 *P. R.* 1907, *Rel. on.* [P 100 C 2]

(c) Civil P. C. (1908), O. 9, R. 13—Execution application can be restored under inherent powers—Civil P. C. (1908), S. 151.

No doubt the provisions of O. 9, do not in terms apply to execution proceedings but such applications can be restored under the inherent powers of the Court: *A. I. R.* 1921 *Lah.* 67 and *A. I. R.* 1926 *Lah.* 534, *Rel. on.* [P 101 C 1]

Panna Lal Bahl—for Petitioner.

Akbar Ali—for Opposite Parties.

Judgment.—In execution of a money decree obtained by the petitioner against the defendants certain house property belonging to the latter was attached and was ordered to be sold. After the necessary proclamation had been issued and other requirements of the law fulfilled, the property was sold by auction to the decree-holder on 22nd November 1929. The judgment-debtors filed certain objections to the sale, and 4th January 1930, was fixed for arguments. On that date neither the decree-holder nor the judgment-debtors were present and the Court passed the following order:

> "Decree-holder is absent. The applicants are also absent. The sale has not yet been confirmed. Application dismissed for default."

It was not clear from this order whether the learned Judge intended to dismiss the application of objections filed by the judgment-debtors, or the application for execution of the decree, though from the use of the words "applicants" and "application" in the order it appears that the real intention was to dismiss the objections only. The record also contains a vernacular order of the same date in the following words:

> "*hasab hukam angrezi misl baadam pairvi khartj hove.*"

It is by no means clear whether the "misl" which was consigned to the record room was the one relating to the objections only or the execution file itself. Bawa Kanshi Ram, the learned Judge, who had passed these orders, was transferred soon after and was succeeded by Mr. G. S. Mongia. Before him the decree-holder filed an application praying that the sale should be confirmed as the judgment-debtors were absent on 4th January 1930, and their objections had been dismissed and, in the alternative, that if the order of 4th January 1930, was to be taken as dismissing the execution proceedings, those proceedings be restored. The learned Judge disposed of the first prayer by his order, dated 9th April, 1930, holding that the execution application itself had been dismissed on 4th January 1930, for default of appearance of the decree-holder and the sale could not be confirmed. As regards the second prayer for restoration of the execution proceedings the learned Judge directed the petitioner to produce evidence to prove that there was sufficient cause for his absence on 4th January 1930. This prayer also was rejected by order, dated 31st October 1930 principally on the ground that under the Civil Procedure Code a Court had no power to restore an application for execution which had been dismissed for default. The decree-holder has preferred two petitions for revision: (1) Civil Revn. No. 298 of 1931 against the order of 9th April 1930, holding that the execution application had been property dismissed on 4th January 1930, and (2) Civil Revn. No. 299 of 1931, against the order dismissing the application for restoration of the execution proceedings.

After hearing counsel and examining the record, I am of opinion that both petitions must succeed. In the first place, I am not sure, if Bawa Kanshi Ram really intended to dismiss the application for execution for default on 4th January 1930. But even if this was so, I have no doubt that the order was erroneous. It is settled law that when a sale has taken place in execution of a decree and either no application has been filed under Rr. 89, 90, or R. 91, O. 21, or such an application has been dismissed the Court has no option but to confirm the sale under R. 92, If the judgment-debtor having filed objections under R. 90 fails to prosecute them, these objections must be dismissed in default, and an order confirming the sale automatically passed. For this purpose the presence of the decree-holder is not legally necessary, and I am not aware of any authority where a contrary rule has been laid down: see in this connexion *Ram Prasad* v. *Kodu, A. I. R.* 1930 *Nag*. 134. This position was not seriously challenged by counsel for the respondents, but he strenuously urged that in a case like this, the High Court should not interfere on the revision side. There is however ample authority that if a sale has taken place in execution of a decree and the executing Court in disregard of the imperative rule of procedure laid down in R. 92, declines to confirm the sale, the order is liable to be set aside on revision by the High under S. 115, of the Code. *Brij Mohun Thakur* v. *Rai Uma Nath* (1) and *Girdhari Lal* v. *Bhago* (2). I must therefore hold that the order of 4th January 1930, if it can be interpreted at all as dismissing the execution application, was erroneous and the learned Judge should not have dismissed the application of the decree-holder on 9th April 1930, on this ground.

The subsequent order of the learned Judge, dated 31st October 1930, holding that a Court has no power to restore an application for execution, which has been dismissed for default is also unsustainable. It is no doubt true that the provisions of O. 9, Civil P. C., do not in terms apply to execution proceedings, but, it has been held by this Court in *Bholu* v. *Ram Lal* (3), *Attar Singh* v. *Bur Singh*, *A. I. R.* 1926 *Lah*. 534, and several other rulings that such applications can, and should be restored under the inherent powers of the Court. In this view of the case, it is unnecessary to give a decision on the other points argued by counsel before me. I accept both the revisions and set aside the orders of the Court below, dated 9th April and 31st October 1930, respectively, and remand the case to it for disposal in accordance with law.

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(1) [1893] 20 Cal 8=19 I A 154 (P C).

(2) [1907] 92 P R 1907.

R.K. *Case remanded.*

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(3) A I R 1921 Lah 67=60 I C 720=2 Lah 66.

A. I. R. 1933 Lahore 101

JAI LAL, J.

Rali Ram—Judgment-debtor— Appellant.

v.

Sant Ram Ganpat Rai—Decree-holder —Respondent.

Misc. Second Appeal No. 254 of 1932, Decided on 12th October 1932, from order of Addl. Dist. Judge, Jullundur, D/- 23rd November 1931.

Provincial Insolvency Act (1920), S. 78 (2) —*A*, an unconstituted attorney, acting for decree-holder in insolvency proceeding — Power of attorney supplied subsequently—*A* was examined by Official Receiver who however failed to include debt in schedule—Debt held as proved under S. 78 (2) and limitation was extended.

A, acting on behalf of a creditor in an insolvency proceeding, made a statement before the Official Receiver with a view to prove debt due to the creditor and produced a copy of the decree. He however did not possess a power of attorney on behalf of his principal. Subsequently a power of attorney was sent and *A* was examined by the Official Receiver. The Official Receiver did not formally include the debt in the schedule of debts prepared by him:

Held: that the creditor ought not to be made to suffer for the irregularity of the Official Receiver. He proved his debt as that term is used in S. 78 (2) by having done all that was necessary to prove it and in the absence of a decision refusing to admit his debt it must be assumed that the debt was proved but that the Official Receiver by inadvertence omitted to mention the debt in the schedule:

Held also: that the decree-holder was, for the purposes of execution against the judgment-debtor, entitled to deduct the time between the date of the adjudication order passed against the judgment-debtor and the annulment thereof. [P 101 C 2; P 102 C 1]

Mehr Chand Sud for *Shiv Charan Das* —for Appellant.

Fakir Chand—for Respondent.

Judgment.—A decree for money was granted against the appellant on 29th January 1925 and an application to execute the same was made in June 1925 but it was not prosecuted because the judgment-debtor had been adjudicated an insolvent. The application for execution however remained pending and was dismissed on 28th May 1930. In the meantime the order of adjudication was annulled on 13th May 1927 and another application for execution of the decree was made on 16th October 1928. The question is whether this application is within time. Counsel for the respondents contends that it is within time for two reasons, first that under S. 78 (2), Provincial Insolvency Act, the period between the order of adjudication and the annulment thereon should be excluded, and secondly, the application made in June 1925 being pending on 16th October 1928, the later application must be deemed to be a continuation of the previous application. It may however be mentioned that the first application was pending in the Court of another Subordinate Judge when the application of 16th October 1928 was made. In fact both the applications were made to the District Judge who transferred the first to one Subordinate Judge and the second to the other. The matter, in my opinion, is not material for the purpose of the the disposal of this appeal.

The respondent is entitled to deduct the time between the date of the adjudication order and the annulment thereof if it can be shown that he proved his debt before the Official Receiver. The learned District Judge has found that he did so prove his debt. It appears that one Hans Raj acting on behalf of the respondent made a statement before the Official Receiver with a view to prove the debt due to the respondent and produced a copy of the decree. He howeever did not possess a power of attorney on behalf of his principal. Subsequently a power of attorney was sent by the respondent with a covering letter and Hans Raj was examined by the Official Receiver. All that was necessary therefore for the respondent to prove his debt was done by him but it appears that the Official Receiver did not formally include the debt in the schedule of debts prepared by him. The respondent, in my opinion, ought not to be made to suffer for the irregularity of the Official Receiver. He proved his debt as that term is used in S. 78 (2) by having done all that was necessary to prove it and in the absence of a decision refusing to admit his debt it must be assumed that the debt was proved but that the Official Receiver by inadvertence omitted to mention the debt in the schedule. The conclusion of the District Judge therefore that the respondent was entitled to deduct the period specified above and therefore his application for execution was within time is correct. If the contention of the appellant be allowed to prevail then it means that a creditor who has applied to prove his debt and has tendered proof in support of his claim is not entitled to the benefit of S. 78, if before the insolvency Court or the Official Receiver are able to pass final orders on his application, the order of adjudication is annulled. This may lead to miscarriage of justice in some cases which could not have been the object of the legislature. I dismiss this appeal with costs.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 102

TEK CHAND AND MONROE, JJ.

Thakar Das Bhatia—Defendant—Appellant.

v.

Malik Chand and *another*—Plaintiffs and Defendants—Respondents.

First Appeal No. 2871 of 1926, Decided on 14th November 1932, against decree of Senior Sub-Judge, Rawalpindi, D/- 25th August 1926.

Debtor and Creditor — Order given by debtor to creditor upon person holding funds to pay from such fund operates equitable assignment.

An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor, operates as an equitable assignment of that part of the debt or funds to which the agreement or order refers: *A.I.R.* 1930 *Lah.* 820, *Rel. on*: 43 *P. R.* 1897, *Ref.* [P 103 C 1]

Gobind Ram Khanna and *Ajit Ram*—for Appellant.

Gobind Das and *Narotam Singh*—for Respondents.

Tek Chand, J.—Thakar Das, defendant 1, obtained a money decree for Rs. 4,900 against Uttam Chand, defendant 2. In execution of this decree he attached a sum of Rs. 5,588 which was in deposit with the Assistant Controller of Dairy Farms, Circle 1, Lahore Cantonment, on behalf of Uttam Chand, defendant 2, on account of butter and cream supplied by him to the Rawalpindi and Peshawar Government Dairies. The plaintiff Malik Chand preferred an objection, alleging that the aforesaid money had been assigned by the judgment-debtor Uttam Chand to him. The objection was disallowed and Malik Chand had instituted a suit for a declaration that the amount is not liable to attachment in execution of the decree obtained by Thakar Das against Uttam Chand. The suit has been decreed by the Senior Subordinate Judge. Thakar Das, defendant 1, appeals. The relevant facts are that Uttam Chand entered into a contract with the Assistant Controller of Dairy Farms for the supply of butter to the Rawalpindi and Peshawar Cantonments for one year, commencing 1st April 1923, and ending 31st March 1924. After some time he found himself unable to provide the necessary money for carrying out the contract and approached Malik Chand, plaintiff, for financial assistance. The plaintiff agreed, and on 6th September 1923, two agreements Exs. P-1 and D-1, were executed by the parties whereby the plaintiff undertook to advance the necessary funds to Uttam Chand; and the latter agreed to send the plaintiff weekly receipts for the butter supplied by him to the dairies and authorized the plaintiff to deduct six pies per pound of butter "as commission in the shape of interest" out of the price and hand over the "balance" to Uttam Chand. It was also agreed that Uttam Chand would get a letter from the officer-in-charge of the dairies to the effect that the plaintiff should send bills for the butter supplied and obtain cheques for the price thereof and that he should himself cash these cheques. It was further stipulated that as the entire amount of money would be invested by the plaintiff and cheques for bills will also be issued in his name no other creditor or representative of Uttam Chand shall have any concern with that money. In accordance with this agreement Uttam Chand wrote to the Dairy authorities on 6th and 13th September respectively, asking them to receive the bills for butter from the plaintiff and to issue cheques in his name. In the second of these letters, dated 13th September 1923 (Ex. P-11), Uttam Chand specifically stated that:

> "the cheques payable to me on account of the cost of butter supplied were to be issued in future in favour of Malik Chand who was paying all the cost of butter and cream purchased by me,"

and that this:

> "may continue until Lala Malik Chand Kohli himself writes to you to the contrary. Moreover my other creditors shall have no claim over any money due to me on account of cost of butter supplied by me."

It is thus clear that an irrevocable authority was given by Uttam Chand to Malik Chand to receive the amount of the bills and appropriate it towards repayment of the amount advanced by him to Uttam Chand and interest thereon at the rate stipulated in the agreement. It is contended by Mr. Gobind Ram Khanna on behalf of the appellant that the relationship created between the parties by this agreement was merely one of banker and customer and that no assignment of the money lying at the credit of Uttam Chand with the dairy authorities was created in favour of the plaintiff. In my opinion, this contention is without force, and I have no hesitation in overruling it. It is settled law that:

> "an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor, operates as an equitable assignment of that part of the debt or funds to which the agreement or order refers, Chitty on Contracts: Edn. 18, p. 970."

Reference in this connexion may also be made to the leading decision of the House of Lords in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co. Ltd.* (1), where it was laid down that an agreement by merchants with a bank that the price of goods sold by the merchants should be remitted direct by the purchasers to the bank constitutes an equitable assignment of the price to the bank. There are numerous cases in this province in which these principles have been applied to agreements similar to those of the case before us: see *A. I. R.* 1930 *Lah.* 820 and *Jhamman Lal* v. *Sant Lal* (2). I hold therefore that the plaintiff was the assignee of the price of butter supplied under the contract to the dairies at Rawalpindi and Peshawar, and that Uttam Chand or his creditors had no right to realize the money. Mr. Gobind Ram Khanna however contended that the plaintiff himself had broken the contract inasmuch as he ceased supplying funds for the performance of the contract after November 1923, and that he being guilty of breach of the contract, has lost his right to recover the amount under the agreement. In my opinion, the evidence on the record does not support this contention. On the the other hand, I find it fully established that contrary to the terms of the agreement Uttam Chand began to appropriate to other purposes the moneys taken by him from the plaintiff for the purchase of butter. The plaintiff's case is that he had advanced Rs. 14,000 odd under the contract. Uttam Chand however pleaded that Rs. 11,000 only was advanced. For the purpose of this appeal, it is not necessary to adjudicate on these rival contentions; for assuming that the figure as given by the defendant is correct, it is clear that out of this sum he did not apply about Rs. 5,000 to the purchase of butter or cream.

It is further admitted by the counsel that out of the sum received from the plaintiff Uttam Chand paid Rs. 1,000 for a fine which had been imposed upon him by a criminal Court, and he also paid another sum of Rs. 1,000 to one Prithmi Chand in satisfaction of a promissory note, which had no connexion whatever with the butter contract. The breach was therefore on the part of Uttam Chand, and in these circumstances the plaintiff was justified in refusing to make further payments to him, after he had discovered that the defendant was misapplying the funds supplied by him. I hold therefore that the plaintiff's suit has been rightly decreed and this must be dismissed with costs. The decree-sheet prepared by the lower Court is defective and should be corrected so as to grant the plaintiff a declaration to the effect that the money lying with the Assistant Controller of Dairy Farms, Circle 1, Lahore Cantonment, to the credit of Uttam Chand, defendant 2, on account of butter supplied to the Rawalpindi and Peshawar Government Dairies, is not liable to attachment in execution of the decree obtained by Thakar Das, defendant 1, against Uttam Chand, defendant 2.

Monroe, J.—I agree.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 103

DALIP SINGH, J.

Bhulla—Plaintiff—Appellant.

v.

Mihan Singh and *another*—Defendants—Respondents.

Second Appeal No. 295 of 1932, Decided on 20th October 1932, against decree of Dist. Judge, Jullundur.

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1. (1905) A C 454=74 L J K B 898=93 L T 495=11 Com Cas 1=21 T L R 710.
2. (1897) 43 P R 1897.

Hindu Law — Alienation—Setting aside—Alienation not for valid necessity—Minor need not recoup benefit before setting aside alienation.

Where it is found that the alienation was not for valid necessity even when the minor is benefited not exactly from the alienation, but from subsequent events following the alienation and to which the alienation contributed, he is not in equity obliged to recoup the benefit before setting aside the alienation: *A.I.R.* 1932 *Lah.* 179, *Dist.* [P 104 C 1]

S. C. Manchanda for *R. C. Manchanda*—for Appellant.

J. L. Kapur for *Achhru Ram*—for Respondents.

Claim.—For possession of 6 kanals 16 marlas of land along with shares of well, Shamilat and Persian wheel, situate in the area of Mauza Dhonda, Tahsil Phillaur and for a declaration that the mortgage deed dated 6th May 1929 is fictitious and without consideration and legal necessity and is void against the plaintiff's rights after the death of the mortgagor.

Judgment. — The learned District Judge found that the alienation was not for valid necessity. He held that the minor having benefited not exactly from the alienation, but from subsequent events following the alienation and to which the alienation contributed, was in equity obliged to recoup the benefit know of no authority in support of this before setting aside the alienation. I proposition and none has been cited to me by learned counsel for respondent. The authority cited *A. I. R.* 1932 *Lah.* 179, is distinguishable. The finding there was that the alienation itself was for necessity. It has been contended here that the learned District Judge's finding is the same really though the words used are different, but there is no force in this contention. I therefore accept the appeal and decree the plaintiff's claim. Parties will bear their own costs throughout.

V.S. *Appeal allowed.*

A. I. R. 1933 Lahore 104

JAI LAL, J.

Milkhi Ram—Plaintiff—Appellant.

v.

Gujar Mal—Defendant—Respondent.

Second Appeal No. 1738 of 1931, Decided on 24th October 1932.

(a) Transfer of Property Act (1882), S. 60 — Redemption suit on mortgage deed—Mortgagee cannot lead evidence to show that transaction was otherwise than mortgage—Evidence Act (1872), S. 92.

Where the document on the face of it is a mortgage deed and the mere fact that the conditions of the deed are onerous does not alter the real nature of the transaction, it is not open to the mortgagee in a suit for redemption to lead evidence to show that the transaction was other than what appears on the face of the document: 22 *All.* 149 and *A.I.R.* 1917 *P. C.* 207 *Rel. on.* [P 104 C 2]

(b) Civil P. C. (1908), S. 35—Appeal succeeding on objection not raised in lower Courts—Costs were disallowed.

Where an objection on which the appellant succeeded in the High Court was not raised in the lower Courts the costs of the appeal to the successful appellants were disallowed. [P 104 C 2]

Fakir Chand and *Mohammad Amin*—for Appellant.

Shamair Chand—for Respondent.

Judgment.— The appellant instituted a suit for the redemption of a mortgage which had been created by means of a registered mortgage-deed. The plea of the defendant mortgagee was that the transaction was really a sale and not a mortgage. The District Judge, on appeal, has held that, having regard to the circumstances, it had been established that the parties intended the transaction to be a sale and and not a mortgage and has consequently dismissed the suit. The mortgagor has presented this second appeal and Mr. Fakir Chand, advocate, on his behalf contends that it was not open to the respondent to plead, in view of the terms of the registered mortgage-deed or to lead oral or circumstantial evidence to show that the transaction was other than what appears on the face of the document and in support of this contention has cited *Bal Kishen Das* v. *Legge* (1) and *Maung Kyin* v. *Ma Shwe Law* (2), both judgments of the Privy Council, which fully support the contention of the learned counsel.

Mr. Shamair Chand, on behalf of the respondents, contends that the terms of the deed are such that it appears that the parties intended that the property should belong in ownership to his client. The document however on the face of it, is mortgage-deed and, as rightly remarked by the District Judge, the mere fact that the conditions of the deed are onerous does not alter the real nature of the transaction. I consequently hold that it was not legally permissible to the District Judge to arrive at the conclusion that the mortgage-deed was really intended to be a sale-deed. The objection however was not raised, except in this Court, and therefore I do not consider that the appellant is entitled to the costs of this appeal which is hereby accepted and the case remanded to the District Judge with direction to hear the appeal and to decide

the remaining question involved in it, his decree being hereby set aside. The costs of this appeal shall be borne by the parties. Court-fee on the memo, of appeal shall be refunded to the appellant.

V.S. *Appeal allowed.*

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1. (1900) 22 All 149=27 I A 58 (P C).
2. A I R 1917 P C 207=42 I C 642=44 I A 236=45 Cal 320 (P C).

A. I. R. 1933 Lahore 105

Addison and Agha Haidar, JJ.

Mt. Raushan Ara Begam—Appellant.

v.

Mahmud Beg—Respondent.

Second Appeal No. 1900 of 1928, Decided on 28th November 1932.

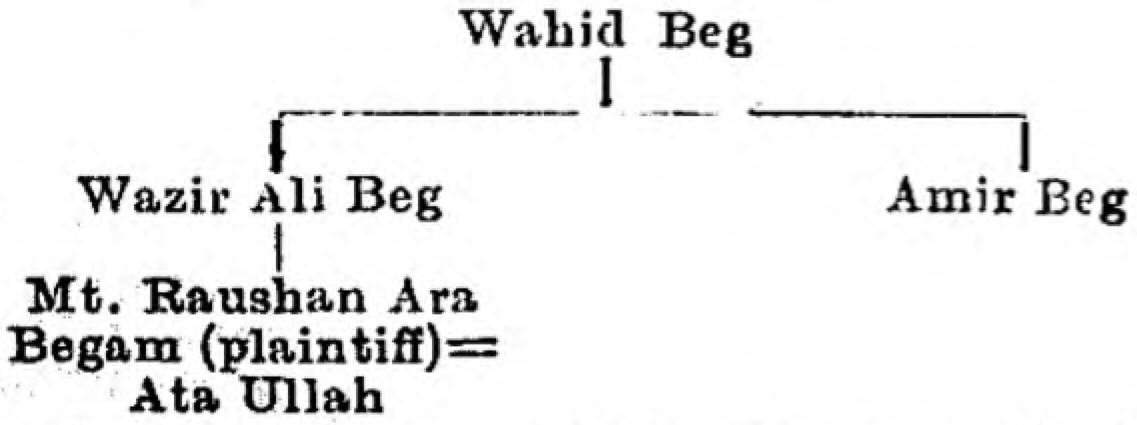
Adverse possession—Suit for possession brought on title—Plaintiff need not prove possession at period within 12 years of suit—Limitation Act (1908), Art. 144.

In a suit for possession and mesne profits when a plaintiff comes into Court relying upon his title it is not necessary for him to prove that he had been in possession at a period within 12 years prior to the commencement of the suit. It is sufficient if the plaintiff establishes a prima facie title and it is then for the defendant to substantiate the plea of adverse possession: *A.I.R.* 1919 *All.* 403, *Foll*; *A.I.R.* 1930 *Lah.* 608 and 135 *I C* 680, *Rel. on*: *A.I.R.* 1922 *Lah.* 432, *not Foll*: *A.I.R.* 1927 *All.* 799 and *A.I.R.* 1928 *Oudh* 246, *Ref.* [P 106 C 1]

Ajit Parshad—for Appellant.

Bishen Narain—for Respondent.

Agha Haidar, J.—**This is a plaintiff's appeal arising out of a suit for possession of a certain house situate in Kucha Pandit in the city of Delhi and for recovery of a sum of Rs. 115 on account of mesne profits. Both the Courts below have dismissed the plaintiff's suit. The plaintiff has come up to this Court in second appeal. The following short pedigree table may be subjoined here for facility of reference, as it would show at a glance the position of the plaintiff in the case:**



In the year 1902 Wazir Ali Beg brought a suit for ejectment against one Munir Hussain. The latter pleaded that he was the tenant of Amir Beg who had made a Wakf of the property in suit, and that Wazir Ali Beg had no share in it. On 14th July 1902, the Subordinate Judge holding that Wazir Ali Beg had a good title as an heir decreed the plaintiff's claim. The present plaintiff, Mt. Roshan Ara Begam, is the only child and the heir of Wazir Ali Beg. She at first brought a suit for ejectment of the defendant-respondent. Mahmud Beg, on the allegation that he was the plaintiff's tenant. Mahmud Beg denied, the tenancy, with the result that the plaintiff's suit was dismissed. Mt. Roshan Ara Begam then instituted the present suit, out of which this second appeal has arisen on 22nd January 1927, against Mahmud Beg for possession on the ground of her title and also claimed mesne profits. The defendant, without claiming any title in himself, relied upon his long possession and denied the plaintiff's claim. The learned Judge of the lower appellate Court concurring with the trial Court held that the plaintiff had succeeded in proving that the title was in her; but having regard to a decision of a Division Bench of this Court (Broadway and Abdul Qadir, JJ.) reported as *Duni* v. *Maleri Ram* (1), he held that the onus of proving that she was in possession within 12 years prior to the institution of the present suit was upon her and that, having failed to discharge it, her suit was rightly dismissed. He has clearly said in his judgment that the plaintiff never alleged that she was in actual possession of the house in suit and that in fact it was never her case that she had either been dispossessed or had discontinued possession. Even the defendant never pleaded that the plaintiff had been dispossessed or had discontinued her possession. There cannot be any doubt that the learned Distrtict Judge could not hold otherwise in view of the Division Bench decision of this Court, already noted. There are undoubtedly observations in that judgment which go to support the contention of the respondent in the present case. But a recent Division Bench case of this Court decided by the Chief Justice and Broadway, J., and reported as *Daulu Mal* v. *Rawal Bakhsh* (*A. I. R.* 1930 *Lah.* 608), fully supports the plaintiff's case.

In this case the applicability of Arts. 142 and 144, Limitation Act, was discussed and it was pointed out that the rule that the onus lies upon the plaintiff to prove his possession prior to the time when he was admittedly dispossessed or discontinued possession applies only when the plaintiff has come into Court on the allegation of dispossession or discontinuance of possession as a part of his case. But when the plaintiff

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1. A I R 1922 Lah 432=69 I C 171.

founded his claim upon title only, then it was for the defendant to establish his adverse possession over a period of 12 years prior to the institution of the suit. In *Kallu Mal* v. *Maman* (2), decided by the Chief Justice and Broadway, J., we find a similar exposition of law.

The case reported as *Jai Chand Bahadur* v. *Girwar Singh* (3), contains a discussion of the case law on the subject and Walsh, J., relying upon the decision of their Lordships of the Privy Council in *Secy. of State* v. *Chellikani Rama Rao* (4), held that, when a plaintiff comes into Court relying upon his title it is not necessary for him, as in a case falling under Art. 144, Limitation Act, to prove that he had been in possession at a period within 12 years prior to the commencement of the suit. It is sufficient if the plaintiff establishes a prima facie title and it is then for the defendant to substantiate the plea of adverse possession. In *Ram Surat Singh* v. *Badri Narain Singh* (5), the law is clearly laid down practically on the same lines as in the case reported as *Jai Chand Bahadur* v. *Girwar Singh* (3). I may observe that, prior to the decision of the case reported as *Jai Chand Bahadur* v. *Girwar Singh* (3), there was a considerable body of case law in the Allahabad High Court in which the view that in every suit for possession the plaintiff must prove not only a legal title but a subsisting title not barred by the law of limitation held the field. In other words the plaintiff had to prove in all suits for possession when his title was denied that he had been in possession during the 12 years prior to the institution of the suit. As Walsh, J., in *Jai Chand Bahadur* v. *Girwar Singh* (3), rightly pointed out, there does not seem to be any warrant for qualifying the word "title" and holding that in every suit for possession the plaintiff must prove a "subsisting title" before he can succeed in his claim. A single Judge case reported as *Faqir Bakhsh Singh* v. *Prag Singh*, *A. I. R.* 1928 *Oudh* 246, also lays down the law on the same lines as *Jai Chand Bahadur* v. *Girwar Singh* (3), and I fully approve of it.

These cases clearly support the contention of the plaintiff who has proved her title and it will be for the defendant to prove that his possession was adverse for a period of 12 years prior to the institution of the suit. As the case had been decided on a preliminary point in the Court below I would accept this appeal and, setting aside the judgment and decree of the lower appellate Court, remand the case, under O. 41, R. 23, Civil P. C., to that Court for disposal of the remaining issues according to law. Costs would abide the event.

Addison, J.—I agree.

V.S. *Case remanded.*

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2. (1930) 135 I C 680.
3. A I R 1919 All 403=52 I C 366=41 All 669.
4. A I R 1916 P C 21=35 I C 902=43 I A 192=39 Mad 617 (P C).
5. A I R 1927 All 799=102 I C 814=50 All 89.

A. I. R. 1933 Lahore 106

BHIDE, J.

Bura Beg and *others*—Appellants.

v.

Bashir Ahmad and *others*—Respdts.

Second Appeal No. 180 of 1931, Decided on 13th October 1932, from decree of Dist. Judge, Hoshiarpur, D/- 10th November 1930.

Landlord and Tenant—Non-ancestral property— Proprietor claiming it on death of last holder—He must prove custom; otherwise it is escheated to Crown—Custom (Punjab)—Crown.

Where in a suit for possession of land brought by the proprietors of a certain "patti" of the village, the proprietors claim the non-ancestral land on the ground that the last holder had died without any heir, in order to succeed to such a claim the claimants must prove a custom to that effect; failure to prove such a custom entails an escheat of the property in that village to the Crown. [P 107 C 1]

M. C. Mahajan and *Asghar Beg*—for Appellants.

Fakir Chand—for Respondents.

Judgment. — This second appeal arises out of a suit for possession of land. The appellants are the proprietors of Patti Rajputan of the village and claim the land on the ground that the last holder had died without any heir. The Courts below have found that part of the property was ancestral while a few khasra numbers, namely, Nos. 103, 127, 142 and 148 were non-ancestral. The defendants were held to be entitled to the ancestral land owing to the reversion of the property to the donor's line. As regards the non-ancestral property it was held that the plaintiffs had failed to establish that they, as proprietors of the village, were entitled to succeed to it and hence the suit was dismissed by the Courts below. The learned District Judge also has expressed the opinion that the property would escheat to Government.

The learned counsel for the appellants has urged that the learned District Judge has made out an entirely new case inasmuch as he raised the question of escheat to Government suo motu and that therefore the case should be remanded to enable the plaintiffs to meet this position. I do not however find any adequate justification for adopting this course. The plaintiffs relied on custom to establish their claim. The learned District Judge had therefore to ascertain what the custom was. He considered the custom on the point as laid down in Art. 28 of Rattigan's Digest of Customary Law and also in the Riwajiam of the village and came to the conclusion that the plaintiffs were not entitled to succeed but that the land would go to the Crown by escheat. It does not appear therefore that the learned District Judge has set up any new case. If his decision on the question of custom is incorrect, as alleged by the learned counsel for the appellants, it was his duty to secure the certificate from the learned District Judge as required by S. 41, Punjab Courts Act, to enable him to challenge it but no such certificate has been secured. In these circumstances this appeal must fail and it is accordingly dismissed with costs.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 107

HARRISON AND ADDISON, JJ.

Mohammad Bakhsh—Defendant—Appellant.

v.

Mt. Jeo—Plaintiff—Respondent.

First Appeal No. 1809 of 1927, Decided on 2nd March 1932, against decree of Senior Sub-Judge, Lyallpur, D/- 20th June 1927.

Custom—(Punjab) — Succession—Hoshiarpur District—Daughter is excluded by collaterals if within third degree.

The custom of inheritance in the Hoshiarpur District is peculiar in that daughters up to a point are excluded both from ancestral and self-acquired property by near collaterals but as a sort of return they come into their own again by excluding the more distant collaterals and in most cases those beyond the third degree. [P 108 C 1]

Abdul Rashid and *M. A. Majid*—for Appellant.

R. C. Manchanda and *S. C. Manchanda*—for Respondent.

Judgment.—The necessary facts in this case are that one Ali Ahmad acquired some occupancy rights and gave one-half of them to his brother Dina and these Dina converted into full proprietorship by paying the necessary nazrana. Dina had a son Ibrahim and a daughter Mt. Jio; and Ibrahim had two children, a son Muhammad Sharif and a daughter Mt. Sharifan. In the epidemic of 1918 the whole of Dina's family including himself was wiped out, Mt. Jio alone surviving. Ali Ahmad has been succeeded by his son Muhammad Bakhsh. On Dina's death the land in suit, of which Ali Ahmad had originally made a gift of the occupancy rights to Dina, was mutated in favour of Muhammad Bakhsh and has remained with him ever since. Eight years later Mt. Jio brought this suit, she being married in another village. She has been financed by a zaildar and it is suggested with some show of reason that the true cause for the litigation is the dispute between Muhammad Bakhsh and Nizam Din over the Lambardarship of this village. Mt. Jio's suit has been decreed, it being found that the property being self acquired she succeeds in preference to Muhammad Bakhsh, and it has been found as a fact that Dina was the last of his family to die. On appeal two points are agitated, the first that Dina was not the last of his family to die and that the entry in the chaukidar's book to this effect is wrong and has been wrongly read and that his son and grandson, or at any rate one of them, survived him. It is urged that Mt. Jio has no position at all; as being at best the sister and not the daughter of the last owner. The second point is that granted that Dina was the last to die, Mt. Jio has no right to succeed as against Muhammad Bakhsh.

Now, on the first point we have been taken through the whole of the evidence. It is doubtless full of exaggerations and we are asked to believe that witnesses remember eight years later the exact hour of the day on which not only one member but several members of the family died. What evidence there is supports the finding of the trial Court and there is no reason to suppose that the order in which the entries have been made in the chaukidar's register is wrong. We therefore hold that the finding is correct and that Dina did die last of his family and after his son and his grandson and his granddaughter. On the question of whether Mt. Jio, a daughter excludes Muhammad Bakhsh, a brother's son, from succeeding to self-acquired property, both sides curiously enough relied upon the same paragraph in the riwajiam of the Hoshiarpur District. This is para. 45, which, while describing in detail the extent to which daughters exclude collaterals sometimes in the third and sometimes in the fifth degree in succession to ancestral property, gives the daughter no right over collaterals in the matter of self-acquired property. This answer has been considered in *Pir Bakhsh* v. *Abo* (1) and the opinion which can be said to have been to some extent obiter was that while a reply of this sort, which makes no distinction between ancestral and self-acquired property, must ordinarily be read as referring only to ancestral property, the whole scheme and contents of this volume show that the distinction between self-acquired and ancestral property was kept consistently before the persons examined and in question after question they drew a definite distinction between the two and that it must therefore be taken that in answer to question No. 45 the persons replying understood quite clearly that there was this distinction and meant to indicate that the rule of succession to ancestral and self-acquired property was precisely the same. It is quite clear that, even though unsupported by instances, this reply, if not rebutted must decide the question. Not only is there no rebuttal, but there is definite and substantial oral evidence in support of this entry and taking this with the entry, especially when read with the remainder of the volume we find it established that the custom of inheritance in the Hoshiarpur District is peculiar in that daughters up to a point are excluded both from ancestral and self-acquired property by near collaterals, but, as a sort of return they come into their own again by excluding the more distant collaterals and in most cases those beyond the third degree. No sufficient reason is shown in our opinion for remanding case for further evidence. We are of opinion that this appeal must succeed and the suit be dismissed. Parties to bear their own costs throughout.

S.R. *Appeal accepted.*

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1. A I R 1925 Lah 306=88 I C 71=6 Lah 332.

A. I. R. 1933 Lahore 108

DALIP SINGH, J.

Amar Singh—Appellant.

v.

Khalsa Bank Ltd., Gujranwala—Respondent.

Misc. First Appeal No. 375 of 1932, Decided on 27th October 1932, against order of Dist. Judge, Gujranwala, D/- 21st November 1931.

Companies Act (1913), S. 40—Entry of person's name in register of members—Presumption.

The entry of a person's name in the register of members casts the onus on that person to prove that he was not duly a member of the Company. [P 108 C 2]

Narotam Singh—for Appellant.

Shamair Chand—for Respondent.

Judgment.—The appellant in this case has been put on the list of contributories of the Khalsa Bank Limited, Gujranwala, in liquidation, by the learned District Judge and he objects. His main plea in the Court below was that he put in two applications: one as manager of the Model Press, and the other as proprietor of the Model Press. As manager of the Model Press no shares were allotted to him but shares were allotted to him on his application as proprietor of the Model Press. This application however according to him, was a conditional application requiring certain people to be directors of the Bank etc., and has been done away with by some officials of the Company to suit their own ends. The application as manager is on the record as Ex. O-A. The learned District Judge has given good reasons for holding that the substitution of the proprietor for manager in the register of members is a mere clerical mistake and that the story of the appellant that he made two applications is incorrect and is not proved. The appellant before me gave a further explanation that his original application, which bore no conditions, was withdrawn by him on learning that the directors were not to be appointed and he then put in the conditional application. This story is so utterly improbable that I cannot accept it for a moment. I therefore consider that the entry in the register of members cast the onus on the appellant to prove that he was not duly a member of the Company.

The only thing the learned counsel for the appellant can point to is that while there is a letter mentioned as sent to the appellant in the despatch register, no such letter finds a place in the peon book. But this is immaterial for obviously the peon book on examination shows that only local letters or letters which were sent on postal certificates were given to the peon. I consider therefore that there is a fair presumption that the allotment letter was duly sent to the appellant. In any event his own letters subsequently show that he came to know that he had been entered as a member in the register of the members, and though he protested, he took no steps at any time to have his name duly removed from the register. I therefore hold that the appeal fails and is dismissed with costs.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 109

TEK CHAND AND MONROE, JJ.

Gulzari Mal and *another*—Appellants.

v.

Maghi Mal and *others*—Respondents.

First Appeal No. 1719 of 1931, Decided on 1st December 1932.

(a) Civil P. C. (1908), O. 22, R. 9—R. 9 does not bar fresh suit brought on dissimilar causes of action.

The abatement by the death of a pro-forma defendant (vendee) in a former suit brought by the mortgagor against the mortgagee for the redemption of his mortgage does not bar under O. 22, R. 9, a fresh suit brought by the mortgagor against the representatives of the vendee for the recovery of part of the purchase-money alleging that the vendee had failed to redeem the mortgage as stipulated in the sale deed. [P 110 C 1]

(b) Limitation Act (1908), Art. 132—Suit by vendor against vendee for recovery of part of purchase-money—Suit being one to enforce charge on immovable property is governed by Art. 132 — T. P. Act (1882), S. 55 (4) (b).

Where a suit is brought by the plaintiff as an unpaid vendor claiming for the recovery of a certain sum of money on the security of the two-thirds of the immovable property sold, such a suit becomes a suit to enforce payment of money alleged to be charged on immovable property and as such it is governed by Art. 132. [P 110 C 2]

Quaere.—Alternatively, a claim brought by the plaintiff after having paid the amount to the creditor to avoid loss to himself, whether is governed by Art. 116 read with Art. 83 or by Art. 61: 34 *All.* 429, *Expl.* and *Dist*; *Case law referred.* [P 111 C 2]

Madan Lal Sethi and *Amar Nath Chopra*—for Appellants.

Shamair Chand, Qabul Chand, Jagan Nath Malhotra and *Ram Lal Anand*—for Respondents.

Tek Chand, J.—The facts of the litigation which has given rise to this appeal are as follows: Nanda Mal, the predecessor-in-interest of the plaintiffs-appellants, owned six shops and a two-third share in a haveli situate in Kasur town, the remaining one-third of the haveli being the property of Maghi Mal, defendant 1, and Shankar Das, father of defendants 2 and 3. On 16th October 1902, Nanda Mal mortgaged the six shops and his share in the haveli to Narain Mal and Pala Mal for Rupees 5,000. The mortgage was with possession. On 16th September 1921, Nanda Mal sold by registered deed his two-third share in the haveli to Maghi Mal, defendant 1, and Shankar Das for Rs. 10,000. Out of the sale price, Rs. 5,000 was paid in cash to the vendors, and the remaining Rs. 5,000 was left with the vendees for payment to the mortgagees. The vendees took no action to redeem the mortgage for more than two years and on 30th April 1924, plaintiffs served them with a notice asking them to redeem the mortgage without further delay, so that the plaintiffs might be able to get back the six shops free from the incumbrances. The vendees replied on 12th May 1924, saying that the demand of the vendors was premature as no time was for redemption has been fixed and that they could pay the mortgagees at any time during the currency of the mortgage. The vendors were naturally anxious to avoid further loss to themselves and therefore they filed a suit for redemption against the mortgagees in the Court of the Senior Subordinate Judge, Lahore, on 17th December 1925. In that suit the vendees (Maghi Mal and Shankar Das) also were impleaded as pro forma defendants. During the pendency of this suit Shankar Das died and his representatives were not brought on the record within ninety days. The Senior Subordinate Judge held that the suit had abated as against both the pro forma defendants but that this did not affect the case against the mortgagees. He accordingly proceeded to trial on the merits and granted the plaintiffs a preliminary decree under O. 34, R. 7, for redemption on payment of Rs. 5,000 within one month. This amount was duly deposited in Court by the plaintiffs on 15th February 1928. The mortgagees went in appeal to the District Judge, but the appeal was dismissed on 20th December 1928. A second appeal was lodged in this Court and this also was unsuccessful. The Senior Subordinate Judge accordingly passed a final decree in redemption suit on 18th June 1930.

On 16th December 1930, the present action was brought by the plaintiffs against Maghi Mal and the sons of Shankar Das asking for a decree for Rs. 6,000 "on the security of two-third share of the haveli." It was also prayed that a decree against the other property of the defendants and the person of Maghi Mal be passed. The sum claimed was made up of Rs. 5,000 which the plaintiffs had to pay to the mortgagees on failure of the defendants to redeem the mortgage in accordance with the stipulation in the sale-deed, and Rs. 1,000 as damages. The defendants pleaded inter alia that the suit was not maintainable under O. 22, R. 9, by reason of the abatement of former suit against Maghi Mal and Shankar Das, and that it was time-barred. The learned Subordinate Judge has sustained the first objection, and has also held the suit to be barred by limitation under Art. 116 of Act 9 of 1908 against defendants 2 and 3, the claim against the first defendant having been found to have been within time by reason of an acknowledgment of liability made by him within six years of the suit.

In my opinion there is no substance in the plea that O. 22, R. 9, is a bar to the maintainability of this suit. The present defendants were admittedly pro-forma parties to the previous suit and it is clear from the plaint in that case that no cause of action had been disclosed, nor any relief claimed, against them. It is also beyond question that the nature of the two suits is wholly dissimilar. The former suit was one against the mortgagees for redemption of the mortgage which had been effected in their favour by the predecessor-in-interest of the plaintiffs in 1902; while the present suit is for recovery from the vendees of the amount which they had undertaken to pay to the mortgagees but which on their failure to do so the plaintiffs had been compelled to pay from their own pocket in order to avoid further loss to themselves. The causes for action for the two suits are thus entirely different. Indeed, it is obvious from the plaint in the present case that the alleged cause of action arose after, and in consequence of, the decision in the previous suit. The finding of the Subordinate Judge appears to have been based on a misunderstanding of para. 10 of the plaint in the former suit and cannot be maintained. I hold therefore that O. 22, R. 9, which bars a fresh suit based on the same cause of action on which an earlier suit has been instituted has no application to the facts of this case. In deciding the question of limitation, the allegations in the plaint and the relief sought have to be carefully examined, as stated already, the plaintiffs in the first instance ask for a decree for a recovery of a certain sum of money "on the security of two-thirds of the haveli" and the ground of their claim is that "as unpaid vendors," and also because they had to pay to the mortgagees the amount on foot of the mortgage, which under the terms of the sale the defendants were bound to pay, they have a charge on this part of the haveli for the sum sued for. It is clear that in this part of the claim, as laid in the plaint, the plaintiffs seek to enforce payment of money alleged to be charged on immovable property, and as such it is governed by Art. 132, Lim. Act, which prescribed a period of twelve years from the date when the money became due. In this view of the case, the claim is obviously within time.

The learned Subordinate Judge has dealt with the question simply from the point of view of the alternative claim for relief against defendant 1 personally and against the property of defendants 2 and 3, and has followed *Raghubar Rai* v. *Jaij Rai* (1). That case is clearly distinguishable, as there the vendor had not paid off the creditors and the question whether second cause of action would arise if and when the plaintiff had made the payment and sustained the actual loss, was not finally decided: see p. 437. The learned Judges however made certain observations which lend support to the view that a second cause of action would not arise in such a contingency. These observations, which were admittedly in the nature of obiter dicta, were considered by a Division Bench of same Court in *Sarju Misra* v. *Ghulam Husain* (2), and it was held that a claim of this kind brought after the plaintiff had paid the amount to the creditor to avoid loss to himself, is governed by Art. 61 and that the terminus a quo is the date of the payment. The same view had been taken previously at Allahabad in *Hakim Ali Khan* v. *Dalip Singh* (3), and was again adopted in *Dinanath Mahish* v. *Nabakumar Hajra* (4) and *Shib Lal* v. *Munni Lal* (5). It may be mentioned however that *Raghubar Rai* v. *Jaij Rai* (1) was followed, though not without hesitation, by a Single Bench at Allahabad in *Ram Narain* v. *Nihal Singh* (6), and also by a Single Bench of our own Court in *Mehar Chand* v. *Shanti Sarup* (7), but it appears that in neither case was the attention of the learned Judge drawn to the subsequent rulings of the Allahabad Court cited above in which a contrary opinion had been expressed. Moreover in *Mehar Chand* v. *Shanti Sarup* (7), the suit was within time whether Art. 116 or

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1. (1912) 34 All 429=14 I C 244.
2. (1920) 63 I C 87.
3. (1913) 19 I C 676.
4. A I R 1921 Cal 792=70 I C 542.
5. A I R 1922 All 153=63 I C 604=44 All 67.
6. A I R 1925 All 488=87 I C 804.
7. A I R 1929 Lah 395=118 I C 445.

Art. 61 applied and therefore it was not necessary to decide which of these articles really governed the case.

The question again came up for consideration before the Allahabad Court in *Kedar Nath* v. *Har Govind* (8) where Kanahya Lal, J., held that the limitation for a suit to recover damages in such a case is that provided in Art. 83 and that time runs from the date when plaintiff pays off the person to whom the money had to be paid. The other learned Judge, Ashworth, J., however held that the suit was one based on a breach of a registered contract and therefore governed by Art. 116 and that the starting point for the limitation was the date of actual injury to the plaintiff, that is to say, the date on which payment was made by him. As the particular suit which the learned Judges were deciding was within time according to either view, it was not thought necessary to refer the matter to a third Judge for decision as to which of these two views was correct. In *Ram Rachhya Singh* v. *Raghunath Prasad* (9), a Division Bench of that Court, following *Daswant Singh* v. *Ramzan Ali* (10), held that Art. 116 was applicable to such cases, and that the terminus a quo was the date on which the contract was deemed to have been broken, viz., the date when either there was repudiation of liability under it, or when the contract had became impossible of performance on account of the debt having been satisfied by the plaintiff. As the suit was within time from either of these dates it was not definitely decided as to which of them was the real starting point of limitation. The learned Judges however considered at great length the obiter dictum in *Raghubar Rai* v. *Jaij Rai* (1), that time ran from the date of the execution of the sale-deed, and held that it was unsound.

In Calcutta the only case bearing on the point, which I have been able to discover, is *Ram Burai Singh* v. *Mohendra Prasad* (11) where Lawrence Jenkins, C. J., and Chatterji, J., held that where a person purchases an equity of redemption subject to a mortgage and pays merely for the value of that equity, he contracts to protect his vendor from the obligation of the mortgage and buyer's contract with the mortgagor is that the debt shall not fall upon him. Such a contract is one of indemnity and the buyer is bound without any apecific contract to indemnify the seller. The learned Judges were of opinion that if in such cases the vendor has to pay the mortgagee and sues the vendee to recover the amount so paid, the suit is governed by Art. 83 extended by Art. 116, and that the starting point of limitation is the date when the plaintiff is actually damnified. In this connection, it might be useful to refer to a decision of our own Court reported as *Abdul Aziz Khan* v. *Mahomed Bakhsh* (12) in which Art. 116 was applied, the starting point being held to be the date on which the plaintiff was damnified. It may however be stated that the facts of that case were not on all fours with those of the case before us.

After a careful consideration of the allegations in the plaint, and having regard to the authorities discussed above, I am of opinion that the obiter dicta in *Raghubar Rai* v. *Jaij Rai* (1), which the learned Subordinate Judge has followed, do not lay down the law correctly and that this part of the plaintiffs' claim is governed either by Art. 116, read with Art. 83, under which the plaintiffs could bring their suit within six years from the date when they actually sustained the loss, or Art. 61 under which they could sue within three years from the date of the payment. It is not necessary for the purposes of the present case to express a final opinion as to which of these two articles is applicable, for in either case the suit is within time, having been instituted within three years from 15th February 1928, when the plaintiffs made the payment to the mortgagees. I would accordingly accept the appeal, set aside the judgment and decree of the Subordinate Judge and remand the case under O. 41, R. 23 for trial on the merits. Court-fee on appeal shall be refunded; other costs shall be costs in the cause. Counsel for both parties have been directed to cause their respective clients to appear before the Subordinate Judge on 19th December 1932, when he shall frame the issues on the remaining points which arise for decision in the case and fix an early date for evidence.

Monroe, J.—I agree.

V.S. *Appeal allowed.*

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8. A I R 1926 All 605=95 I C 919.
9. A I R 1930 Pat 46=122 I C 244=8 Pat 960.
10. (1907) 6 C L J 398.
11. (1912) 16 I C 78.
12. A I R 1921 Lah 260=64 I C 431=2 Lah 316.

A. I. R. 1933 Lahore 112

JAI LAL, J.

Karam Elahi and *another* —Plaintiffs —Appellants.

v.

Hari Ram and *others* — Defendants—Respondents.

Second Appeal No. 276 of 1932, Decided on 7th July 1932, against decree of Sub-Judge, First Class, Gujrat, D/- 13th November 1931.

Limitation Act (1908). Arts. 97, 115 and 120 — Payments made by judgment-debtor certified in previous applications but credit not given for them in final application—Execution taken for full amount resulting in realization of amount in excess of amount due—Suit for recovery of excess — Art. 97 does not apply—Art. 115 may apply but in all probability Art. 120 applies.

Where the decree-holder certifies to the Court the payments of the amounts made to him by the judgment-debtor in his previous applications for execution but fails to give credit for the amounts in his final application for execution and executes the decree for the full amount and purchases the house of the judgment-debtor sold in execution, Art. 97 does not apply to a suit brought for the recovery of the amount realized in excess of the amount due. Art. 115 may apply but in all probility the case is governed by Art. 120 and the limitation starts from the date when the house is sold and not from the date when the application is filed: 79 *P. R.* 1892, *not Foll.* [P 112 C 2]

Mohammad Monir—for Appellants.

V. N. Sethi—for Respondents.

Judgment.—The only question in this case is one of limitation. The brief facts of the case are that the respondent obtained a money decree against the predecessor in the interest of the appellant and in execution of that money decree he realised the amount, involved in the present suit, in excess of the amount due to him under the decree. It appears that he had received some amounts from the judgment-debtor which in the previous application for execution he admitted as having received from him but in the final application that he made on 8th October 1925, he did not give credits for the amounts which he had previously admitted to have received and executed the decree for the full amount and on 19th November 1927, had a house of the judgment-debtor sold, which he purchased himself. It having been found that the amount claimed in the present suit by the previous judgment-debtor was actually realized by the respondent in excess of the amount which was really due to him under the decree, the question is what article of the Limitation Act applies to the suit and from what date the period be counted. In *Ganpat* v. *Kirpa Ram* (1) Art. 115, Lim. Act, was held to be applicable to a suit of this nature. It must however be noted that in that case the decree-holder had not certified the payment at all to the executing Court whereas in the present case he had previously certified to the Court the payment of the amount to him by the judgment-debtor. Art. 97 also was in the alternative considered to be possibly applicable to the facts of that case.

In my opinion Art. 97 does not apply, Art. 115 may apply and in all probability the present case is governed by Art. 120, Lim. Act, owing to the fact that the decree-holder had actually certified the payment in Court but in the final application for execution omitted to give credit for it. Even if Art. 115 were applicable, the limitation, in my opinion, would start from 19th November 1927, when the appellant's house was sold. In the Chief Court judgment already cited an opinion was expressed that the limitation starts from the date of the application for execution of the decree because it is on that date there is a breach of contract by the decree-holder to give credit for the amount received by him. Assuming that Art. 115 was applicable to the facts of the reported case it was not necessary to decide from what date time would begin to run as the suit had been instituted within three years from the earliest date and was clearly within time, i. e., even if time were counted from the date of the application. The suit, in my opinion, was within time in this case and the view of the learned Senior Subordinate Judge is erroneous. No other point was urged before me by either party. The consequence is that this appeal is accepted, the decree of the Senior Sobordinate Judge set aside and that of the trial Court restored with costs throughout.

P.N./R.K. *Appeal allowed.*

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1. (1892) 79 P R 1892.

** A. I. R. 1933 Lahore 113

BHIDE, J.

Banarsi Das-Kapur Chand — Judgment-debtors—Appellants.

v.

Maman Chand-Radha Kishan and *others*—Creditors—Respondents.

Misc. First Appeal No. 681 of 1932, Decided on 9th July 1932, against order of Dist. Judge, Ludhiana, D/- 25th April 1932.

** **(a) Provincial Insolvency Act (1920), S. 6 (g)—Even temporary suspension amounts to act of insolvency.**

Even temporary suspension of payment until the debtors are able to sell or mortgage their property does amount to an "act of insolvency": *Crook* v. *Morley*, (1891) *A. C.* 316, *Foll.* [P 114 C 1]

** **(b) Provincial Insolvency Act (1920), S. 6 (g)—Inability to pay debts when amounts to act of insolvency illustrated—Test is effect produced on minds of creditors.**

A mere declaration that a person is unable to pay his debts does not by itself amount to an "act of insolvency", but coupled with the context and the surrounding circumstances it may amount to such an act. The test is the effect which the declaration would produce on the minds of the creditors in view of all the circumstances. [P 114 C 2]

The debtors were in embarrassed circumstances and were not in a position to pay their debts. They called a meeting of their creditors and offered to mortgage their property to enable them to meet their liabilities and negotiations were started for the purpose but fell through. They further stated that they intended to deal with the creditors collectively and not individually:

Held: that the circumstances were sufficient to induce the creditors to believe that the debtor intended to suspend payment and was therefore tantamount to notice to that effect within the meaning of S. 6 (g): *Crook* v. *Morley*, (1891) *A.C.* 316, *Rel. on.* [P 114 C 2]

(c) Provincial Insolvency Act (1920), S. 6 (g)—Notice.

The notice required by S. 6, Cl. (g) need not be in writing: *A. I. R.* 1929 *Lah.* 136 and *A. I. R.* 1926 *Sind.* 246, *Rel. on.* [P 114 C 2]

Mehr Chand Mahajan and *Nawal Kishore*—for Appellants.

Jagan Nath Aggarwal and *Krishna Sarup*—for Respondents.

Judgment.—This is an appeal by the proprietors of a firm named Banarsi Das-Kapur Chand who were adjudicated insolvents on the application of some of their creditors. The "act of insolvency" alleged to have been committed by them on which the insolvency petition was founded was that they called a meeting of the creditors at their house and intimated that they were unable to pay their debts and had suspended payment. The only point for decision in this appeal is whether the alleged "act of insolvency" has been proved. The petitioning creditors produced eleven witnesses in support of their allegations. The appellants tried to make out in their evidence that no such meeting as alleged by the creditors was called, but the evidence produced in this respect was worthless. It was rejected by the learned District Judge and has not been relied upon before me. The learned District Judge found. after considering the entire evidence that a meeting was called as alleged by the petitioning creditors, that the appellants declared that they had no liquid assets to meet their liabilities, and that they were not in a position to pay their debts within a reasonable time. They offered to mortgage their property to enable them to meet their liabilities and negotiations were started for the purpose but fell through. The learned Judge further found that the appellants stated that they intended to deal with creditors collectively and not individually, and held that this coupled with the declaration of their inability to pay their debts was tantamount to a notice to suspend payment. Reliance was placed in this respect on *Gurmukh Singh* v. *Ram Ditta Mal* (1).

The learned Counsel for the appellants has taken me through the material portions of the evidence and I have no hesitation in agreeing with the findings of the learned District Judge. There can be no doubt that the appellants were in embarassed circumstances and were not in a position to pay their debts. According to the statement of Tilak Ram himself (one of the appellants) the appellants' debts amount to about Rs. 56,000. The appellants have stated that the property is worth about two lacs, but there is no reliable evidence to prove this and I feel little doubt that if they had property of this value, they would not have found it difficult to pay their debts by selling a portion of it and would not have found it necessary to call a meeting of their creditors as they did. As regards the finding of the learned District Judge that the appellants declared at the meeting that they meant to pay their creditors collectively and not individually, it was urged that one of the witnesses whom the learned District Judge considered to be disinterested has not supported this allegation, but there is I think sufficient other evidence to support the learned Judge's finding. *Gurmukh Singh* v. *Ram Ditta Mal* (1), relied upon by the learned Dis-

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1. A I R 1926 Lah 136=112 I C 132.

trict Judge undoubtedly supported his view that the declarations and acts proved amount to a notice of suspension of payment within the meaning of Cl. (g), S. 6, Provincial Insolvency Act. The learned Counsel for the appellants has urged that the words in that section must be strictly construed, that the declarations and acts held to be proved, only showed that the appellants were devising means to pay their creditors and keeping themselves out of insolvency. The case reported as *In re Walsh* (2), was cited as an authority.

The case seems to have been decided on its peculiar facts, the finding being that there was nothing to show that the debtors would not be able to carry on even if their offer of composition was not accepted. In the present instance the appellants have admittedly stopped business. The decision in *In re Walsh* was based upon *Ex-parte Oarlter, In re Freidlender*. These cases have been noticed at p. 321 in the judgment of the Earl of Selborne in *Crook* v. *Morley* (3) and in view of the remarks therein and the decision of the House of Lords in that case these cases seem to be of doubtful authority. The contention of the learned counsel that mere temporary suspension of payment until the appellants are able to sell or mortgage their property cannot amount to an "act of insolvency" cannot be accepted as sound. In *Crook* v. *Morley* (3), decided by the House of Lords, the Earl of Selborne remarked as follows:

> "To "suspend" in its natural signification rather means something which may not be permanent than that which necessarily is so. A perpetual stoppage of payment would be a suspension and something more; but to say that the word "suspension" means nothing, in this context, but a necessarily permanent stoppage of payment, is a proposition to which I cannot agree. A stoppage of business in the ordinary course, and of the payment of debts in the ordinary course, is so serious a thing in many if not in all businesses, certainly for example in the business of a banker, that the legislature might well consider it a sufficient reason for giving the creditors the power of treating it as an act of bankruptcy in itself, without entering into the question whether in conceivable circumstances and by conceivable methods it might not come to an end and business be resumed. I cannot but think that it would be violence to these words if a suspension of payments de facto whether in circumstances which might make it possible to resume them or in circumstances which might make that impossible, were held not to be enough."

It is true that a mere declaration that a person is unable to pay his debts may not by itself amount to an "act of insolvency" but coupled with the context and the surrounding circumstances it may amount to such an act. The test is the effect which the declaration would produce on the minds of the creditors in view of all the circumstances (cf *Crook* v. *Morley* (3) at pp. 319-20). Some of the witnesses have actually stated that the appellants said that they intended to suspend payment but even if this evidence is not accepted at its face value, the other acts and declarations which have been proved would, I think, in the circumstances have naturally produced the impression that the appellants had or were about to suspend payment. In *Crook* v. *Morley* (3) Crook had sent a circular to his creditors stating that he was unable to meet his engagement as they fell due and inviting them to attend a meeting at which he proposed to submit a statement of his position. It was held in that case that the letter would naturally induce the creditors to believe that the debtor intended to suspend payment and was therefore tantamount to notice to that effect within the meaning of S. 4-1 (h), Bankruptcy Act (which is identical with S. 6, Cl. (g), Provincial Insolvency Act). The facts of the present case are similar. In this case no letter was issued, but it is well-settled that the notice required by S. 6, Cl. (g) need not be in writing: cf. *Gurmukh Singh* v. *Ram Ditta Mal* (1), *In re David Sasoon & Co. Ltd.* (4). In my opinion the appellants have been rightly adjudged insolvents. I dismiss this appeal with costs. The interim order staying proceedings is discharged.

R.K. *Appeal dismissed.*

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2. (1885) 51 L T R 52.
3. (189) A C 316=61 L J Q B 97=65 L T 389=8 Morrell 227.
4. A I R 1926 Sind 246=95 I C 453.

A. I. R. 1933 Lahore 114

JAI LAL, J.

Amira—Defendant—Petitioner.

v.

Jagan Nath — Plaintiff — Opposite Party.

Civil Revn. No. 244 of 1932, Decided on 12th October 1932, against decree of Sm. C. C. Judge, Lahore, D/- 18-12-31.

Civil P. C. (1908), O. 5, Rr. 12 and 13—Case remanded—Notice of date fixed for hearing served on counsel and not on defendant personally—Defendant absent on date and suit dismissed—Counsel not informing defendant—Absence held not intentional but bona fide.

On case being remanded, the trial Court fixed a date for the hearing and evidence. Notice was served on the counsel, but not on the defendant though it was ordered to be served personally. On the date fixed the case was decreed in default of defendant's appearance. The counsel did not inform the defendant of the date. On revision:

Held: that the defendant's absence was not intentional, but was due to absence of knowledge of the date fixed and the counsel bona fide believed that the defendant would be personally served and would give him fresh instructions. [P 115 C 1]

N. C. Mehra—for Petitioner.

Parkash Chand—for Opposite Party.

Order.—A suit having been dismissed, it was remanded by this Court on the ground that burden of proving discharge of liability lay on the defendant. The result was that the defendant had to produce evidence in support of his plea in the trial Court. The trial Court fixed a date for the hearing of the case and directed that notice should issue to the defendant and his counsel. Notice was served on the counsel but not on the defendant and on the date fixed the suit was decreed in default of defendant's appearance. It is contended on this petition for revision that the duties of the counsel had terminated on the dismissal of the suit originally and consequently he did not inform the defendant of the date fixed in the trial Court and further that the Court having ordered personal service to the defendant in addition to the service on the counsel, the latter did not consider it necessary to inform the defendant specially as he was no longer expected to appear for the defendant without fresh instructions and fees. This latter contention appears to have force. It appears that the defendant's absence was not intentional but was due to absence of knowledge of the date fixed and the counsel bona fide believed that the defendant would be personally served and would give him fresh instruction. Case cited by respondent's counsel that service on counsel in a pending case is tantamount to service on the party have no application to the facts of this case.

I accept the petition and setting aside the decree of the trial Court remand the case to it with direction to proceed with it in accordance with law. Costs abide the result. The parties have been directed by me to appear in the trial Court on 2nd November 1932, when a date will be fixed by the trial Judge for the evidence of the parties.

R.K. *Petition accepted.*

A. I. R. 1933 Lahore 115

BHIDE, J.

Ala Dad—Plaintiff—Appellant.

v.

Sardar and *others*—Defendants—Respondents.

Second Appeal No. 1922 of 1931, Decided on 11th October 1932, from decree of Dist. Judge, Sialkot, D/- 14th August 1931.

(a) Custom (Punjab)—Money-decree passed against estate of Mahomedan—Death of Mahomedan after such decree—Mother entering into possession—Alienation by mother to satisfy decreed-debt is for legal necessity.

Where a Mahomedan governed by customary law has contracted a debt in respect of which a money decree has been passed against the estate and thereafter has died leaving the estate which has come into the possession of his mother, an alienation by the mother in order to satisfy the decreed-debt is an alienation for valid necessity and binds the reversioner: 39 *P. R.* 1915, *Rel. on.* [P 115 C 2; P 116 C 1]

(b) Punjab Courts Act (1918), S. 41—Question of custom—Custom (Punjab).

A question of custom in absence of a certificate under S. 41 cannot be agitated in the High Court. [P 116 C 1]

Bodh Raj Sawhney—for Appellant.

Judgment.—This appeal was heard ex parte as the respondents failed to appear though sufficiently served. The appeal arises out of a declaratory suit by a reversioner challenging an alienation of land by one Mt. Karam Bibi, on the usual ground of want of necessity and consideration. The trial Court granted a decree but on appeal the learned District Judge held that necessity for the alienation was proved to the extent of Rs. 362 only out of the consideration of Rs. 500 and modified the decree accordingly. The plaintiff has now come up to this Court in second appeal and it is urged on his behalf that the learned District Judge was in error in holding that necessity had been proved for the sum of Rs. 362. This sum included Rs. 354 on account of a decree obtained by Sohan Lal against the estate of Khushi Mohammad son of Mt. Karam Bibi and Rs. 8 on account of registration expenses. The learned counsel for the appellant urges that Khushi Mohammad having died his estate was not liable for his debts in the hands of Mt. Karam Bibi and that therefore the alienation in dispute was not justified. *Jagdip Singh* v. *Narayan Sing* (1), is cited in support of this contention. It was however held in *Bambul Devi* v. *Narain Singh* (2), that the principle laid down in *Jagdip*

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1. (1913) 4 P R 1913=15 I C 866 (F B).
2. (1915) 39 P R 1915=29 I C 572.

Singh v. *Narayan Singh* (1), is not applicable to the case of a widow and that she cannot be considered to be the "next holder" within the meaning of that ruling. It seems to me that the case of a mother would also be analogous. The mother like the widow holds only a life estate in lieu of maintenance. Secondly, this would be a question of custom and the learned counsel for the appellant has not produced any certificate from the learned District Judge as required by S. 41, Punjab Courts Act, to enable him to agitate this question in this Court. The other grounds of appeal have not been pressed. The appeal must therefore fail and it is accordingly dismissed.

V.S. *Appeal dismissed.*

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* A. I. R. 1933 Lahore 116

TEK CHAND AND MONROE, JJ.

Jawahar Singh—Plaintiff—Appellant.

v.

Parduman Singh and *another*—Defendants—Respondents.

Second Appeal No. 280 of 1931, Decided on 23rd November 1932, against decree of Addl. Dist. Judge, Lahore, D/- 4th December 1930.

(a) Hindu Law—Mitakshara—Debts take preference over right of maintenance of wife or minor children—Hindu Law, Maintenance.

Debts contracted by a Hindu, governed by the Mitakshara School, take preference over the right of maintenance of his wife or minor children unless the debt is immoral or illegal; hence an arrangement for such maintenance is not binding on the creditors of the father and cannot defeat their right to recover debts incurred before the arrangement is made. [P 117 C 1]

(b) Hindu Law—Debts—Sons' share is liable for pre-partition debts of father.

Property which falls to a son on partition is liable for the pre-partition debts of his father unless the debts are raised for illegal or immoral purposes: *Case law referred.* [P 117 C 2]

M. C. Mahajan—for Appellant.

Kahan Chand—for Respondents.

Tek Chand, J.—In execution of a money decree obtained by Jawahir Singh plaintiff against Arjan Singh, defendant 2, a house situate in Sheranwala Gate, Lahore, was attached as the property of the judgment-debtor. Parduman Singh minor, defendant 1, who is the son of Arjan Singh, objected on the ground that a charge for his maintenance had been created on this house by a decree of the civil Court and that it was not liable to attachment and sale in execution of a personal decree against his father. In support of this contention he produced an agreement, dated 12th February 1927, showing that disputes had arisen between Arjan Singh and Parduman Singh about the maintenance of the latter and that they had appointed one Ram Bheja as arbitrator. The arbitrator gave his award on 14th February 1927, fixing the maintenance payable to Parduman Singh at Rs. 12 per mensem till he attained majority, and making it a charge on the house in question. The arbitrator also directed that Arjan Singh would not be entitled to alienate the house till Parduman Singh had attained majority. Parduman Singh applied to the Senior Subordinate Judge, Lahore, for having the award filed, and on 28th March 1927, a decree in accordance with its terms was passed. The executing Court allowed the objection, holding that the award and the decree passed thereon had practically made Parduman Singh owner of the house and that it could not be sold in execution of a money decree obtained against Arjan Singh Thereupon Jawahir Singh decree-holder, instituted a suit under O. 21, R. 63, for a declaration that his debt having been incurred by Arjan Singh before February 1927, had priority over the charge of the maintenance of the judgment-debtor's minor son, and that he could execute his decree by sale of the house. The Courts below have dismissed the suit.

On second appeal it is urged on behalf of the plaintiff-appellant (1) that the lower Courts are in error in holding that the award and the decree passed in accordance with its terms had effected a partition of the joint Hindu family properties between Arjan Singh and his son, Parduman Singh; and (2) that even if it was so, on a correct view of the Hindu law property which falls to the share of a son on partition is liable for the pre-partition debts of the father, unless the debts had been raised for immoral or illegal purposes. In my opinion both these contentions are well founded and must prevail. The arbitration proceedings do not show that there was disruption of the joint family, or that its properties were divided between the various co-parceners. It appears that owing to disputes in the family the education of the minor was being neglected, and therefore a convenient arrangement was made by setting apart for the purpose of a portion of the income of the house for the period of his minority. The ownership of the house continued to vest in the joint family, of which Arjan Singh is the manager. This arrangement however is not binding on the creditors of the father and cannot defeat their right to recover debts incurred before the arrangement was made, unless, of course, the debts were tainted with illegality or immorality. It is settled law that debts contracted by a Hindu, governed by the Mitakshara school, take preference over the right of maintainance of his wife or minor children, and this proposition was not controverted by counsel for the respondents. In the case before us there is no allegation that the debt was immoral or illegal and in this view of the case the decision of the Courts below is erroneous and must be set aside.

But even if the lower Courts were correct in holding that the arbitration proceedings are to be taken as effecting a partition of the joint family properties between Arjan Singh and his son, the plaintiff's claim must still succeed. In this province, it has been held in numerous cases that property which falls to a son on partition is liable for the pre-partition debts of his father, and the conflict which at one time prevailed in other Courts has also been set at rest now. See *Subramania Aiyar* v. *Sabapathi Aiyar* (1), *Bankey Lal* v. *Durga Prasad* (2), *Raghunandan Prasad* v. *Moti Ram* (3), *Anna Bhat Shankar Bhat* v. *Shivappa Dundappa* (4), *A. I. R.* 1931 *Sind.* 84 and *Vithal* v. *Dawoo* (5). Mr. Kahan Chand has referred us to *Ram Ghulam Singh* v. *Nand Kishore Prasad* (6), but in that case the question was not discussed at any length. The decision was based on *Venkanna* v. *Shreenivasa Deekshatulu* (7), but that case has since been overruled in *Subramania Aiyar* v. *Sabapathi Aiyar* (1). I hold therefore that the plaintiff's suit was wrongly dismissed. I would accordingly accept the appeal and setting aside the judgments and decrees of the Courts below, would pass a decree granting the plaintiff-appellant the declaration asked for. Having regard to all the circumstances I would leave the parties to bear their own costs in all Courts.

Monroe, J.—I agree.

K.S. *Appeal accepted.*

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1. A I R 1928 Mad 657=110 I C 141=51 Mad 361 (F B).
2. A I R 1931 All 512=135 I C 139=53 All 868 (F B).
3. A I R 1929 Oudh 406=119 I C 449=6 Luck 497 (F B).
4. A I R 1928 Bom 232=110 I C 269=52 Bom 376.
5. A I R 1931 Nag 106=127 I C 345.
6. A I R 1925 Pat 688=88 I C 813=4 Pat 469.
7. (1918) 41 Mad 136=43 I C 225.

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* A. I. R. 1933 Lahore 117

JAI LAL, J.

Manga—Defendant—Appellant.

v.

Imam Din and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 454 of 1932, Decided on 20th October 1932, against decree of Dist. Judge, Rawalpindi, D/- 3rd March 1932.

*** Pre-emption—Person with superior right to pre-empt associating stranger with him in his purchase cannot resist claim to pre-empt by person with inferior right to pre-empt.**

A person with a superior right cannot resist the claim of a person with an inferior right to pre-empt if he associates a stranger in the purchase by him. [P 118 C 1]

M and *Z* purchased certain properties subject to the right of pre-emption from *K* and a suit for possession by pre-emption of those rights was instituted by one *I*. After the purchase, *Z* entered into an agreement with *M* to sell his half-share in the transaction to *M* and in pursuance of this agreement he sold his interest in the property to *M* before the pre-emption suit was instituted:

Held: that the subsequent sale did not deprive the pre-emptor of his right to pre-empt the original sale because if *Z* had remained a purchaser of the property along with *M* the latter could not resist the claim of *I* to pre-empt the sale. [P 118 C 2]

Mohsin Shah—for Appellant.

Ghulam Mohyuddin—for Respondents.

Judgment.—This second appeal raises rather a difficulty and a novel question relating to the law of pre-emption. The facts are these: By means of a sale-deed dated 14th August 1929 Manga and Mir Zaman purchased occupancy rights in the land in dispute from Karam Dad and on 30th July 1930 a suit for possession by pre-emption of those rights was instituted by the respondent Imam Din. It appears however that on 17th August 1929, that is to say, three days after the purchase, Mir Zaman entered into an agreement with Manga to sell his half-share in the transaction to Manga and in pursuance of this agreement he sold his interest in the occupancy rights purchased by him jointly with Manga to the latter on 1st April 1930. The suit for pre-emption having been decreed by the trial Court an appeal was preferred by Manga which also has been dismissed by the District Judge. The learned Judge has held that the agreement of 17th August 1929 and the sale which was effected in pursuance thereof on 1st April 1930 were genuine transactions. He does not however find, as was alleged by Manga, that the original sale by Karam Dad was really in favour of Manga and that Mir Zaman was associated merely because he had advanced money to Manga to enable him to purchase the property and he wanted to secure himself in respect of the money so advanced by him. The agreement to sell and the consequent sale-deed of 1st April make no mention of any such arrangement between the parties and the finding of the District Judge that these transactions were genuine transactions, I take it, amounts to finding that it was a straightforward sale by Mir Zaman of his share in the property of Manga and if it were necessary for me to give a finding on this point I would hold accordingly, that is, that there is no truth in the assertion of Manga that Mr. Zaman had been associated merely because he had financed him and that it was not intended that he would have no share in the property purchased. The circumstances show that Mir Zaman was a joint purchaser with Manga.

The question therefore is whether the sale of his interest by Mir Zaman in favour of Manga prior to the institution of the stuit for pre-emption deprived the pre-emptor of his right to pre-empt the original sale, it being conceded that if Mir Zaman had remained a purchaser of the property along with Manga the latter could not resist the claim of Imam Din to pre-empt the sale because Manga alone was competent to do so if he alone had been the purchaser of the property. It is an established proposition of the law of pre-emption that a person with a superior right cannot resist the claim of a person with an inferior right to pre-empt if he associates a stranger in the purchase by him. No authority disrectly bearing on the point has been cited by either counsel. Mr. Mohsin Shah on behalf of the appellant has relied upon the principle recognized by several authorities in this Court that if a stranger purchases a property which is subject to the right of pre-emption and before the institution of the suit he transfers to a person who has an equal or superior right to pre-empting plaintiff then the latter cannot succeed in his claim. The ratio decidendi in all such cases however is that the transfer has been made by the stranger to the person concerned in recognition of his right to pre-empt the sale. These considerations do not seem to me to apply to the present case. In the present case a more analogous instance is the resale by the stranger of the property purchased by him to the vendor and it has been held that in such cases a person having a superior right to pre-empt can successfully pre-empt the sale, that is a person having a superior right to the original vendee. It is on these grounds that I have reached the conclusion, though not without hesitation, that the view taken by the District Judge is correct and specially as in such cases analogies are not always a safe guide. I accordingly dismiss this appeal; but in view of the difficult point involved in the case I leave the parties to bear their own costs in this Court.

M.N. *Appeal dismissed.*

A. I. R. 1933 Lahore 118

HARRISON AND ADDISON, JJ.

Allah Bakhsh and *others*—Defendants—Appellants.

v.

Amar Nath and *others*—Plaintiff and Defendants—Respondents.

First Appeal No. 1630 of 1926, Decided on 17th October 1932, against decree of Senior Sub-Judge, Amritsar, D/- 3rd May 1926.

Custom (Punjab) — Adoption — Aroras of Amritsar are governed by Hindu Law.

Aroras of Amritsar City are governed by Hindu law and no custom modifying such law has been introduced into the law of adoption governing them. [P 119 C 1]

Nawal Kishore and *Ajit Prasada*—for Appellants.

Gobind Ram Khanna and *Hem Raj Mahajan*—for Respondents.

Judgment.—Amar Nath, an Arora of Amritsar City, brings this suit for Jowala Singh, the alienees from those collaterals and the alienees from his own mother. The suit is based on the allegation that Amar Nath's father Mula Mal was adopted in the year 1891 by Jowala Singh, his sister's husband. In the year 1905 Amar Nath was born. Mula Mal died early in 1906 and Jowala Singh died in 1909 or 1910. After his death the house in suit which constituted his property, was divided between Amar Nath and the collaterals, the former taking one-third and the latter two-thirds. Amar Nath was admittedly born in the house of Jowala Singh where his parents had been living for considerable time. Amar Nath seeks to set aside the various sales and to obtain possession of the whole property as the son of the adopted son of Jowala Singh. He alleges that the alienation made by his mother was not made in his interest and should be set aside. The defendants traversed every allegation made by the plaintiff, except that he was the son of Mula Mal and put him to the proof of alleged adoption and likewise the date of his own birth. This they said took place before 1906 and therefore the suit was barred by time.

Putting aside for the moment the technical objection of limitation, the main point in the case is whether the adoption is established, and this again may be divided into the factum of the adoption and the validity thereof. There is no question that the parties who are Aroras of Amritsar City, are governed by Hindu law and no question of custom modifying such law has been introduced into the case. This being so, it is quite clear on the various authorities, of which it is only necessary to quote Mulla's well-known hand-book and *Balak Ram High School, Panipat* v. *Nanun Mal* (1). that, in order to establish an adoption of the nature alleged in this case, it is absolutely essential that the physical acts of giving and taking should be established. Not a shred of evidence has been led by the plaintiff to prove that there was such giving and taking. All that he endeavoured to prove is that a deed was executed and that his father was treated as an adopted son by Jowala Singh by being allowed to remain in his house. This is wholly insufficient and the plaintiff's suit therefore must fail on this ground. The second point, as to whether the deed was executed and Jowala Singh ever treated Mula Mal as his adopted son becomes academic, but we may say that the evidence regarding the deed is, in our opinion, most unsatisfactory, and that the oral evidence as to conduct is no better. (The judgment considered the evidence and concluded). The plaintiff has wholly failed to establish the allegations on which he rests his case, and his suit must be dismissed with costs. The appeal is accepted accordingly. The costs of the appellants will be paid throughout by the plaintiff.

M.N. *Appeal allowed.*

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1. A I R 1930 Lah 579=128 I C 532=11 Lah 503.

A. I. R. 1933 Lahore 119

JAI LAL, J.

Mohammad Hussain Khan and *others*—Defendants.

v.

Kirpa and *others*—Plaintiffs.

Civil Ref. No. 21 of 1932, Decided on 25th October 1932, made by Dist. Judge, Horshiarpur, D/- 10th June 1932.

Punjab Tenancy Act (1887), S. 100—S. 100 applies when either Civil or Revenue Court determines suit without jurisdiction—Stage at which lack of jurisdiction arises is immaterial.

Section 100 applies to all cases in which a Court, whether civil or Revenue, has determined a suit which it had no jurisdiction to entertain. It is immaterial whether the objection to the jurisdiction of the Court could be raised initially on the institution of the suit or whether it came into existence on the pleadings of the defendant. In either case from the stage that the objection to jurisdiction comes into existence the Court ceases to have jurisdiction to entertain the suit and if it continues with its determination then S. 100 would empower the High Court to take action provided the other conditions laid down therein are satisfied. [P 120 C 1]

Badri Das—for Defendants.

Achhru Ram—for Plaintiffs.

Order. - - The facts of this case are peculiar. A suit was originally instituted in the Court of the Assistant Collector of Hoshiarpur, but was dismissed because it was held that it was bad for multifariousness and the plaintiffs declined to amend the plaint. An appeal was preferred to the Collector of Hoshiarpur, who was of opinion that the suit was cognizable by the civil Courts and referred the case to this Court under S. 100, Punjab Tenancy Act, with a recommendation that the decree of the Assistant Collector be registered as a decree of the civil Court having jurisdiction. This reference came up for hearing before me and I declined to register the decree mainly on the ground that the suit had not been disposed of on the merits and it was open to the Collector to direct the trial Court to return the plaint to the plaintiffs for presentation in the Court having jurisdiction. I did not however express any opinion whether the suit was cognizable by the Revenue Court or by the civil Court. The Collector thereupon passed an order setting aside the decree of the Assistant Collector and remanded the case to him with direction to return the plaint for being presented in the Court having jurisdiction to try the suit. The plaint was consequently returned and the suit was instituted in the Court of a Subordinate Judge at Hoshiarpur. The Subordinate Judge has decreed the suit on the merits. An objection to his jurisdiction was raised by the defendants but was overruled, apparently the Subordinate Judge considered that he was precluded by my order from going into the question of jurisdiction.

I may memtion that it does not appear that the defendants had taken objection to the jurisdiction of the Assistant Collector when the suit was originally instituted in his Court, on the other hand it was the Collector who appears to have suo motu taken up the question of jurisdiction on appeal. From the decree of the Subordinate Judge decreeing the suit an appeal has been preferred to the District Judge who is of opinion that the suit was not cognizable by the civil Court but by the Revenue Court, and with this opinion counsel for both parties, who have appeared before me, agree. It is however contended by counsel for the defendants that the decree should not be registered as a decree of the Revenue Court, because he says that S. 100, Punjab Tenancy Act, does not apply to cases in which a civil Court is initially competent to entertain the suit but by virtue of the defence raised by the defendants is precluded from doing so under the proviso to S. 77 (3), Punjab Tenancy Act. I am unable to agree with this contention. S. 100 applies to all cases in which a Court, whether Civil or Revenue, has determined a suit which it had no jurisdiction to entertain. It is immaterial whether the objection to the jurisdiction of the Court could be raised initially on the institution of the suit or whether it came into existence on the pleadings of the defendant. In either case from the stage that the objection to jurisdiction comes into existence the Court ceases to have jurisdiction to entertain the suit and if it continues with its determination then S. 100 would empower this Court to take action provided the other conditions laid down therein are satisfied.

Then some attempt was made by the defendant's counsel to show that his clients were likely to be prejudiced if an order under S. 100 is passed by me. The proceedings before the District Judge show that it was not even alleged before him that the defendants would be prejudiced by the course recommended by him. In any case the learned counsel has not succeeded in satisfying me that any prejudice would be caused to his clients. I consequently accept the recommendations of the District Judge and direct that the decree of the Subordinate Judge be registered as a decree of the Assistant Collector competent to entertain this suit and direct the District Judge to return the memorandum of appeal to the appellants for presentation to the Court having jurisdiction to entertain the appeal. Costs of this reference will abide the result of the suit.

M.N. *Order accordingly.*

✻ A. I. R. 1933 Lahore 120

JAI LAL, J.

Nur Din—Defendant—Petitioner.

v.

Khair Din — Plaintiff — Opposite Party.

Civil Revn. No. 208 of 1932, Decided on 14th July 1932, against order of Senior Sub-Judge, Sialkot, D/- 28th January 1932.

✻ Civil P. C. (1908), S. 20, Expl. 1—Person having permanent dwelling at one place and temporary residence at another—Cause of action arising at place of temporary residence—Suit can be brought at both places.

A defendant who has a permanent dwelling at one place and temporary residence in another place and who intends to return to his permanent dwelling, can be sued at both places on a cause of action arising at the place of his temporary residence.

The defendant had his original family at *Q* but was actually residing at *C*, carrying on business. Plaintiff sold some goods to him at *C* and got him to execute documents in his favour. On the basis of those documents he instituted a suit at *Q*. The defendant was examined on interrogatories and was definitely asked if he had no intention to return to *Q* to which he replied that he did intend to return to *Q*.

Held: that the defendant must be deemed to have his temporary residence at *C*, and as the cause of action arose at *C* he must be deemed to be residing at both places and a suit could be instituted against him at both places: *A.I.R.* 1930 *Cal.* 347, *Appr*; 2 *Bom. L. R.* 605, *not Foll*; 42 *P. R.* 1916 and 112 *P. R.* 1916, *Dist*.

[P 121 C 2]

Charanjiv Lal and *Muhammad Amin*—for Petitioner.

Badri Nath—for Opposite Party.

Judgment.—The only question raised in this petition for revision relates to the jurisdiction of the trial Court to entertain the suit. The facts are these: The petitioner has his original family at Qila Sobha Singh, Tahsil Narowal, District Sialkot, but he is actually residing at Chapra, in Bihar and Orissa, where he carries on business. The plaintiff, it seems, sold some goods to him at Chapra and got him to execute documents in his favour. On the basis of these documents he instituted a suit in the Court of Subordinate Judge at Narowal. In the plaint the plaintiff stated—and this has been found to be wrong—that the documents were executed at Qila Sobha Singh. The trial Court, holding that it had no jurisdiction to entertain the suit, returned the plaint for presentation to the Court having jurisdiction. The Senior Subordinate Judge on appeal has held that the trial Court had jurisdiction to entertain the suit because the defendant had his permanent dwelling in Qila Sobha Singh and his temporary residence at Chapra where the contract in suit was made and where therefore the cause of action in favour of the plaintiff arose. In coming to this conclusion the Senior Subordinate Judge relied upon Expl. 1, S. 20, Civil P. C., which is where a person has a permanent dwelling at one place and also a temporary residence at another place he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence. This explanation must be read with S. 20 (a) which provides that a suit can be instituted in a Court within the local limits of whose jurisdiction the defendant, at the time of the commencement of the suit, actually and voluntarily resides. The Senior Subordinate Judge consequently remanded the case to the trial Court for decision on the merits.

Against this order of the Senior Subordinate Judge this petition for revision has been presented and it is contended that Expl. 1, S. 20 is of no assistance to the respondents because the defendant-petitioner cannot be deemed to have a permanent dwelling in Qila Sobha Singh. Some objection also was raised that the plaintiff had not mentioned these facts in the plaint, but there is no force in this objection because they were expressly raised before the Senior Subordinate Judge and it appears that before the trial Court also this matter was agitated. The counsel for the petitioner relies upon *Allah Ditta* v. *Shankar Das* (1) and *Guran Ditta Mal* v. *Ram Das* (2). The case first mentioned however is not of much assistance in the present case. In *Guran Ditta Mal* v. *Ram Das* (2) it was found that though the defendant had originally a permanent dwelling in Nurpur in the district ot Jhelum he had been carrying on business in Peshawar for a long time where he had settled down and had no intention of returning to Nurpur. This by no means is the case in the present case. In the first instance, a power of attorney executed by the petitioner has been produced in which he describes himself as a resident of Qila Sobha Singh and has aothorized his attorney to generally represent him in suits to be brought by him or that may be brought against him or in suits which are already pending against him. He was further examined on interrogatories and was definitely asked whether he had no intention of returning to Qila Sobha Singh and he stated that he had the intention of returning to Qila Sobha Singh. It seems therefore that the petitioner has not abandoned his permanent dwelling at Qila Sobha Singh. *Ugar Chand Mulchand* v. *Suraj Mal Lekherchand* (3), seems to favour the contention of the petitioner but *Sitanath Bhadra* v. *Jatindra Nath Sarkar* (4), supports the conclusion of the learned Senior Subordinate Judge.

In my opinion the Calcutta view is the correct one, and, it is obvious from the wording of Expl. 1, S. 20, which contemplates the case of a defendant who has a permanent dwelling at one place and a temporary residence in another place; that the petitioner in this case has been residing in Chapra for the sake of business and he intends to return to his ancestral or permanent dwelling ultimately is beyond doubt. He must be deemed therefore to have his temporary residence at Chapra; and as the cause of action, which is the subject-matter of this suit, arose at Chapra he must be deemed to be residing both at Qila Sobha Singh and at Chapra and consequently a suit could be instituted against him on this cause of action on both places. I dismiss the petition with costs.

K.N./R.K. *Petition dismissed.*

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1. (1916) 42 P R 1916=38 I C 353.
2. (1916) 112 P R 1916=38 I C 62.
3. (1900) 2 Bom L R 605.
4. A I R 1930 Cal 3 =125 C 320=57 Cal 65.

A. I. R. 1933 Lahore 121

BHIDE, J.

Nathu—Defendant—Appellant.

v.

Wali Mahammad and *another*—Plaintiffs—Respondents.

Second Appeal No. 104 of 1932, Decided on 19th October 1932, against preliminary decree of Addl. Dist. Judge, Lahore, D/- 29th October 1931.

(a) Companies Act (1913), S. 4—Association of 100 members—Subscriptions to be paid by lots of members—Association whether required registration and subscriptions whether can be claimed back—(*Quaere*).

An association was formed of 100 members. Each member was to pay Rs. 10 as subscription and the amount thus subscribed was to be paid to one of the members by drawing lots until all the members had their turn. The association was to remain in existence for 100 months:

Held: it was doubtful whether the association required registration and whether a claim for refund of subscriptions would have been legally maintainable against secretary and treasurer. [P 122 C 2]

(b) Contract Act (1872), S. 2 (d)—Abandonment of disputed claim is valid consideration.

The abandonment of a disputed or doubtful claim is a valid consideration. It makes no difference, even if the claim is ultimately found to be without foundation as by the execution of the deed the defendant's sons are saved from the prospect of a protracted and uncertain litigation with which they were threatened: *A. I. R.* 1926 *Oudh* 22 and 32 *I. C.* 468, *Ref.* [P 122 C 2]

Har Gopal and *Fakir Chand*—for Appellant.

M. C. Mahajan—for Respondents.

Judgment.—This was a suit for recovery of Rs. 1,770 on the basis of a mortgage. The suit has been decreed by the Courts below and the defendant has preferred a second appeal. The material facts may be very briefly stated as follows: As association called "Baradaran-i-millat" was formed at Kasur and the defendant's sons, Siraj Din and Firoz Din, were the Secretary and Treasurer thereof. There were 100 members, of the association and each was to pay Rs. 10 as subscription and the amount thus subscribed was to be paid to one of the members by drawing lots until all the members had their turn. The association was to remain in existence for 100 months, but, before the expiry of the period, it ceased to function and the plaintiffs, thereupon, claimed Rs. 1,770 from the defendant's son on account of the balance of the subscriptions paid by them. The defendant thereupon executed a mortgage-deed in favour of the plaintiffs to secure the payment of that amount and the plaintiffs gave up the claim against the defendant's sons. This happened in 1927. In June 1930, the plaintiffs sued for recovery of the amount on the basis of the mortgage-deed executed by the defendant. The defendant resisted the suit pleading that he was not liable as the "Baradranimillat" was an illegal association as it consisted of over 20 members but was not registered as required by S. 4, Companies Act, and that the mortgage-deed was executed under undue influence. The Courts below have rejected these pleas and decreed the suit as stated above. In appeal, it is urged on behalf of the defendant that the association referred to above being an illegal body and its purpose having been carried out in part the Courts below were wrong in decreeing the plaintiffs' claim. On behalf of the plaintiffs-respondents, on the other hand, it is urged that the association does not fall within the purview of S. 4, Companies Act, and that even if it did, a suit for refund of the subscriptions paid by the plaintiffs was maintainable. Lastly, it was urged on behalf of the respondents that, even if the above contentions are not accepted, the contrtact with the defendant on which the present suit is based is binding on him as it was effected in consideration of the plaintiff's giving up a disputed claim against the defendant's sons and this was a valid consideration for the contract.

The questions, whether the association called the "Baradran-i-millat" described above required registration and whether a claim for subscriptions would have been legally maintainable against the defendant's sons are not free from doubt, but I consider it unnecessary to discuss them for the purpose of this appeal, as it seems to my mind clear that the last contention of the learned counsel for the respondents must be upheld. It must be carefully borne in mind at the outset that the present claim is not for the refund of the subscriptions against the Treasurer and Secretary of the association but against the defendant, their father, who took their liability upon himself by virtue of the mortgage-deed upon which the suit is based. It is not denied that the sum of Rs. 1,770 was actually due to the plaintiffs, as balance of the subscriptions paid by them. The question, whether the sum could be legally recovered from defendant's sons, can at best be considered doubtful in view of the technical pleas raised. But, assuming that there was some doubt in the matter, the fact remains that the defendant executed a mortgage-deed in favour of the plaintiffs in consideration of their giving up the claim against his sons. It is well-established that the abandoment of a dispute or doubtful claim is a valid consideration and it has been held that it makes no difference, even if the claim is ultimately found to be without foundation: cf. *Ramcharan* v. *Mt. Sartaji* (1), *Upendra Nath* v. *Bindeshri Prasad* (2). By the execution of the deed the defendant's sons were saved from the prospect of protracted and uncertain litigation with which they were threatened. I therefore hold that there was valid consideration for the mortgage-deed executed by the defendant and he has been rightly held to be liable on it. The appeal must therefore fail and it is hereby dismissed with costs.

R.K. *Appeal dismissed.*

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1. A I R 1926 Oudh 22=90 I C 766.
2. (1916) 32 I C 468.

A. I. R. 1933 Lahore 123

SHADI LAL, C. J. AND AGHA HAIDAR, J.

Mitha—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 866 of 1932, Decided on 12th October 1932, against order of Sess. Judge, Multan, D/- 28th May 1932.

Penal Code (1860), Ss. 302 and 84—Accused murdering his children—Mind unsound—Accused not ignorant that his act was wrongful—Cas does not come within S. 84—Accused affectionate father—No provocation—Sentence reduced from death to transportation.

A person was tried for murdering his two children and convicted under S. 302. At or about the time when the accused committed the murderous attack upon his two little children, his mind was unsound, but it could not be said with any degree of certainty that he did not know that what he was doing was wrong or contrary to law within the meaning of S. 84.

Held: that the sheer brutality of the assault in the absence of any provocation was a circumstance which would lead to the inference that the mind of the accused was in fact unhinged and far from normal. Under these circumstances, while upholding the conviction of the accused under S. 302, it was not a case in which capital sentence should be imposed. [P 124 C 1]

S. C. Manchanda—for Appellant.

Mohammad Akbar Khan for *Govt. Advocate*—for the Crown.

Agha Haidar, J.—The appellant, Mitha, son of Bakhshan, has been convicted by the Sessions Judge, Multan (at Muzaffargarh) of an offence under S. 302, Penal Code, and has been sentenced to suffer the extreme penalty of law. His appeal and the reference under S. 374, Criminal P. C., are before the Court. On 9th February 1932, the day of the last Idulfitr, Mt. Jantan, P. W. 2, wife of Mitha, accused, went to the house of Kaura, P. W. 3, brother of the accused, to fetch some vermicelli, a delicacy peculiar to the day of Id among the Mahomedans. She had left her two daughters, Mt. Sabi, aged about nine years, and Mt. Zohran, aged six months, in the house. Mitha accused, who is a cripple and has to use a crutch, and his aged and decrepit mother, who is almost blind, were the only adult members of the family present in the house. Mt. Jantan returned to the house soon afterwards and, to her horror, discovered that her two children had been seriously injured and were profusely bleeding. She raised an outcry which attracted Kaura, P. W. 3, his son Ahmad Bakhsh, P. W. 4, and Imaman, P. W. 5, a neighbour, to the scene of the tragedy. Sohanra, P. W. 6, who is related to the accused as his brother-in-law, was sent for by Kaura, P. W. 3, and arrived soon after. They found the crutch Ex. P-1 of the accused and his shirt, Ex. P-3, and his chadar and turban, Ex. P-4 and P-5 respectively, besmeared with blood. The accused was sitting with the crutch under his leg and was maintaining a sullen silence. He was questioned by Kaura as to why he had killed his children, but he did not make a reply. Afterwards in reply to further questions put by Sohara, P. W. 6, the prisoner stated that he had asked Mt. Sabo to give him water but she merely snapped her fingers at him and refused to give him water and this behaviour enraged him and he struck the child and in doing so injured the baby. Mt. Zohran, who happened to be in the arms of her sister Mt. Sabo. It is also in evidence that the accused stated that he did not realize that he was striking his own children: vide Ahmad Bakhsh, P. W. 4.

Kaura, P. W. 5, was sent to the police station at Daira, Din Panah in the district of Muzaffargarh, to lodge the First Information Report. The report was accordingly made. It is significant that about the end of the report Kaura stated pointedly that, in the beginning of the month of Ramzan, the accused had fallen ill and had been placed under the treatment of some local herbalist and physician and got some relief, and that during his illness he generally used to shout and try to run away saying that he was being struck with knives and hatchets. He also stated that during the previous night he went out twice or thrice as before and used similar words. It was further stated that he had mental disease for a long time past and that on that account he had beaten his daughters who had died. It is unfortunate, that, in spite of these important disclosures in the report, which was lodged with due promptitude soon after the occurrence, the police did not send the prisoner to any doctor for the purpose of keeping him under observation with a view to determine his mental condition. The prosecution witnesses, whose names have already been mentioned above and who have clearly implicated the accused in the crime, are all unanimous, that during the month of Ramzan, the accused was suffering from mental derangement and had been behaving like an insane person. There is no reason why these witnesses, on whose evidence the case for the prosecution mainly rests, should not be belived. It may be argued that they are his near relations and are therefore trying to mitigate the gravity of the offence which the accused has committed, by introducing the episode of insanity during the period immediately preceding the day of the occurrence. But they are prosecution witnesses all the same and their evidence must be considered as a whole. Furthermore, we have the evidence of Imaman, P. W. 5, who is a perfect stranger and had no reason whatsoever to shield the prisoner from the consequences of his act. This witness has also stated that during the whole of the month of Ramzan, the prisoner was mad and used to talk incoherently and abusively to all.

The question for determination is what offence has been committed by the accused and what punishment should be awarded to him, having regard to the evidence on the record. In my judgment the case for the accused does not strictly fall within the provisions of S. 84, I. P. C. At the same time there cannot be any doubt that, at or about the time when the accused committed the murderous attack upon his two little children, his mind was unsound, that it cannot be said with any degree of certainty that he did not know that what he was doing was wrong or contrary to law within the meaning of S. 84, I. P. C. We have evidence of witnesses for the prosecution that the accused was a fond and affectionate father, so that the sheer brutality of the assault in the absence of any provocation of which a Court of justice can take notice is a circumstance which leads to the inference that the mind of the accused was in fact unhinged and far from normal. Under these circumstances, while upholding the coviction of the accused under S. 302, I. P. C., I do not consider that it is a case in which the capital sentence should be imposed. I would therefore set aside the sentence of death which has been passed upon the accused by the Sessions Judge and, in lieu thereof, substitute the sentence of transportation for life. The prisoner shall be kept under medical observation. As observed in *Lachhman* v. *Emperor, A. I. R.* 1924 *All.* 413, if for a sufficiently long period the prisoner appears to be sane (insane?), then it is competent to the Local Government to pass such order as may be considered proper. That is however a matter within the special province of the executive authorities, as to which I need not express any opinion. The course therein adopted is in accordance with the observations contained in *Maulu* v. *Emperor, A. I. R.* 1923 *Lah.* 619. The case should be reported to the Local Government with a copy of this judgment.

Shadi Lal, C. J.—I concur.

R.K. *Sentence reduced.*

A. I. R. 1933 Lahore 124

TAPP, J.

District Board, Jhang— Defendant—Petitioner.

v.

Ganpat Ram — Plaintiff — Opposite Party.

Civil Revn. Petn. No. 462 of 1932, Decided on 12th December 1932, from decree of Sm. C. C. Judge, Jhang.

(a) Punjab District Board Act (1883), Ss. 70, 76 and 72—Suit for refund of Haisiat-tax is cognizable by civil Court.

A civil Court has jurisdiction to entertain a suit against the District Board for refund of Haisiat-tax. [P 125 C 1]

(b) Punjab District Board Act (1883), S. 76—Sahukar does not come under "others" in that section.

A sahukar does not fall within the category of "others" in the section, on the application of the doctrine of ejusdem generis. [P 125 C 1]

(c) Small Cause Courts Act (Punjab) Sch. 2, Art. 1—Suit against District Board for refund of tax is outside the scope of the article.

Article 1, Sch. 2, applies more to suits for damages or compensation in connexion with official acts; and hence a suit against the District Board for refund of tax is outside the scope of this article and is cognizable by a Small Cause Court. [P 125 C 1]

(d) Punjab District Board Act (1883), S. 74—Suit for refund of tax paid—Onus of non-liability to pay is on plaintiff—Evidence Act (1872), S. 103.

In a suit against a District Board for refund of tax paid it is for the plaintiff to show that he is not liable to pay the tax and that it has been illegally exacted from him and not for the District Board to prove that the plaintiff has been properly assessed and is not entitled to a refund. [P 125 C 1]

Shujauddin—for Petitioner,
Fakir Chand—for Opposite Party.

Judgment.—This is an application for revision of the order of the Judge Small Cause Court, Jhang, decreeing the claim of the plaintiff-respondent Ganpat Ram against the District Board, Jhang, for a refund of Rs. 27-8-0 being the half yearly instalment of a Haisiat-tax of Rs. 55 assessed on the plaintiff for the year 1931. It was urged by the learned counsel for the petitioner Board that a civil Court had no jurisdiction to entertain the suit and he relied on Ss. 70, 72 and 76, District Board Act, in support of his contention. S. 70 provides that all rates and taxes imposed under the Act, and all arrears of such rates and taxes, may be recovered as if they were arrears of land revenue. S. 72 provides for appeals in connexion with the assessment and collection of any rate or tax leviable under the Act and S. 76 runs as follows:

> "Suits for the recovery from cosharers, tenants or others of any sum on account of any rate or tax imposed under this Act, and suits on account of illegal execution of any such rate or tax, or for settlement of accounts connected therewith shall, unless the Local Government otherwise directs, be cognizable by Courts which for the time being have cognizance of suits for rent due on land."

It was submitted that the plaintiff, who is a sahukar would fall within the category of "others" in the section, but on the application of the doctrine of ejusdem generis I am not prepared to agree to this contention. I therefore hold that the suit was cognizable by a civil Court. The next contention raised by Dr. Shujauddin was that the suit was excluded from the cognizance of a Small Cause Court under Art. 1, Sch. 2, Small Cause Courts Act. I do not think the present suit would fall within the scope of this article, which possibly applies more to suits for damages or compensation in connexion with official acts. On the merits however I am of opinion that the case has not been properly tried. The tax in question was imposed by notification No. 40935 of 17th December 1929, on all persons resident in the area subject to the authority of the District Board, Jhang, and was leviable at different rates on all annual income from Rs. 400 to over Rs. 50,000. It was not leviable in any financial year on any person who had resided within the area mentioned for less than 180 days of such year. On the pleadings it was for the plaintiff to show that he was not liable to pay the tax and that Rupees 27-8-0 had been illegally exacted from him and not for the District Board to prove that the plaintiff had been properly assessed and was not entitled to a refund. The plaintiff was granted a decree, because the District Board failed to prove that plaintiff resided more than 180 days within the area under the jurisdiction of the Board and because the income of the plaintiff had not been proved to be liable to assessment. This is clearly putting the onus on the wrong party and I hold therefore that the case has been wrongly decided and setting aside the decree of the Court below I remand the case for fresh decision and disposal in accordance with low. Costs of this Court will abide the result.

K.S. *Case remanded.*

A. I. R. 1933 Lahore 125

BHIDE, J.

Deputy Commissioner, Kangra Dist.—Petitioner.

v.

Shiv Ram and *another* — Opposite Parties.

Civil Ref. No. 9 of 1932, Decided on 19th October 1932, case referred by Deputy Commissioner, Kangra, D/- 21st April 1932.

Punjab Land Alienation Act (13 of 1900)—House.

A house in a village "abadi" does not fall within the definition of land. [P 125 C 2]

Labh Singh—for Opposite Parties.

Order.—This is a petition for revision under S. 21-A, Punjab Land Alienation Act. A house was sold on 9th September 1929, by auction in execution proceedings by order of Subordinate Judge, Pathankot. The sale came to the notice of the Collector, Kangra. on 6th May 1931, who moved the District Judge under S. 21-A, Punjab Alienation of Land Act, to set aside the sale on the ground that the sale was in contravention of the Act. The District Judge held that the reference should have been made to the Senior Subordinate Judge and sent it on to him. The Senior Subordinate Judge found that it was time-barred and dismissed it. A petition for revision is now presented to this Court.

There seems to be no doubt that the petition was time-barred by the time it reached the Senior Subordinate Judge's Court. No good ground was shown for extension of time being granted. Further, it does not appear that the property sold falls within the definition of "land" as given in the Punjab Alienation of Land Act. The record of the execution proceedings shows that the property consisted of a house in a village "abadi" and this does not fall within that definition. I dismiss the petition.

R.K. *Petition dismissed.*

A. I. R. 1933 Lahore 126 (1)

DALIP SINGH, J.

Muni Lal—Judgment-debtor—Appellant.

v.

Gulab Singh Bhagwan Singh—Decree-holder—Respondents.

Misc. First Appeal No. 369 of 1932, Decided on 14th October 1932, against order of Senior Sub-Judge, Amritsar, D/-16th November 1931.

(a) Contract Act (1872), S. 60—Appropriation held not intended towards principal.

The decree holder while presenting accounts to the Court on which he based execution application entered the credit and debit items, calculating interest on both and claimed execution for the balance.

Held: that the result was to appropriate the payments towards principal, but it could not be held that it was the intention of the decree-holder to appropriate the payments towards principal or whether it was merely a mathematical mistake which led to an inaccurate result: *A. I. R.* 1922 *P. C.* 233, *Rel. on.* [P 126 C 1]

(b) Civil P. C. (1908), O. 34, R. 3—Appropriation—*Quaere*.

(*Quaere*).—Under O. 34, R. 3 whether question of appropriation by the parties arises. [P 126 C 2]

(c) Civil P. C (1908), O. 34, R. 3—Interest stops from date of deposit and not from withdrawal—Interest.

The interest should be calculated as ceasing from the date of deposit of the money in Court and not from the date of removal by the decree-holder. [P 126 C 2]

M. C. Mahajan—for Appellant.

Badri Das—for Respondents.

Judgment.—The facts are given in the judgment of the learned Senior Subordinate Judge and the question is, whether the decree-holder had appropriated the payment made towards principal and therefore could not subsequently change the appropriation and make it towards interest. It appears that all that the decree-holder had done in presenting accounts to the Court on which he based execution application was to enter the credit and debit items, calculate the interest on both and claim execution for the balance. The result of this no doubt was to appropriate the payments towards principal, but, I doubt very much whether it can be held that it was the intention of the decree-holder to appropriate the payments towards principal or whether it was merely a mathematical mistake which led to an inaccurate result. In the latter case there would be no question that he would not be estopped or bound. I am strengthened in this conclusion by *Venkatadri Appa Rao* v. *Parthasarthi Appa Rao* (1), a Privy Council ruling. It has also been contended by the learned counsel for the respondent that under O. 34, R. 3, there was no question of appropriation by the parties but it is unnecessary to decide this point.

The only other point urged is that the interest should be calculated as ceasing from the date of deposit of the money in Court and not from the date of removal by the decree-holder. This seems correct. No statement of account has been furnished but counsel says that it is sufficient if I give a direction to the Court that allowance should be made for the variation produced by this change in the date up to which interest is to be calculated. The appeal is accepted to this extent only and otherwise it is dismissed. No order as to costs.

R.K. *Order accordingly.*

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1. A I R 1922 P C 233=61 I C 31=48 I A 150=44 Mad 570 (P C).

A. I. R. 1933 Lahore 126 (2)

BHIDE, J.

Hira Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 926 of 1932, Decided on 14th October 1933, against order of Sess. Judge, Hoshiarpur, D/-15th June 1932.

Penal Code (1860), S. 304, Part 1—Sentence reduced from ten to five years.

Where the offence under S. 304 (1) was committed in the heat of passion and on the spur of the moment, after the accused's patience had been strained by the deceased (immoral wife) to the utmost the sentence was reduced from ten years to one of rigorous imprisonment for five years. [P 126 C 2]

Kessar Singh—for Appellant.

Judgment.—The only point urged in this appeal (which is not opposed on behalf of the Crown) is that of the sentence. It appears from the findings of the learned Sessions Judge that the deceased woman, who was the wife of the appellant was leading an immoral life. She had taken a house opposite to his house for carrying on an intrigue with one Munshi Ram. The appellant had put up with her provoking conduct for a long time. On the day of the occurrence, she abused him and insulted him by saying that she would have his daughter and daughter-in-law ravished by Munshi Ram. Considering all the circumstances of the case, the sentence awarded appears to be too severe. I have no doubt that the offence was committed in the heat of passion and on the spur of the moment, after the appellant's patience had been strained by the deceased to the utmost.

I accept the appeal and reduce the sentence to one of rigorous imprisonment for five years.

R.K. *Sentence reduced.*

✱ A. I. R. 1933 Lahore 127

TEK CHAND AND MONROE, JJ.

Raghoo Mal and *others*— Plaintiffs—Appellants.

v.

Nanne Mal Janki Das—Defendant—Respondent.

First Appeal No. 1882 of 1926, Decided on 22nd November 1932, from decree of Senior Sub-Judge, Delhi, D/- 20th May 1926.

(a) Contract—Mercantile usage—Delhi iron market—Interest cannot be charged on unpaid price for transactions before 1917.

By the mercantile usage prevailing in the Delhi iron market, among big merchants, no interest can be charged on the unpaid price for transactions before 1917. [P 127 C 2]

✱(b) Interest—Claim for interest on unpaid price of goods supplied by way of damages is not sustainable — Vendor and Purchaser.

A claim for interest on unpaid price of goods supplied by way of damages on equitable grounds is not sustainable. [P 127 C 2]

Manohar Lal and *Ajit Parshad*—for Appellants.

Kishan Dayal, *Bahgwat Dayal* and *Bishan Narain*—for Respondent.

Tek Chand, J.—This appeal arises out of a suit instituted by the plaintiff-appellant against the defendant-respondent for recovery of Rs. 9,891-12-0, alleged to be due on dealings relating to the purchase and sale of iron, and interest at 10 per cent per mensem on the unpaid price of goods supplied. Both parties are iron merchants of Delhi and the dealings between them continued from 30th August 1915 to 21st June 1923. The claim for the principal sum has been settled in the lower Court and there is no dispute about it now. The trial Judge had disallowed interest except from 29th September 1923 when notice of demand was served by the plaintiff on the defendant. The plaintiff has accordingly appealed urging that the decretal amount be enhanced by Rs. 3,041-13-0 being the amount of interest payable on the price due but unpaid for the period mentioned in the plaint. It is admitted that there was no express agreement between the parties for the payment of interest. The claim is however based on (1) an implied agreement to pay interest to be inferred from the course of dealings between the parties; (2) mercantile usage prevailing in the Delhi iron market; and (3) the "general law" under which the plaintiff is equitably entitled to claim interest by way of damages. The first of these contentions must fail on the short ground that the course of dealings between the parties not only does not support the plaintiff's claim, but definitely establishes the contrary. We have carefully scrutinized the account from the very beginning and do not find a single transaction in which interest was charged on the unpaid price.

The evidence on the record is wholly insufficient to sustain the claim on the ground of a mercantile usage in the iron market at Delhi. The transactions, for the price of which the suit has been brought, are alleged to have taken place prior to 18th October 1917 and the plaintiff's own evidence shows that at that time the practice was to charge interest at varying rates in dealings with "petty" merchants, but no interest was payable if the contracting parties were "big merchants." It is common ground between the parties that the plaintiff and the defendants were two of the biggest iron merchants at Delhi. Reference was made to the proceedings of a panchayat held in March 1921, when the dealers in iron met and resolved that in all future dealings interest would be payable if a statement of the account was delivered to the buyer and demand made for the price within 7 days of the transaction. This however cannot help the plaintiff, as the transactions in dispute admittedly took place before the date of the panchayat and secondly, the demand was made only a few days before the institution of the suit and for the period interest has been allowed to the plaintiff by the lower Court. The claim cannot therefore succeed on the strength of any mercantile usage, binding on the parties. Mr. Manohar Lal has frankly conceded that in the circumstances of the case having regard to the trend of recent judicial decisions, he is unable to sustain the plaintiff's claim for interest by way of damages on equitable grounds. The appeal fails and I dismiss it with costs.

Monroe, J.—I agree.

K.S. *Appeal dismissed.*

✻ A. I. R. 1933 Lahore 128 (1)

HARRISON AND DALIP SINGH, JJ.

Santa Singh—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 338 of 1932, Decided on 24th November 1932, reported by Dist. Magistrate, Amritsar, D/- 4th March 1932.

✻ Penal Code (1860), S. 225-B — Refusal to accompany bailiff and sitting down on ground after arrest does not amount to attempt to escape.

Where a person after arrest by the bailiff refused to accompany him but sat on the ground his action is a mere passive one and does not constitute an attempt to escape: 33 *P. R.* 1918 *Cr., Ref.* [P 128 C 1]

Mohammad Monir—for the Crown.

Harrison, J.—This case has been referred to a Division Bench in consequence of a report submitted by the District Magistrate of Amritsar. The facts are that a bailiff armed with a warrant of arrest apprehended one Santa Singh in his village. Santa Singh refused to accompany him and sat down. He has been convicted under S. 225-B of the offence of escaping from the custody of the bailiff. As pointed out by the learned District Magistrate there is no question of any offence having been cômmitted under the first portion of the section, that is to say Santa Singh did not offer any resistence or obstruction to his apprehension; and the only question is whether he escaped or attemped to escape. *Deva Singh* v. *Emperor* (1) merely deals with an offence under the first part of the section and lays down that there must be an overt act of resistance or obstruction. There is ample authority for the proposition that once a man has been apprehended and effects his escape it is immaterial whether at the time he used any force or whether the bailiff was actually present or temporarily absent. Here we have to see whether the mere refusal to go with the bailiff and the sitting down constitute any attempt to escape. In our opinion they do not. Had Santa Singh exerted any force to get away from the bailiff, or walked away, the Court would have had to decide what inference was to be drawn from his conduct and whether he had actually begun an attempt to escape. But where the action is purely passive and consists of either standing still or sitting down it is I think impossible to hold that such an attempt has begun.

Agreeing therefore with the view taken by the learned District Magistrate I would set aside the conviction and order the fine, if paid, to be refunded.

Dalip Singh, J.—I agree.

K.S. *Conviction set aside.*

A. I. R. 1933 Lahore 128 (2)

COLDSTREAM, J.

Salihon and *others*—Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 786 of 1932, Decided on 15th November 1932, against order of Sess. Judge, Shahpur, D/- 23rd April 1932.

Criminal P. C. (1898), Ss. 423 and 437—Competency of trial Court to try a case does not affect powers of Sessions Judge under S. 423.

A Sessions Judge dealing with a case under S. 423 as well as on revision can exercise any of the powers conferred on an appellate Court by that section and may act under S. 423 even where the trial Court is competent to try the case. He can pass even an order which makes the position of the appellant worse: 15 *All.* 250, and 16 *P. R.* 1895, *Cr., Ref.* [P 128 C 1, 2]

Amin Chand Mehta—for Petitioner.

Chandra Gupta for *Govt. Advocate*—for the Crown.

Judgment.—The four petitioners were charged and tried by a Magistrate, First Class, Shahpur, on a charge under S. 304, Part. 2, I. P. C. The Magistrate convicted and sentenced them to two years' rigorous imprisonment under that section. They appealed to the Sessions Judge and the complainant in the case preferred an application under S. 437, Criminal P. C., asking for an enhancement of the sentence. The Sessions Judge disposed of the appeal and the revision in one order. He held that, on the facts alleged and found established by the Magistrate, the case was one triable exclusively by the Court of Session. He therefore set aside the Magistrate's judgment and ordered him to commit the case for trial on a charge under S. 302, I. P. C. It is contended by counsel for the petitioners that the learned Sessions Judge acted illegally as: (1) S. 437, Criminal P. C., did not allow him to make the order; (2) his power under S. 423 (1) (b) (i) to order committal could only be exercised where the lower Court was incompetent to try the case as put before it; and (3) because S. 423 does not contemplate

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1. (1918) 33 P R 1918 Cr=20 Cr L J 64= 48 I C 832.

the passing of an order on appeal which makes the position of the appellant worse.

As already mentioned the learned Sessions Judge was dealing with the case under S. 423 as well as on revision. He could exercise any of the powers conferred on an appellate Court by that section. There is good authority for the view that an appellate Court may act under S. 423 even where the trial Court was competent to try the case: *Dani* v. *Empress* (1). I can find nothing in the words of S. 423 to support the counsel's third contention. The judgment in *Queen-Empress* v. *Maula* (2) is clearly against him. The petition is dismissed.

K.S. *Petition dismissed.*

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1. (1895) 16 P R 1895 Cr.
2. (1893) 15 All 205=(1893) A W N 105.

* A. I. R. 1933 Lahore 129

BROADWAY, C. J. AND MONROE, J.

Pala Mal-Narain Das—Appellant.

v.

Muhammad Ali—Respondent.

Second Appeal No. 971 of 1928, Decided on 14th November 1932.

*** (a) Civil P. C (1908), O. 22, R. 4—Abatement — Rule of total abatement is highly technical rule and should not be applied unless it must be applied— Punjab Redemption Act (11 of 1913), S. 12.**

The rule of total abatement is a highly technical rule and should not applied unless it must be. On the death of *B* who had mortgaged a certain land to the plaintiffs, the land descended in three shares one of which was mutated in favour of each branch of defendants. There was no partition among the defendants and they obtained on an application for redemption to the Assistant Collector an ex parte decree for possession on payment of Rs. 695. The plaintiffs brought a suit for declaration that the land could be redeemed only on payment of Rs. 1,895. One of the defendants died after the institution of the above suit and his representatives were not brought on record within time and there was no application for extension of time:

Held: that as no declaration can be made defining the rights of the plaintiffs against the surviving defendants without reference to the share of the deceased defendant, the Court had to reluctantly apply the rule of total abatement and the suit had abated in toto. [P 130 C 1, 2]

Held also: that as a result of one of the defendant's death the Collector's order had become final in respect of the share which belonged to him. [P 129 C 2]

(b) Transfer of Property Act (1882), S. 60—Mortgage—Apportionment of mortgage-debt cannot be made without consent of all parties interested.

An apportionment of a mortgage-debt cannot be made without the consent of all the parties interested. [P 130 C 2]

Daulat Ram—for Appellant.

Asghar Beg—for Respondent.

Monroe, J.—This is an appeal from the judgment of the Additional District Judge at Lahore affirming an order of the trial Court by which the suit was dismissed on the ground that it abated against all the defendants. The land now in dispute was formerly the property of one Baja; he mortgaged it to the plaintiffs and on his death the land descended in three shares, one of which was mutated in favour of each branch of his descendants, the first branch being now represented by the defendants Amir and Ismail, sons of Jaimal, the second by Khair Din and the third by Ismail, son of Kamal and Mt. Bakhtawari; there has been no partition. The defendants made an application to the Assistant Collector at Kasur for redemption of the land and obtained an ex parte decree for possession on payment of Rs. 695. The plaintiffs then brought the present suit for a declaration that the land could only be redeemed on payment of Rs. 1,895. Khair Din died on 17th April 1926, after the institution of the suit and his representatives were not brought on the record within time; the lower Courts have held that there was no proper application for an extension of the time and that in consequence of the death of Khair Din, the suit has abated in toto. Against this decision the plaintiffs have now appealed on both grounds.

I have no hesitation in agreeing with the lower Court when they hold that there has been no application on the part of the plaintiffs which can be treated as an application for extension of time; the only application on the record is the belated application to bring the representatives of Khair Din on the record. On the second point, the plaintiffs contend that the suit has abated only against Khair Din and his representatives. The present suit has been brought in accordance with the provisions of S. 12, Punjab Redemption Act No. 11 of 1913 and its object is to obtain a declaration of "the right of the mortgagee." As a result of the death of Khair Din, the Collector's order has become final at least in respect of the share which belonged to him. The only statutory provisions applicable are contained in the Civil Procedure Code which by O. 22, R. 4, provides that where no application is made to substitute the legal representatives of the deceased defendant within the time limited by law the suit shall abate as against the deceased defendant and by O. 1, R. 9, provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it: see judgment of Jai Lal, J., in *Sant Singh* v. *Gulab Singh* (1). No case has been cited to us which governs the present case, nor have I been able to find any authority which I can apply to it and we must proceed on general principles.

The rule of total abatement, a highly technical rule, should not be applied unless it must be; and it seems to me that the result of the present appeal depends on whether the interests of Khair Din and the other defendants are severable and a declaration can be made defining the rights of the plaintiffs against the surviving defendants without reference to the position of Khair Din's share. What declaration can now be made in this case? If it is held that the total amount due on the mortgage is Rs. 1,895, the amount still to be paid by the surviving defendants can only be ascertained by a reference to the sum already paid not for the redemption of their shares only but for the whole of the mortgaged land. If they then pay the full difference in order to recover their shares, they are compelled to pay more than their due proportion; for the effect of the Collector's decree is that Khain Din's share has ceased to be subject to the mortgage and no remedy for contribution against it would now be allowed, and in the result, the surviving defendants by reason of no fault of theirs lose the remedy ordinarily awarded to one of several mortgagors who is compelled to pay more than his due proportion towards the mortgage debt. So far as I can see only one other declaration is possible and I have no doubt that it would have the merit of being just. If the total debt is Rs. 1,895, the shares and liabilities being equal, it may be said that each of the surviving defendants' shares should bear its proportion of the total sum, the position remaining undisturbed in the case of Khair Din's share in such case, Khair Din's represantatives would hold that advantage which they have acquired by the neglect of the plaintiffs, and the surviving defendants would have to bear no greater burden than they would have had to bear had Khair Din survived. But such a decree requires an apportionment of the mortgage debt and I think that it is a fatal objection that no such apportionment of a mortgage debt can be made without the consent of all the parties interested, and further, the terms of such a decree could not be ascertained without a reference to the liability borne by Khair Din's share. I reluctantly come to the conclusion that this is one of the special cases where the rule of total abatement must be applied and accordingly I would dismiss this appeal with costs.

Broadway, C. J.—I concur.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 130

BHIDE, J.

Nand Singh—Plaintiff—Appellant.

v.

Sher Singh and *others*—Defendants—Respondents.

Misc. First Appeal No. 1941 of 1931, Decided on 15th November 1932. from order of Dist. Judge, Ferozepore, D/- 27th October 1931,

(a) Punjab Courts Act (1918), S. 18—District Judge and Additional Judge are not members of the same Court—Civil P. C. (1908), O. 47, Rr. 2 and 5.

Rule 5, O. 47, applies only in the case of a Court consisting of more than one Judge. By S. 18, Punjab Courts Act, a District Judge and Additional Judge cannot be said to be members of the same Court. Hence where an Additional Judge passes an order and an application for review is made to him and notice is issued by him but the case is transferred to the file of the District Judge, the latter has jurisdiction to hear the petition and pass orders [P 131 C 1]

(b) Civil P. C. (1908), O. 47, R. 7—Order granting review—Appeal.

An appeal from an order granting a review is competent only in the circumstances mentioned in O. 47, R. 7. [P 131 C 1]

Fakir Chand—for Appellant:

Jai Gopal Sethi—for Respondents.

Judgment.—This is an appeal from an order of the District Judge, Ferozepore, granting an application for review. The order sought to be reviewed was originally passed by the Additional Judge. The petition for review was also made to the latter and notice was issued by him. The case was then transferred to his file by the District Judge, and after hearing the parties the petition was granted. On behalf of the appellant the first contention raised was that the learned District Judge had no jurisdiction to hear the petition for review as the Additional Judge was still attached to the district. Reliance was placed in this respect on R. 5, O. 47, Civil P. C. That rule however appears to me to

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1. A I R 1928 Lah 572=114 I C 417=10 Lah 7 (F B).

apply only in the case of a Court consisting of more than one Judge. This will be clear from the wording of the rule itself as well as the marginal note. The present petition fell under R. 2, O. 47 of the Code which applies to Courts other than the High Court. According to the Punjab Courts Act the Court of an Additional Judge is distinct from the Court of the District Judge (see S. 18 of the Act), and the District Judge and Additional Judge cannot be said to be members of the same Court. This contention must therefore be overruled.

On merits the learned counsel for the appellant confessed his inability to support the appeal. An appeal from an order granting a review is competent only in the circumstances mentioned in R. 7 or O. 47 of the Code and the learned counsel admitted that no valid ground within the purview of that rule could be made out in the present case. I accordingly dismiss this appeal with costs.

K.S. *Appeal dismissed.*

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* A. I. R. 1933 Lahore 131

COLDSTREAM AND JAI LAL, JJ.

Nawab and *others*—Convicts—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1208 of 1932, Decided on 20th December 1932, from order of Sess. Judge, Hissar, D/- 5th September 1932.

(a) Penal Code (1860), S. 302—Punishment. The lesser penalty provided for the offence of murder is not an adequate sentence where the attack is brutal and deliberate. [P 132 C 1]

*** (b) Criminal P. C. (1898), S. 509—Deposition of medical witness—Failure of Magistrate to append certificate does not itself make evidence inadmissible.**

Failure to append certificate in the prescribed form has not the effect of making the evidence of the medical witness recorded by the Committing Magistrate inadmissible if it otherwise appears that the statement was recorded and attested by the Magistrate in the presence of the accused: 18 *Cal.* 129, *Dist.* [P 133 C 1]

Mohammad Monir—for Appellants.

Mohammad Akbar Khan — for the Crown.

Jai Lal, J.—On 5th November 1932 **Majid received eight injuries on different parts of his body, which had been caused by a large number of lathi blows. His parietal bone was extensively fractured and the brain was protruding and three of his ribs were also fractured. On the same occasion prosecution witness Mehr Din also re**ceived five contused wounds and bruises. He had to remain in the hospital for twenty days and when discharged was unable to resume his ordinary duties. Majid died as a result of the injuries received by him after about an hour. The Sessions Judge of Hissar has convicted Nawab and Abla, two brothers, and their father Sharfu and their nephew Usman, of the murder of Majid and also convicted the same men for the attempted murder of Mehr Din. He has sentenced Nawab and Abla to death under S. 302 read with S. 34, I. P. C., and Usman and Sharfu to transportation for life. He has further sentenced all these men to three years' rigorous imprisonment under S. 307 read with S. 34, Indian Penal Code. The convicts have appealed to this Court through Mr. Mohammad Monir, advocate, whom we have heard on their behalf.

Majid and Mehr Din were two brothers and resided at the village Alika in the Hissar District. Sharfu owns a field adjoining to theirs and lives in a house in that field. A few days before the incident Mehr Din suspected him of having cut and removed jawar crop from his field, and openly accused him of this. During the quarrel he pulled the beard of Sharfu, but those present separated them and thus prevented further trouble on the occasion. Nawab, who is the eldest son of Sharfu and apparently a strong man, was absent from the village on that day; he returned on 5th November 1932 in the morning and was told by Sharfu that he had been grossly insulted by Mehr Din. The prosecution case is that Sharfu incited Nawab and Abla to kill Mehr Din. Enraged at the insult offered to Sharfu and being incited by him Nawab, Abla, Usman and Sharfu shouted a challenge to Majid and Mehr Din who had just arrived to cultivate their field and ran towards them, Nawab being armed with a gandala and the rest with dangs and in the field of Mehr Din and Majid belaboured both with the weapons carried by them. Majid fell on the ground but after the assailants had gone back was removed to his house by prosecution witness Waryam on his charpoy and he died soon after. (After discussing evidence, the judgment proceeded). In my opinion, it has been established by the prosecution evidence that the four appellants went to the field of Majid and Mehr Din armed as described by the prosecution witnesses in order to beat Majid and Mehr Din for the latter's conduct in pulling the beard of Sharfu. Two of them, i. e., Nawab and Abla joined in the attack on Majid and beat him mercilessly, causing him serious injuries which resulted in his death. Usman and Sharfu beat Mehr Din, causing him grievous hurt. It is probable that the story of the prosecution that Satrfu told his sons that it was their duty to kill Mehr Din who had insulted him and incited them to kill Majid and Mehr Din is an exaggeration and it may be that the original idea of the appellants was merely to chastise the two brothers. Nawab and Abla however as I have already stated, made a concerted and prolonged attack on Majid. Having regard to the nature of the injuries and the manner in which they were caused, they must be assumed to intend the natural consequence of their conduct as they should have known that the injuries that they were causing to Majid were dangerous to life; and as they continued to attack him with that knowledge, they must be held guilty of murder. Usman and Sharfu however did not join the attack on Majid and cannot be held guilty of his murder even constructively. They must however be held guilty of causing grievous hurt to Mehr Din.

I would therefore uphold the conviction of Nawab and Abla for the murder of Majid and confirm the sentences of death passed upon them, as, in my opinion the lesser penalty provided for the offence of murder is not an adequate sentence in their case, having regard to the brutal and deliberate nature of the assault. Usman and Sharfu ought,in my opinion, to be convicted under S. 325, I. P. C., and Nawab and Abla must also be convicted under the same section by virtue of S. 34, I. P. C., as it must be assumed that when these men started armed with lathis and a gandala to beat their adversaries, they must be deemed to intend or at least to know that grievous hurt would be accused to their victim. Usman however is a grandson of Sharfu, being his daughter's son, and is aged between 15 or 16 years; therefore, in my opinion, the sentence already undergone by him will suffice in his case. In the case of Sharfu I would merely alter the conviction to one under S. 325, Penal Code. and maintain the sentence of three years' rigorous imprisonment awarded to him under S. 307, I. P. C. I would set aside the conviction and sentence of Usman and Sharfu in respect of the murder of Majid.

It is necessary to mention an objection that was taken by the learned counsel for the appellants to the admissibility of the evidence of the doctor. It appears that the evidence of Dr. Dhanpat Rai, Assistant Surgeon, who performed the post mortem examination of Majid and who examined the injuries of Sharfu and Abla, was recorded by the Committing Magistrate. This witness was not called at the trial, but his statement made before the Committing Magistrate was read out in Court and transferred to the Sessions file under S. 509, Criminal P. C. The same procedure was adopted with the regard to the evidence of Dr. Ghulam Haidar who deposed to the injuries of Mehr Din. I should here mention that Sharfu had three injuries two of which were simple and one was technically a griveous injury being a simple fracture of the bones of the forearm and that Abla had three simple injuries. These apparently were caused by the deceased and Mehr Din when they were defending themselves against the attack by the appellants, though with the exception of Nura, the prosecution witnesses have stated that they did not see any injuries being caused to these two appellants. The statements of both these medical witnesses were recorded in the presence of the accused by the Committing Magistrate. In fact Dr. Dhanpat Rai was cross-examined by the accused when he made his statement relating to the injuries of Majid. The statements of both the doctors are signed by them and the Magistrate and a note is added that they were read over and admitted correct by them. The signatures of the doctors are in fact below these notes.

The learned counsel contends that these statements could not be admitted in evidence under S. 509, Criminal P. C., which provides that the deposition of a Civil Surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused may be given in evidence in any enquiry, trial or other proceeding under this code although the deponent is not called as witness. It is contended that there is nothing to show on the face of the record that the statement was taken and attested by the Magistrate in the presence of the accused. A reference to the record however shows that the accused were present when the statements of these medical witnesses were recorded. The instructions issued by this Court which are to be found in the para. 5, Chap. 24-A, Vol. 3, of the

Rules and Orders, are that the Magistrate should append a certificate in the following form. "Taken before me and signed by me in the presence of the accused," and should sign it. These instructions do not imply that failure to follow them has got the effect of making the evidence of the medical witness recorded by the committing Magistrate inadmissable if it otherwise appears that the statement was recorded and attested by the Magistrate in the presence of the accused. To attest means to certify. I have already stated that it appears from the Magistrate's record that the accused were present when the statements were recorded and read over to the witnesses and admitted by them to be correct and were signed by the witnesses and by the Magistrate.

Now, S. 509, Criminal P. C., does not in so many words require any certificate by the Magistrate in any particular form; and having regard to the form of the certificate prescribed by this Court it appears to me that the requirements of the law would be complied with if it appears or is made to appear that the statement was taken and signed by the Magistrate in the presence of the accused. In order however to obviate the necessity of calling a Magistrate to prove that he did so, in the absence of a clear proof on the record that he recorded and attested the statement of the medical witness in the presence of the accused, this Court has enjoined the Magistrates to append a certificate in the prescribed form and it is obviously their duty to comply with the instructions of this Court. That however does not necessarily mean that if there is no certificate in the prescribed form, the statement becomes inadmissible.

The nearest decided case cited by the appellants' counsel is *Kachali Hari* v. *Queen-Empress* (1). It was held in that case that before the deposition of a medical witness taken by a Committing Magistrate can under S. 509, Criminal P. C., be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record or be proved by the evidence of witnesses to have been taken and attested by the Magistrate in the presence of the accused. It would be observed that the learned Judges were of opinion that the fact the statement was recorded and attested in the presence of the accused, could either be made to appear from the Magistrate's record or be proved by the evidence of witnesses. The addition of a certificate by the Magistrate was not considered to be legally necessary. The facts of that case however were very near to the facts of this case as it appears that the deposition of the Civil Surgeon was signed both by him and the Committing Magistrate and the witness was cross-examined by the accused. It does not however appear from the report that the statement was read over and admitted to be correct by the Civil Surgeon as in the present case. In that case the learned Judges observed that there was nothing on the face of the deposition to show that it was attested by the Magistrate in the prisoner's presence. In the present case however the presence of the accused is noted by the Magistrate at the commencement of the proceedings of the day; it must therefore be assumed that the statements were recorded and read over to the witnesses in the presence of the accused and signed in their presence, especially when it is remembered that one of these witnesses was cross-examined by the accused.

In my opinion therefore the depositions of the medical witnesses are not inadmissible merely because the Magistrate has failed to append certificates in the prescribed form. For this reason the statement of the two medical witnesses is admissible in evidence. At the same time I wish to make it clear that even if the statement of Dr. Dhanpat Rai be held to be inadmissible, the conviction of Nawab and Abla for the murder of Majid is supported by other evidence which shows that both these men belaboured the latter with a gandala and a dang respectively and caused him injuries as a result of which he died within an hour. It must therefore be assumed that in the absence of proof of other supervening causes death was the direct result of the injuries caused by Nawab and Abla.

Coldstream, J.—I agree.

K.S. *Appeal dismissed.*

* A. I. R. 1933 Lahore 133

TAPP, J.

Peoples Instalment and *Savings Bank, Ltd.*—Plaintiffs—Petitioners.

v.

Ram Nath and *others*—Defendants—Opposite Parties.

Civil Revn. Petn. No. 254 of 1932, Decided on 17th November 1932, against decree of Addl. Judge, Sm. C. C., Lahore, D/- 24th February 1932.

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1. (1891) 18 Cal 129.

*** Negotiable Instruments Act (1881), S. 64, Exception — Promissory note payable on demand and at specified place—Part payment made—Presentment is not necessary—Negotiable Instruments Act (1881), S. 76 (c).**

Under the exception to S. 64, Negotiable Instruments Act, the promissory note being payable on demand and payable at a specified place presentment is necessary in order to charge the promissor, but where the promissor makes a part payment on account of the amount due such presentment is not necessary. [P 134 C 1]

Ram Lal Anand—for Petitioners.

Faqir Chand—for Opposite Parties.

Judgment.—The Peoples Instalment and Saving Bank Limited brought a suit in the Small Cause Court, Lahore, for recovery of Rs. 241-10-4 being principal and interest due on a promissory note payable on demand at Lahore for Rs. 200 admittedly executed by the defendants on 8th August 1928. The suit was dismissed by the learned Additional Judge on the ground that the promissory note required presentment and there was no proof that it had been presented. There is no doubt that under the exception to S. 64, Negotiable Instruments Act, the promissory note being payable on demand and payable at a specified place presentment was necessary in order to charge the defendants, but the Court below appears to have failed to consider the application of Cl. (c), S. 76 of the said Act. S. 76 provides for presentment not being necessary in certain cases and Cl. (c) makes this unnecessary where after maturity and with knowledge that the instrument has not been presented the party concerned makes a part-payment on account of the amount due on the instrument. It was obvious that part-payments had been made towards this promissory note and in the circumstances presentment was not necessary.

I accept the application for revision and setting aside the order of the Court below, remit the suit for decision on the merits in accordance with law. The petitioner will be allowed his costs in this Court.

K.S. *Petition accepted.*

A. I. R. 1933 Lahore 134

BHIDE, J.

Rattan Sen Sachhar — Defendant — Petitioner.

v.

Sm. Krishan Kaur and *another* — Plaintiff and Defendant—Opposite Parties.

Civil Revn. No. 371 of 1932, Decided on 26th October 1932.

Transfer of Property Act (1882), S. 106—Punjab—Monthly tenancy—Lessee is entitled to at least 15 days notice terminating with month of tenancy—Landlord and Tenant.

In the case of the monthly tenancy in the Punjab in absence of specific contract, the lessee is entitled to at least 15 days' notice terminating with the month of the tenancy and a notice not fulfilling this condition is invalid: *A. I. R.* 1924 *Lah* 643 and *A. I. R.* 1928 *Lah.* 348, *Dist.* [P 134 C 2]

Narotam Singh—for Petitioner.

Judgment.—This is a petition for revision of a decree of the Additional Judge, Small Cause Court, Lahore. The petition was heard ex parte as the respondents have failed to appear in spite of service. The suit was for recovery of Rs. 194-12-4 on account of arrears of rent and electric and water charges. It appears that two notices were given to the defendant for vacating the house. The first notice was given on 18th June 1931 and required the defendant to vacate the house by the end of the month. The notice also stated that double the rent would be charged if the house was not vacated by the end of the month. This notice was served on the defendant on 23rd June 1931. A second notice was also issued to the defendant. It is dated 15th July 1931, but apparently it was issued on 20th July. This notice required the defendant to vacate the premises within fifteen days. The learned counsel for the petitioner has urged that neither of these notices was valid in law. The tenancy was a monthly one and according to the rule recognised by Courts in such cases in this province the defendant was entitled to at least fifteen days notice terminating with the month of the tenancy. Neither of these notices fulfils this condition. The first notice as stated above, was received by the defendant on 23rd June and the notice consequently gave him only one week to vacate. The second notice was also issued on 20th July and gave the defendant eleven days' time. The learned Additional Judge has relied on *A. I. R.* 1924 *Lah.* 643 and *A. I. R.* 1928 *Lah.* 348; but in those cases the contract between the parties specifically provided for the period of notice. In the present instance there was no such contract.

In my opinion the contention urged by the learned counsel for the petitioner is correct and must be upheld. The notices being invalid, the plaintiff was not entitled to charge double the rent from the month of July as he has done; nor is he entitled to claim Rs. 5-4-0 on account of cost of notices. I therefore accept the petition for revision and reduce the amount of the decree by Rs. 61-14-8 (Rupees 56-10-8 on account of additional rent and Rs. 5-4-0 as costs of the notices). The petitioner will get his proportionate costs throughout.

K.S. *Petition accepted.*

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* A. I. R. 1933 Lahore 135

TAPP, J

Central Bank of India, Ltd., Kasur—Defendants—Appellants.

v.

Thakur Das-Tulsi Ram—Plaintiffs—Respondents.

Misc. Second Appeal No. 1912 of 1931, Decided on 11th November 1932, from order of Senior Sub-Judge, Lahore.

*** (a) Civil P. C. (1908), S. 151 — Disposal of suit on merits—Case remanded on appeal and refund of court-fee ordered—Remand is one under S. 151 and not under Civil P. C. (1908), O. 41, R. 23 and Court-fees Act (1870), S. 13.**

A Court has inherent powers of remand under S. 151 and it is competent to the Court to order refund of court-fee when remanding under S. 151. Therefore a remand of case on appeal which has been disposed of as under S. 151 is not appealable, and the mere fact that refund of court-fee is also ordered does not make it an order under O. 41, R. 23 and appealable. An order of remand can be made under O. 41, R. 23 only when the trial Court has disposed of the suit on a preliminary point: *A. I. R.* 1932 *Lah.* 219, *Foll.* [P 135 C 2]

(b) Practice—Appeal cannot be treated as application for revision in the absence of want of jurisdiction or illegal exercise of jurisdiction—Civil P. C. (1908), S. 115.

An appeal cannot be treated as an application for revision, specially when the appellant can have another remedy, unless the lower appellate Court has exercised a jurisdiction not vested in it by law or that in the exercise of such jurisdiction it has acted illegally or with material irregularity. [P 126 C 1]

Nawal Kishore—for Appellants.

Amar Nath Monga—for Respondents.

Judgment.—The Kasur Branch of the Central Bank of India sued the firm Thakar Das-Tulsi Ram and another firm for recovery of Rs. 828-13-9 on the basis of a hundi and obtained a decree on 24th January 1921. The firm of Thakar Das-Tulsi Ram brought an action against the Kasur Branch of the same bank for recovery of Rs. 920 due on a bahi account in the same Court and their suit was dismissed on the same date. Against both these decrees the firm of Thakur Das-Tulsi Ram preferred appeals to the Senior Subordinate Judge, Lahore. Their appeals were accepted and both suits were remanded for redecision after amendment of the plaints. Against these orders of remand the present appeals have been preferred and a preliminary objection has been taken that as the orders remanding the two suits were not made under R. 23, O. 41, no appeal lies. The learned Senior Subordinate Judge has not mentioned any provision of law under which the remands have been made and it is obvious that he has done so under the inherent powers conferred by S. 151, Civil P. C. Mr. Nawal Kishore on behalf of the appellants contends that the remands have been made under R. 23, O. 41, because (1) this is apparent from the form and substance of the orders; (2) the Court has ordered refund of court-fees; (3) no provision of law has been cited and (4) R. 23 should be given as wide an interpretation as possible.

Now, R. 23, O. 41 only permits of a suit being remanded when it has been disposed of upon a preliminary point and it is well settled that a remand can only be made under R. 23 in such circumstances. Both the suits were disposed of on the merits and amendment of the plaints has been allowed. Neither in form nor in substance are the orders of remand such as would full under R. 23, O. 41. It is also beyond dispute that a Court has inherent powers of remand and should use such powers in cases where the provisions of law relating to remands contained in O. 41 are not applicable. The order of the appellate Court directing the refund of court-fees will not, as urged by Mr. Nawal Kishore, bring the remand under R. 23, O. 41. S. 13, Court-fees Act, to which reference has been made makes it obligatory on the Court to refund the court-fee on the memorandum of appeal where a suit is remanded under the order and rule quoted. This provision of law does not prohibit a Court ordering a remand under its inherent powers and directing a refund of court-fee on the memorandum of appeal inasmuch as the inherent powers contained in S. 151, which permit a Court to make a remand in cases other than those falling under O. 41, also permit of the Court ordering a refund of the fee paid on the memorandum of appeal. The question whether an order of remand can be made under O. 41, R. 23 unless the trial Court has disposed of the whole suit upon a preliminary point and the further question as to the competency of a Court to order a refund of court-fee when remanding a case under S. 151 of the Code has been dealt with by a learned Judge of this Court in *Mt. Gendo* v. *Radha Mohan* (1). I fully agree with the views expressed therein and hold that the appeals preferred by the Central Bank of India do not lie.

Finally, learned counsel for the appellants urged that if the point was decided against him both appeals might be treated as applications for revision, but I am not prepared to do this. There will be a further remedy open to the appellants and moreover it cannot be held that the lower appellate Court has exercised a jurisdiction not vested in it by law or that in the exercise of such jurisdiction it has acted illegally or with material irregularity. For the above reasons I dismiss both the appeals with costs.

K.S. *Appeals dismissed.*

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1. A I R 1932 Lah 219=136 I C 559.

A. I. R. 1933 Lahore 136

TAPP, J.

Mohammad Shah and *others*—Appellants.

v.

Khem Chand and *others*—Respondents.

Misc. Second Appeal No. 736 of 1932, Decided on 7th December 1932, against order of Dist. Judge, Mianwali, D/- 16th October 1931.

(a) Custom (Punjab) —Mianwali District—Ancestral property — Male proprietors are not full owners.

In the Mianwali District though male proprietors have a right of gift and devise over ancestral property under certain conditions they have not full and unrestricted rights of ownership: 4 *P. R.* 1913 (*F. B.*), *Ref.* [P 136 C 2]

(b) Punjab Alienation of Land Act (as amended by 1931), does not affect compulsory mortgage sanctioned before Act came into force.

A compulsory mortgage sanctioned before 1st July 1931 on which date the amended Punjab Alienation of Land Act, came into force is not affected by the Act. [P 136 C 2]

(c) Custom (Punjab)—Ancestral property.

Compulsory mortgage of ancestral property of male agriculturist proprietors in Mianwali District is invalid even before Act 1 of 1931 where debt is not expressly charged on the property: 4 *P. R.* 1913, *Rel. on.* [P 136 C 2]

S. C. Manchanda—for Appellants.

Gobind Ram Khanna—for Respondents.

Judgment.—In execution of the decree of the respondents Khem Chand and his two minor brothers for Rupees 2,592-9-0 dated 21st October 1927, against the estate of one Hayat Khan, an area of 217 kanals 8 marlas of land belonging to the appellants, the two minor sons and a minor daughter of Hayat Khan, was alienated by compulsory mortgage in favour of one Jahangir Khan in full satisfaction of the above decree. An appeal against this compulsory mortgage was preferred to the District Judge on the ground that the mortgage was invalid as the property was ancestral and such a mortgage was against the provisions of the Punjab Alienation of Land Act. The appeal was however dismissed, the learned District Judge holding that in the Mianwali district agriculturists are full and not limited proprietors and consequently *Jagdip Singh* v. *Narayan Singh* (1) had no application to the case. In regard to the mortgage being contrary to the provisions of the Punjab Alienation of Land Act, he found that Punjab Act 1 of 1931 which prohibits such mortgages only came into force on 1st July that year while the mortgage in question was sanctioned on 17th April 1931. The land which is the subject of the compulsory mortgage is clearly ancestral and I am not prepared to agree that male proprietors are full owners in the Mianwali district. All that the Customary law of the district tends to show is that male proprietors have a right of gift and devise under certain conditions; I fail to see how such a power would give them full and unrestricted rights of ownership. In the circumstances the Full Bench decision of the Chief Court reported as *Jadip Singh* v. *Narayan Singh* (1) applies to the present case as the debt in respect of which a decree was obtained against the estate of Hayat Khan was not expressly charged on the property comprised in the compulsory mortgage.

As regards the compulsory mortgage being ultra vires of the Punjab Alienation of Land Act as amended by Punjab Act 1 of 1931, I am inclined to agree with the learned District Judge that the order sanctioning the mortgage having been made before the Act came into force, remains unaffected. It is however unnecessary for me to arrive at a decision on the matter as the appeal can be conveniently disposed of on the other question, and further the retrospective effect of the amendment on such an order has been referred to a Division Bench for decision in another case. For the reasons stated I accept the appeal and set aside the compulsory mortgage in question. The parties will bear their own costs.

K.S. *Appeal accepted.*

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1. (1913) 4 P R 1913=15 I C 866.

A. I. R. 1933 Lahore 137

BROADWAY, C. J. AND
ABDUL QADIR, J.

Ran Singh and *others*—Petitioners—Appellants.

v.

Shiromani Gurdwara Parbandhak Committee, Amritsar and *another*—Defendants—Respondents.

First Appeal No. 1186 of 1929, Decided on 22nd November 1932, against decree of Sikh Gurdwaras Tribunal, Lahore, D/- 16th January 1929.

Punjab Sikh Gurdwaras Act (1925), S. 18 (1) (b)—Assignments of proprietary rights in land for maintenance and service of gurdwara displaces presumption under Punjab Land Revenue Act (1887), S. 44.

A gift of land by way of dharmarth for meeting expenses for Gurdwara to which langar was attached is an assignment of the proprietary rights in the land for the service and maintenance of Gurdwara and the provisions of S. 18 (1) (b) are applicable; and the presumption therein contained displaces the presumption which otherwise would arise under S. 44, Punjab Land Revenue Act; but where the assignment is without any direct reference to any religious purpose, the presumption does not apply.
[P 137 C 2]

Mohsin Shah—for Appellants.

Gurcharan Singh—for Respondents.

Broadway, C. J.—A Gurdwara known as Gurusar situate in village Lopon in the Moga Tahsil of the Ferozepore District was notified in Sch. 1, Sikh Gurdwaras Act, 1925, as a Sikh Gurdwara. In due course the notification required by S. 3 of the Act published the consolidated list of the various properties in which rights, titles and interests were claimed to belong to the Gurdwara which resulted in a petition under S. 5 by four persons, Ran Singh and Mohar Singh, sons of Man Singh, Sucha Singh, son of Ran Singh, and one Kartar Singh, son of Hari Singh. In this petition the petitioners claimed to be the owners not only of all the properties mentioned in the list but of the Gurdwara itself. In due course this petition was sent to the Gurdwara Tribunal for disposal and after hearing the opposite party and recording such evidence as was produced by both sides the petition was dismissed by a majority of the said Tribunal. Against this dismissal the said petitioners have preferred this appeal to this Court and on their behalf we have heard Mr. Mohsin Shah.

The claim to the muafi has been given up and it is obvious that the petitioners could not claim the Gurdwara itself. The dispute before us therefore has centred round what may be described as two distinct areas of land: (1) an area of about 40 ghumaons which was gifted by one Rani Sada Kaur and (2) an area of about 173 kanals, which was gifted by the villagers. The question is to whom these respective gifts were made, that is to say, were they gifts to the anscestor of the petitioners or to the Gurdwara. So far as the first area is concerned, that is, the land gifted by Rani Sada Kaur, the matter is to my mind, perfectly clear. It is in evidence (see R-4, pp. 41 to 42) that this particular area was gifted by Rani Sada Kaur, Raisa of Badheni, to Bhai Bagh Singh by way of dharmarth for meeting expenses of the Gurdwara Guru Hargobind Sahib, which is the present Gurdwara, although it is now known as Gurusar. Inasmuch as this was an assignment of the proprietary rights in the land for the service and maintenance of this Gurdwara, to which admittedly a langar was attached, the provisions of S. 18 (1) (b) are applicable and the presumption therein contained displaces the presumption which otherwise would arise under S. 44, Punjab Land Revenue Act, 1887. It is in evidence that Bagh Singh was the first known controller of this institution. He is referred to as "Bhai Bagh Singh" and a statement made by Ran Singh, one of the present petitioners-appellants, in July 1912, R. 11, p. 60, shows that from the very commencement the Granth Sahib used to be daily read here and that fairs were also celebrated. Bagh Singh was succeeded by his son Chanda Singh, who was succeeded in his turn by Man Singh on whose death Ran Singh appears to have been acknowledged as the head, while, according to some witnesses, his brothers also assisted in the work connected with this Gurdwara. Admittedly some of the produce derived from both the areas was utilized for the purpose of this institution; and taking this into consideration, I have no hesitation in agreeing with the majority of the Tribunal that this particular area, i. e., the land that at one time had belonged to Rani Sada Kaur, has been rightly held to be of a religious nature and the declaration sought for regarding this area has been rightly refused. There remains the second area which admittedly was gifted to some one by the villagers.

In the 1852 settlement this land is shown as belonging to Bhai Chanda Singh who was described as the son of Bhai Bagh Singh, caste Fakir Nibang. In the remarks column it is stated that the land of this khata has been confiscated by the Government but that all the proprietors of this village of their own accord granted the muafi of this land in perpetuity. The entry also goes to show that the said proprietor and his descendants will enjoy the produce of the said land as muafi for ever without payment of revenue. Now, no doubt this may be regarded as a gift to Chanda Singh, or, if the gift was made at an earlier period, to Bagh Singh. An examination of R. 18, p. 34 shows that out of the total area shown as 173 kanals, 16 marlas, 74 kanals, 3 marlas consisted of a tank. There seems to be little doubt that this tank is the tank which is attached to this institution. It has been urged by the learned counsel for the appellants that having regard to the entries relating to this area ever since 1852-53 which entries show that Chanda Singh was succeeded by his son, who in his turn was succeeded by his sons in equal shares, the land was really secular property and had been gifted to Bagh Singh or Chanda Singh for themselves and not in their capacity as the head of a religious institution. On the other hand Mr. Gurcharan Singh has urged that really Ex. R-18 is evidence of an assignment of the proprietary rights in this land and that therefore the presumption referred to in Sub-Cl. (b), Sub-S. (1), S. 18, Gurdwaras Act, applies in this case as well.

With this view I am not prepared to agree. The descent has not been from office-holder to another office-holder as such but has evidently been from father to son. The assignment was an assignment without any direct reference to any religious purpose, the reference to the religious purpose being confined to the muafi or remission of land revenue. There is however evidence to show that the produce of this land has been mixed with the produce of the other land gifted by Rani Sada Kaur and that the combined produce of these two areas has been used for the purposes of this institution. That is stated by certain witnesses produced for the respondent and has also been stated by Chanda Singh himself. At p. 40 will be found Ex. R-1, which is an application made by Chanda Singh in 1854 in which he sought to obtain an extention of the muafi to the entire area held by him. In this application he stated that 50 ghumaons of the land situate in Lopon had been muafi in the name of the Gurdwara from ancient times and the produce thereof had been spent on the langar. He then goes on to say that for some reason or other the muafi was now allowed only qua 40 ghumaons and he therefore prays that the muafi should extend to the entire area of 50 ghumaons. It has been urged that the weight to be given to these statements is not great, inasmuch as it is obvious that efforts were being made to obtain a remission of the land revenue. That may be so, but the fact remains that the statement supports the oral evidence on the record in this connection, and I am not prepared to give less weight to this evidence than has been given to it by the majority of the Tribunal. Further, there is an application at p. 41, Ex. R-2, which is another application made by Chanda Singh in 1887 where again he seeks to obtain any alteration in the muafi asking that it should be entered in the name of the Gurdwara and thus made perpetual. In this application he distinctly refers to the holding having been wrongly entered in his name. The words are:

> "By the applicant's own mistake muafi land measuring 61 ghumaons of the Gurdwara was entered in his name for his lifetime,"

and he then prays that this error should be rectified. Here again, there is a distinct admission that the lands had been wrongly entered as his whereas they really belonged to the Gurdwara and if this area, which we are now considering, be added to the area which was gifted by Rani Sada Jaur, it will be seen that the two together really do amount to 61 ghumaons as near as may be. In these circumstances it seems to me that the view taken by the majority of the Tribunal cannot be held to be erroneous and I would therefore dismiss this appeal. I have not considered it necessary to refer to a certain other point raised by Mr. Gurcharan Singh as to Bagh Singh and his sons being Mahants of this institution, as the matter is far from clear and as the decision of this appeal does not rest on that point. No order as to costs, as neither side has put in any certificate. The printing charges will be paid by the appellants.

Abdul Qadir, J.—I agree.

K.S. *Appeal dismissed.*

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* A. I. R. 1933 Lahore 139

TAPP, J.

Nanak Chand— Plaintiff— Appellant.

v.

Ram Kishen—Defendant—Respondent.

Second Appeal No. 161 of 1932, Decided on 22nd November 1932, from decree of Dist. Judge, Delhi, D/- 30th October 1931.

*** (a) Civil P. C. (1908), Sch. 2, Para. 16—Award includes modifed or corrected award—Decree on award is not appealable.**

An award according to which the Court is required to pass a judgment under para. 16, Sch. 2, includes a modified or corrected award; and hence when a Court corrects or modifies an award, it is the modified award and not the original one with which the decree must accord. And the decree on such award is not appealable: 8 *All.* 449, *Diss. from.* [P 139 C 2]

(b) Civil P. C. (1908), S. 104 (2)—Order upholding the modification of an award is not appealable.

The appellate order of a District Judge upholding the modification of an award is final and not appealable. [P 140 C 1]

(c) Civil P. C. (1908), S. 115—Revision.

No revision is competent from an order rejecting certain objections when the trial Court has fully considered them and in doing so and rejecting them has not exercised jurisdiction not vested in it, or failed to exercise such a jurisdiction or acted illegally or with material irregularity in the exercise of its jurisdiction. [P 140 C 1]

(d) Civil P. C. (1908), S. 115—Modification of award—Court acting with material irregularity—Revision is competent—Civil P. C. (1908), Sch. 2, Para. 12.

Though a Court has jurisdiction to modify an award under para. 12 such power is limited by Cls. (a) (b) and (c) of the paragraph.

In a dispute as to a land the arbitrator decided that plaintiff had by efflux of time lost his right to the plot of land but as the defendant had acquired the legal title without incurring any expense he should compensate plaintiff by paying him Rs. 125 and the defendant raised no objection to it. On objection from the plaintiff, the trial Court deleted from the award the payment of Rs. 125 to the plaintiff.

Held: in revision that the Court committed an illegality or acted with material irregularity and that there was no justification for the modification. [P 140 C 1]

Kishen Dayal—for Appellant.

J. G. Sethi—for Respondent.

Judgment.—Nanak Chand brought a suit in the Court of the Subordinate Judge, Delhi, against his cousin Ram Kishan for possession of a plot of land and recovery of rent and mesne profits amounting to Rs. 23. Defendant pleaded adverse possession and alleged having expended Rs. 500 in building over the plot. The dispute was referred to the arbitration of Pandit Bakhtawar Singh, an uncle of the parties who awarded the land to the defendant and Rs. 125 to plaintiff as compensation. Objections to the award were raised by the plaintiff alone. These were that the award had been made without taking the evidence of the parties or giving them an opportunity of producing any; that the arbitrator was prejudiced against the plaintiff and that in awarding Rs. 125 to the plaintiff and the land to the defendant the arbitrator had effected a compulsory sale. The Subordinate Judge rejected these objections, modified the award by excluding the portion relating to the payment of Rs. 125 to the plaintiff, and in accordance with the award as modified dismissed the suit leaving parties to bear their own costs. Against this decree the plaintiff preferred two appeals to the District Judge, one against the decree and the other under Cl. (c), S. 104 (1), Civil P. C., against the order modifying the award. The learned District Judge held that no appeal lay against the decree on any ground other than such decree being at variance with, or in excess of, the award and though he arrived at no definite conclusion on the point he appears to have found that the decree was not in excess of or at variance with the award as modified. The other appeal was also dismissed on the finding that the modification of the award was justified. The plaintiff has through Mr. Kishan Dayal preferred an appeal against the dismissal of his appeals by the learned District Judge and a petition for revision of the order of the trial Court rejecting his objections and modifying the award.

It is conceded that the award according to which the Court is required to pass a judgment under para. 16, Sch. 2, includes a modified or corrected award. In the circumstances I need not discuss *Jawahir* v. *Mul Raj* (1), where it was held that a decree based on an award which has been modified is not a decree in accordance with the award, beyond briefly observing, with all respect, that I cannot agree in this view. Under para. 12 a Court may modify or correct an award under certain conditions and surely when it does so properly it is that award and not the original one with which the decree must accord. There would be no point in permitting the Court to modify or correct an award and allowing an appeal from such an order and then insisting on the Court making a decree in accordance with the original award. The decree of the trial Court being thus in accordance with the award no appeal lay and it follows that a second appeal is not

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1. (1886) 8 All 449=1886 A W N 210.

competent. Under sub-S. (2), S. 104 no appeal lies from any order passed in appeal under the section and consequently the appellate order of the District Judge upholding the modification of the award is final and not appealable. On these grounds I dismiss the appeal (No. 161 of 1931) with costs.

I now proceed to deal with the application for revision the competency of which has been challenged by Mr. J. G. Sethi. I have no hesitation in upholding the objection so far as the application relates to the rejection of the objections raised by the plaintiff petitioner against the arbitrator. The trial Court has fully considered these and in doing so and rejecting them has not exercised jurisdiction not vested in it, or failed to exercise such a jurisdiction or acted illegally or with material irregularity in the exercise of its jurisdiction. As regards the other part of the application relating to the modification of the award I am of opinion that the Court in deleting from the award the payment of Rs. 125 to the plaintiff committed an illegality or acted with material irregularity. It certainly had jurisdiction to modify the award under para. 12 but the power to do so was limited by by Cls. (a), (b) and (c) of the paragraph. The Subordinate Judge purports to have acted under Cl. (a) and though the question of compensating plaintiff was not referred to arbitration I do not quite see how this part of the award can be separated from the other part and how its exclusion does not affect the decision of the arbitrator. He decided that plaintiff had by efflux of time lost his right to the plot of land but as defendant had acquired the legal title without incurring any expense he should compensate plaintiff by paying him Rs. 125. On equitable grounds too I do not think there was any justification for the modification made by the trial Court especially when defendant raised no objection to the payment of this sum.

For the above reasons I accept the application and setting aside the order modifying the award I direct that the decree be drawn up in accordance with the original award. Parties will bear their own costs and the direction of the arbitrator as to payment of interest will only have effect if the sum of Rs. 125 is not paid into Court within one month of this date.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 140

TAPP, J.

Mt. Parmeshri — Defendant — Appellant.

v.

Ralla—Plaintiff—Respondent.

Second Appeal No. 368 of 1932, Decided on 25th November 1932, from decree of Dist. Judge, Hoshiarpur, D/- 14th December 1931.

Punjab Tenancy Act (1887), S. 59—Interest of widow terminates on remarriage—Existence of male collateral relative is not necessary.

The interest of a widow of a deceased tenant on whom the right of occupancy has devolved terminates on her re-marriage irrespective of the existence or non-existence of male collateral relatives. [P 141 C 1]

Fakir Chand—for Appellant.

Achhru Ram—for Respondent.

Judgment.—The respondent Ralla and Tulsi were joint tenants of an occupancy holding in equal shares and on the death of Tulsi his widow Mt. Parmeshri, the appellant before me, succeeded to his share. The suit out of which this second appeal arises was brought by Ralla along with the landlords for possession of the share of Tulsi on the ground that his widow Mt. Parmeshari had remarried and thus forfeited her share. The suit of Ralla was dismissed on the ground that he had failed to prove that he was entitled to succeed by right of survivorship and that of the landlords, that they had no right to possession in the presence of Ralla. Ralla and the landlords appealed to the District Judge, but as regards the latter it was conceded that their suit had been rightly dismissed and consequently their appeal failed. In connexion with the appeal of Ralla the learned District Judge held that, in view of Mt. Parmeshari having forfeited her share in the tenancy by her remarriage, Ralla was entitled to succeed apparently on the ground of survivorship.

It has been found as a matter of fact that Mt. Parmeshari has remarried and it seems to me that the question whether she has incurred any forfeiture under Hindu law or the Customary law does not arise for the simple reason that under Cl. (b), S. 59, Tenancy Act, which is the law bearing on the point, the right of occupancy on the death of a tenant and on failure of male lineal descendants in the male line of descent devolved on his widow, if any, until she dies, remarries or abandons the land or is under the provisions of the Act ejected therefrom.

It is true that Cl. (c) of the said section provides that failing such descendants and widow or if the deceased tenant left a widow, then when her interest terminates under Cl. (b), the right devolves on his male collateral relatives in the male line of descent from the common ancestor of the deceased tenant and those relatives but I am unable to accept the contention of Mr. Fakir Chand the learned counsel for the appellant, that Ralla not being a male collateral relative of Tulsi the interest of Mt. Parmeshari did not terminate on her remarriage. If such a view were to obtain then obviously the interest of a widow of a deceased tenant on whom the right of occupancy has devolved could only be terminated if a male collateral relative were in existence. Mr. Fakir Chand conceded that he could not carry the matter any further and tacitly admitted that the proposition viewed from this standpoint would be absurd. In the circumstances it was not necessary to call upon the respondent to reply and for the reasons stated I dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 141

BHIDE, J.

Hardit Singh and *another*—Plaintiffs—Appellants.

v.

Mt. Damodari and *others*—Defendants—Respondents.

Second Appeal No. 903 of 1932, Decided on 23rd November 1932, from preliminary decree of Dist. Judge, Rawalpindi, D/- 4th March 1932.

(a) Transfer of Property Act (1882), S. 58 (d)—Mortgage with possession—Mortgagee bound to render account for rent and profits—Rent is equivalent to interest only in the absence of finding as to rent.

In a mortgage with possession, where the mortgagee is bound to render account of rent and profits, the rent can be taken to be equivalent to the interest only in the absence of a definite finding as regards rent: *A. I. R.* 1922 *Lah.* 230 and *A. I. R.* 1929 *Lah.* 741, *Dist.* [P 141 C 2]

(b) Civil P. C. (1908), S. 100—Finding of fact—Second appeal.

Finding of fact cannot be interfered with in second appeal. [P 142 C 1]

Har Bhajan Das—for Appellants.

Shamair Chand—for Respondents.

Judgment.—Civil Appeals Nos. 903 and 916 of 1932, are connected and will be disposed of together. They arise out of a suit for recovery of Rs. 1,000 principal and Rs. 900 interest on the basis of a mortgage. The trial Court granted a preliminary decree for Rs. 1,000 with proportionate costs. The decretal amount was to be paid on or before 14th November 1931, failing which the mortgaged property was to be sold. On appeal the learned District Judge reduced the amount of the decree to Rs. 500 only. From this decision both parties have appealed. It is necessary to recapitulate the facts of this case as the only point which requires decision in these appeals is whether the learned District Judge was right in granting a decree for Rs. 500 only. The contention of the plaintiffs is that the decree of the trial Court was correct while the contention of the defendant is that the suit should have been dismissed. The learned District Judge has held that the mortgagees were bound to render an account of the rents and profits of the mortgaged property of which they were in possession. The rent of the property was found to be Rs. 15 per mensem and it was also found that the mortgagees were in possession from January 1919 to December 1921 and also for four years during the period from December 1921 to December 1927. The rent for these two periods was deducted from the total amount claimed by the mortgagees and a decree for Rs. 500 only was passed in their favour. The learned counsel for the plaintiffs has urged that the rent should have been taken to be equivalent to the interest and has cited *A. I. R.* 1922 *Lah.* 230 and *A. I. R.* 1929 *Lah.* 741 in support of the contention. But these rulings are not applicable to the circumstances of the case as there is a definite finding that the rent of the property was Rs. 15 per mensem. In the authorities cited there was apparently no such definite finding and hence the rent was taken to be equivalent to interest.

On behalf of the defendants the sole point urged in their appeal was that the rent should have been deducted for the full period from January 1919 to December 1927. The learned District Judge has however taken into consideration the statement of Mt. Gojri and the other evidence on the record and come to the conclusion that the mortgagees were proved to have been in possession from January 1919 to December 1921 and again for four years during the period from December 1921 to December 1927. The learned District Judge's findings in respect of the amount of th erent which could be realized from the property and the period for which the property remained in possession of the mortgagees are findings of fact and cannot be interfered with in second appeal. On the basis of these findings the decree granted by the learned District Judge appears to be correct. I therefore dismiss both the appeals with costs.

K.S. *Appeals dismissed.*

A. I. R. 1933 Lahore 142

BROADWAY AND MONROE, JJ.

Pala Ram—Appellant.

v.

Shiromani Gurdwara Parbandhak Committee and *others*—Respondents.

First Appeal No. 1582 of 1930, Decided on 17th October 1932, against decree of First Sikh Gurdwaras Tribunal, Lahore, D/- 17th April 1930.

Punjab Sikh Gurdwaras Act (1925), S. 5—Mahant shown as owner of land—Land is Gurdwara property.

A land was shown in 1911-12 as being in the cultivating possession of one *D* as a tenant without occupancy rights, the owner being shown as *K D*, Mahant of the Gurdwara Bhai Pheru. In 1921-22 after the death of *D* the tenant-at-will or without occupancy rights was shown as *P R* who claimed to be the owner of the land:

Held : that the onus lay very heavily on *P R* to show that he was the owner of the land in question and that on the evidence on record land must be deemed to be Gurdwara property. [P 142 C 2]

Badri Das and *Mohan Sunder Das*—for Appellant.

Bhagat Singh—for Respondents.

Broadway, J.—In the consolidated list published under S. 3, Sikh Gurdwaras Act, 8 of 1925, relating to the properties claimed to belong to Bhai Pheru Gurdwara were four houses and a parcel of land measuring 347 kanals 8 marlas. On the publication of the aforesaid list one Pala Ram, a son of Jowahar Das, an Udasi Sadh, living at Bhai Pheru, filed a petition under S. 5, Sikh Gurdwaras Act, to the Local Government in which he claimed to be the owner of the land and the four houses referred to. This application or petition was in due course sent by the Local Government to the Gurdwaras Tribunal and the matter came up before the Tribunal presided over by Coldstream, J., Mr. Munna Lal and Sardar Kharak Singh being the other two members. They unanimously came to the conclusion that the petitioner's claim to the land and two houses namely, those Nos. 78 and 81 on the list, should be dismissed but granted him a declaration in respect of the other two houses which were Nos. 225 and 332 on the said list. Against this decision Pala Ram has preferred this appeal and on his behalf we have heard Mr. Badri Das who has taken us through such evidence as is to be found on the record. The documentary evidence is clearly against the claim advanced by the appellant so far as the land is concerned. It is clear that in 1911-12 this particular land was shown as being in the cultivating possession of one Dalu as a tenant without occupancy rights, the owner being shown as Kishen Das, Mahant of the Gurdwara Bhai Pheru. In 1921-22 Dalu appears to have died and the tenant at will or without occupancy rights is shown as Pala Ram. In these circumstances it is perfectly clear that the onus lay very heavily on Pala Ram to show that he was the owner of the land in question, having either acquired it in some way himself or through Dalu. According to Pala Ram, Dalu was his guru and he claims to have succeeded to Dalu's rights, titles and interests as his chela. So far as the land is concerned, it seems to me perfectly clear that the decision arrived at unanimously by the Tribunal was the only possible one on the record and is perfectly correct.

It has been urged however that the learned President of the Tribunal as well as the members have erred in thinking that any presumption arose *qua* the houses. Now it seems to me that in using the word "presumed" the learned President was not attributing to it any of the meaning to be found in the Evidence Act, but was dealing with the facts of this particular case. Pala Ram's own evidence with regard to the houses and the land is so contradictory as to be utterly worthless. The only other witness who deals with the houses is Lal Singh P. W. 2 who says that Pala Ram had succeeded to these two houses on the death of Dalu, his guru. Now, inasmuch as Dalu was in cultivating possession of the land—land which was in area something like two squares—, it is not surprising to find that he was also in possession of a house in which to live and another house in which to keep his cattle, and it is these two houses which are now in dispute. I consider that having regard to the evidence on the record and all the surrounding circumstances, the view taken by the learned Tribunal is the correct one and that the right decision has been arrived at. I would therefore dismiss this appeal with costs.

Monroe, J.—I agree.

K.S. ***Appeal dismissed.***

A. I. R. 1933 Lahore 143

BROADWAY, C. J.

Ghulam Hussain and *others*—Petitioners.

v.

Sajawal Shah and *others*—Opposite Parties.

Criminal Revn. No. 512 of 1932, Decided on 12th December 1932, by Dist. Magistrate, Attock, D/- 8th March 1932.

(a) Criminal P. C. (1898), S. 12—Magistrate of first class with powers gazetted throughout district—Certain division of it not allotted to such Magistrate—Magistrate is not prevented from exercising jurisdiction over village in that division.

Where the powers of a Magistrate of the first Class have been gazetted throughout the district, the mere fact that, for the sake of convenience the District Magistrate has divided the district up into Ilaqas and the Ilaqa in which a particular village is has not been allotted to him does not prevent him from exercising his jurisdiction as a Magistrate of the first class throughout district. [P 144 C 2]

(b) Criminal P. C. (1898), S. 145 (1) and S. 145 (4), Proviso—Absence of order under S. 145 (1)—Proviso to S. 145 (4) does not apply.

In the absence of any order under S. 145 (1), Criminal P. C., the proviso to S. 145 (4) cannot be applied. [P 144 C 2]

Mohsin Shah—for Petitioners.

Shah Nawaz—for Opposite Parties.

Report.—There is a shrine at Qadirpur in the Tellagang Tahsil of this District, over the offerings of which there is a dispute between the Faqirs Mujawars on one side and Sayyads proprietors of the village on the other. The Mujawars were, according to their allegations, dispossessed of the shrine by the Sayyeds on 31st May 1931. The Mujawars accordingly gave an application under S. 145, Criminal P. C., in my Court on 10th June 1931, which was sent to the Subdivisional Magistrate for disposal. The Subdivisional Magistrate kept the file pending in his Court for some time and then reported to me that he had already expressed his opinion against the interest of one of the parties in other proceedings and he therefore asked that the file might be transferred from his Court. I accepted the statement and transferred the application for disposal to another First Class Magistrate, Sardar Ram Singh. The application was dismissed by Sardar Ram Singh, Magistrate, First Class, Campbellpur, on 25th December 1931.

I find that in these proceedings a legal error has been committed by my Court by overlooking the provisions of S. 145, Criminal P. C., which required such cases to be disposed of only by Magistrates within their Ilaqas, and transferring the application to the Court of Sardar Ram Singh, Magistrate, First Class, who had no territorial jurisdiction in this Ilaqa. This, in fact, appears to invalidate the proceedings in the lower Court. In this connexion I would refer to a ruling of the Madras High Court, published in *A. I. R.* 1928 *Mad.* 1230, *Chellapathi Naidu* v. *Subha Naidu*. This ruling discusses the meaning of the words "local limits of his jurisdiction under S. 145 (1), Criminal P. C. In that case it was held illegal for a District Magistrate to transfer an application under S. 145, Criminal P. C., from his own Court to a Subdivisional Magistrate when the case concerned pertains outside the local jurisdiction, i. e., Subdivision of the Magistrate in question. Now, under the present system of administration all First Class stipendiary Magistrates are given certain thanas in which they exercise jurisdiction, and although they are gazetted with powers over the whole district, their local jurisdiction, if this ruling is held to be correct, would appear to be limited to their own specific thanas for the purpose of disposing of applications under S. 145, Criminal P. C. In the present case, even if transfer of this application to this Court of Sardar Ram Singh should be held not to be illegal and Sardar Ram Singh should be held to have jurisdiction to decide the application, there is still another good reason for moving the High Court to interfere in revision.

According to another ruling of the Madras High Court, *A. I. R.* 1929 *Mad.* 198, *R. Shrinivasa Reddy* v. *Dasaratha Rama Reddy,* the first proviso of S. 145 (4), Criminal P. C., should not be construed strictly according to the text of the law, but grace should be allowed to the party complaining of forcible dispossession when he files his complaint within a few days of the dispossession even if the Magistrate's order referred to in proviso (1) is not passed within two months of the date of his dispossession owing to some delay for which the applicant was not responsible. The present case is on all fours with the case cited as the application was made in my Court on 10th June 1931, in respect of the dispossession alleged to have occurred on 31st May 1931, and following this ruling the Magistrate should not have given a decision contrary to the equity of the case dismissing the application in limine without recording the evidence required in the main text of S. 145 (4), Criminal P. C., as to the fact of possession. Further the report of a Tahsildar should not be accepted as evidence in such an enquiry but the statement of each party should be recorded and considered. In conclusion, I find that Sardar Ram Singh had no jurisdiction to take cognizance of this application, or if he had such jurisdiction, his order is incorrect and not based on proper appreciation of the evidence of the parties. I therefore forward the file to the High Court under S. 438, Criminal P. C., for favour of setting aside the order of the Magistrate dismissing the application under S. 145, Criminal P. C., and since the Subdivisional Magistrate has given good reasons for not wishing to decide this case I suggest that it should be transferred to my own Court for decision.

Order.—It appears there is a dispute between the faqir Majawars on one side and the Sayyeds, who are proprietors of village Qadirpur, in relation to the offerings received at a shrine in that village. An application was made by the faqir Majawars on 10th June 1931 under S. 145, Criminal P. C., in the Court of the District Magistrate of Attock. In this application it was definitely stated that the petitioners had been ousted from possession on 31st May 1931. The application was sent to the Subdivisional Magistrate (by the District Magistrate) who without passing any order under S. 145 (1), Criminal P. C., appears to have recorded the statements of parties and then called on the Tahsildar to furnish a report. For reasons, with which I am not at present concerned, the matter was held up till October when on 10th of that month the Subdivisional Magistrate returned the case to the District Magistrate, saying that as he had expressed his opinion in a case under S. 147, I. P. C., relating to the same dispute, this matter should be sent to some other Magistrate for disposal. The case appears to have been held up in the Court of the District Magistrate till December 1931 when on 10th of that month the District Magistrate forwarded it to Sardar Ram Singh, a Magistrate of the First Class in the district, for disposal. This Magistrate recorded his order on 25th December 1931, dismissing the application on the ground that inasmuch as the only question for decision was who was actually in possession, and as from the application itself it was clear that the petitioners had admitted that the Sayyeds had been in possession from 31st May 1931, nothing further could be done. He also pointed out that inasmuch as no order under S. 145 (1), Criminal P. C., had been passed, proviso 1, S. 145 (4) could not be resorted to. The learned District Magistrate has sent this case up under S. 438, Criminal P. C., with the recommendation that the order of dismissal should be set aside and the case sent to him for disposal. In the opinion of the learned District Magistrate Sardar Ram Singh had no jurisdiction to deal with the case and even if he had, the order was incorrect. Admittedly Sardar Ram Singh is a Magistrate of the First Class, whose powers have been gazetted throughout the district. The mere fact that, for the sake of convenience, the District Magistrate has divided the district up into Ilqas and that the Ilaqa in which village Qadirpur is has not been allotted to Sardar Ram Singh, does not, in my opinion, prevent Sardar Ram Singh from exercising his jurisdiction as a Magistrate of the First Class throughout the district, and, as at present advised, I do not think that his order was without jurisdiction.

On the merits again, I am of opinion that Sardar Ram Singh's view is not erroneous. Admittedly, the Sayyeds had taken possession on 31st May 1931. Had an order been passed under Sub-Cl. 1, S. 145, Criminal P. C., proviso 1, Sub-Cl. 4, would have been applicable and the Magistrate could have acted thereon, provided that order had been made within two months from 31st May. In the absence of any order under S. 145 (1), Criminal P. C., it seems to me obvious that the proviso in question could not be applied and the Magistrate's order dismissing his application was therefore not wrong. It seems to me that the case has been mismanaged from the start; but as things stand, I cannot accept the recommendation and must decline to do so. The order of dismissal will stand.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 144

COLDSTREAM AND JAI LAL, JJ.

Indar Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 943 of 1932, Decided on 1st November 1932, from order of Sub-Judge, Ferozepore, D/- 21st June 1932.

Penal Code (1860), S. 300, Excep. 2—Evidence.

The deceased came in a state of great excitement with a lathi determined to use violence against his erring wife or her lover or both and the lover snatched the lathi from him and struck him twice on the head which resulted in his death:

Held: that excep. 2 to S. 300 was applicable and the conviction under S. 302 should be altered to one under S. 304. [P 145 C 2]

Des Raj Sawhney—for the Crown.

Coldstream, J.—The appellant in this case Indar Singh, a barber of village Mehraj in Ferozepore District, has been sentenced by the Sessions Judge of Ferozepore to transportation for life under S. 302, I. P. C., for the murder of Mara a teli of the same village. The prosecution story is that Indar Singh had been carrying on an intrigue with Mara's wife Mt. Kauri, P. W. 3 for some six months. Mara had protested and told Indar Singh to break off the intimacy. Indar Singh however continued to pay attention to Mt. Kauri. Some time about the middle of April 1932 Mara left Mehraj with his wife and began to work at a village some 12 miles away. Towards the end of the month they quarrelled and Mt. Kauri returned to her house in Mehraj which she shortly reached before sunset on 28th April. While she was cooking the evening meal, Indar Singh came to the house and sat down in the court-yard. Mara, who presumably had suspected where his wife had gone, arrived shortly afterwards. There was a dispute in which Indar Singh declared that he was not going to give up his friendship with Mt. Kauri. Mara went into the kotha of his house and came out brandishing a lathi. Indar Singh snatched the lathi from him and struck him twice on his head. One of the blows was given with sufficient force to cause an extensive fracture of Mara's skull and Mara died on the 30th April.

The matter was reported at the police station of Nathana, seven miles off, by the officer in charge of the local dispensary where Mara had been taken. Indar Singh was not found in his village on the next day when the police arrived. He was arrested on the 2nd May at a village 15 kos distant from Mehraj. At his trial he denied the allegations against him and declared that he had been falsely accused because he had warned the relatives of a boy to whom the niece of Mara was going to be betrothed that the girl's mother was of bad character. He called no evidence to substantiate this story which was rejected unanimously by the assessors. That Indar Singh had been carrying on a liaison with Mt. Kauri, that Mara threatened his wife with a lathi which was taken from him by Indar Singh and that Indar Singh struck him a fatal blow with that lathi is I find established beyond any doubt by the evidence in the case which has been fully described by the learned Sessions Judge in his judgment. The only question is whether the appellant has been rightly convicted of murder and sentenced to transportation for life. In first describing the affair Mt. Kauri stated that when her husband came into the court-yard brandishing his lathi he made as if he was going to use it against Indar Singh. In Court however she has modified this story, stating that Mara was threatening her with the lathi. In any case there can be no doubt that Mara came into the court-yard in a state of great excitement obviously determined to use violence against his erring wife or her lover or both. In the circumstances of this particular case I am of opinion that Exception 2, S. 300, Penal Code, is applicable. I would accordingly accept the appeal in so far as to alter the conviction from one under S. 302 to one under S. 304, Part 1, Penal Code, and reduce the sentence to one of ten years' rigorous imprisonment.

Jai Lal, J.—I agree.

K.S. *Appeal partly accepted.*

A. I. R. 1933 Lahore 145

ADDISON, J.

(*Agha*) *Turab Ali Khan* — Accused—Petitioner.

v.

Shromani Gurdwara Parbandhak Committee—Opposite Parties.

Criminal Revn. Petn. No. 844 of 1932, Decided on 4th November 1932, against order of Addl. Sess. Judge, Lahore, D/ 10th May 1932.

(a) Criminal P. C. (1898), S. 145—Ex parte proceedings without service are illegal.

No ex parte proceedings are possible in cases where there has been no service and absence of service by itself is sufficient to vitiate all the proceedings. [P 146 C 2]

(b) Criminal Trial—Power of attorney is not necessary.

In proceedings under the Criminal Procedure Code, no power of attorney is necessary. [P 146 C 2]

(c) Criminal P. C. (1898), S. 145—Action can be taken only when dispute is as to possession.

It is only where there is a dispute as to the possession of land that action under this section is possible. [P 146 C 2]

(d) Criminal P. C. (1898), S. 147—Order cannot be passed without notice under the section.

No order can be passed under S. 147, when notice is not issued under that section as required by the section itself: 2 *I. C.* 310, *Ref.* [P 147 C 1]

C. H. Carden Noad—for Petitioner.

Bhagat Singh—for Opposite Parties.

Judgment .— Sardar Karam Singh, Vice President of the Gurdwara Parbandhak Committee, Lahore, petitioned the Court of the Magistrate of the First Class, Lahore, under S. 145, Criminal P. C., to the effect that one Turab Ali was bent upon blocking a public street which ran along the east wall of the Gurdwara Shahid Ganj and which led to some vacant land of the Gurdwara at the back. He added that there was an apprehension of the breach of peace on this account. There is no doubt that the Magistrate took action under S. 145, Criminal P. C., for he immediately attached the passage in question and this he could only do at that stage under proviso 2, sub-S. 4, S. 145, Criminal P. C. He also ordered that notice should be issued to Torab Ali to put in his written statement in Court on 10th September 1931, and in the meantime to refrain from blocking the passage in any way. The notice which issued was not accompanied by a copy of the order of the Magistrate as was necessary under sub-S. 3, S. 145. The notice, such as it was, was never served upon Turab Ali but it was attached at the spot where the alleged obstruction had been placed on the alleged public road. The respondent's brother was shown a notice but it was nót served on him. He stated that the respondent had left Lahore. The Magistrate upon this ordered ex parte proceedings in the case. On 29th January 1932 an advocate of this Court appeared in the Magistrate's Court who was prepared to accept service on behalf of the respondent and to act for him. This however was refused by the Magistrate on 18th February 1932 on the ground that he held no power of attorney from the respondent who, it is said, was then in England. At the next hearing the petitioner applied that the brother of Turab Ali, who had been left in charge of the property, should be made a party as he was interested. The Magistrate even refused this and after taking summary evidence held that it had been established in some former suit that the site in question was a public thoroughfare. He did not enquire into the question of possession but apparently was satisfied rightly or wrongly as to the question of title. He thereupon proceeded to pass an order not under S. 145, Criminal P. C., but under **S. 147**, Criminal P. C., to the effect that the wall should be demolished and that no interference with the exercise of the right of way over this land should be caused in future. The respondent dissatisfied with this order moved the Sessions Judge who rejected his petition and he has come here on revision.

All the proceedings of the Magistrate are vitiated by illegality. He has not followed the proper procedure and has deliberately refused to give the respondent a chance to make good his case. Service of summons is provided for by Ss. 69 to 71, Criminal P. C. A summons has to be served, if practicable, personally. If this cannot be done, it can be served on an adult male member of his family. Service was not effected in either of these two ways. It was therefore necessary under S. 71 to affix one of the duplicates of the summons to some conspicuous part of the house where the person summoned ordinarily resided after which the summons could be deemed to have been duly served. A copy of something was attached at the spot in dispute, but this was done under part. 2, S. 145 (3), and did not dispense with ordinary service upon the respondent as required by the first part of that subsection. As no summons was affixed to the house or served upon him personally or upon an adult male member of his family, there was no service of any kind effected upon him. No ex parte proceedings are possible in cases where there has been no service. This is itself sufficient to vitiate all the proceedings of the Magistrate. Further, when the respondents' advocate appeared before evidence was led in the Magistrate's Court and tried to represent him, the Magistrate had no power to refuse to hear him. This was not a civil case but proceedings under the Criminal Procedure Code, where no power of attorney is necessary. The respondent in fact tried to put right the Magistrate's error by appearing in spite of want of service but the Magistrate would not hear him; nor did he later permit the respondent's brother to be brought on the record as managing the property when the petitioner himself wanted this.

Again, no action, it seems to me, was possible under S. 145, Criminal P. C., as there was no dispute as to possession of the land in question and it is only where there is a dispute as to the possession of land that action under this section is possible. Of course action was possible under Chap. 10, Criminal P. C., and it may be that it was possible under S. 147, Criminal P. C. As to this I prefer to express no opinion. S. 147 is concerned with disputes as to an alleged right of user of land including easements. Seeing that the petitioner only claimed the right to use this land either as a public road or as a pathway it would seem that S. 147 is a more appropriate section than S. 145, Criminal P. C. But it is clear that no order could be passed under S. 147 when notice was not issued under that section as required by the section itself. It has been held in *Subramania Pillai* v. *Sannasia Pillai* (1) that where a notice was issued under S. 147 and the Magistrate passed an order under S. 145, he acted without jurisdiction. This is the converse case and equally it must be held that the Magistrate acted without jurisdiction. Other illegalities have been committed which need not be mentioned. For the reasons given I accept this petition and set aside the order of the Magistrate. The petition is badly drawn up and there is no use in sending it back for re-decision. It will however be open to the petitioner, if he thinks fit, to institute further proceedings in accordance with law.

K.S. *Petition accepted.*

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1. (1909) 9 Cr L J 565=2 I C 310.

A. I. R. 1933 Lahore 147

TAPP, J.

Ujagar Singh and *another*—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 874 of 1932, Decided on 4th November 1932, from order of Magistrate, First Class, Multan, D/- 23rd May 1932.

Penal Code (1860), S. 75—Enhancement.

Accused were found guilty of a trivial offence under S. 379 of stealing cotton, and in view of their previous convictions under S. 457 for which they were sentenced to two years' rigorous imprisonment were sentenced to five years' rigorous imprisonment and a fine of Rs. 100 and were placed under police surveillance for three years on the expiry of the sentence:

Held: that the sentence imposed tended to be severe, but that a substantial reduction should not be made, and that two years' rigorous imprisonment without the order as to fine and police surveillance would be sufficient: *A. I. R.* 1929 *Lah.* 768; *A. I. R.* 1930 *Lah.* 100 and *A. I. R.* 1929 *Lah.* 787, *Ref.* [P 148 C 1]

Asa Ram—for Appellants.

Judgment.—Ujagar Singh and Nanik Singh, Mahtams of Chak No. 309, in the Multan District have each been convicted of theft under S. 379, I. P. C., and in view of each having a previous conviction sentenced to five years' rigorous imprisonment and a fine of Rs. 100 or in default two months' further like imprisonment. Each of the convicts has further been placed under police surveillance for three years on the expiry of his sentence. The facts alleged by the prosecution are that on the night of 19/20 December 1931 Ghulam Mohammad, a kardar of Sardar Sardul Singh, accompanied by several tenants of the Sardar was going round the cotton fields as cotton was being stolen. This party observed two persons stealing cotton and on approaching the spot one of these was recognised as the appellant Ujagar Singh and the other as Nanik Singh.

These two persons were picking cotton and placing it in their Jholis. On seeing the approach of the party the two thieves made off, Ujagar Singh being pursued by Ghulam Mohammad P. W. 1 and two others. Ujagar Singh was secured while Nanik Singh, who had run in another direction pursued by two other persons managed to make good his escape. Ujagar Singh was taken to the thana where the first information report was recorded at 7 a. m. on the morning of 20th December. The appellant Ujagar Singh advanced the usual plea that he was caught while passing by. Nanik Singh pleaded an alibi which he entirely failed to support by any reliable evidence. It was urged by the learned counsel on behalf of the appellants that Ujagar Singh had been implicated on account of enmity and Nanik Singh because he had been convicted in a previous case along with Ujagar Singh. Ujagar Singh's story as to his being an innocent passer-by has not been supported by any reliable evidence and the alleged enmity has not been established. The prosecution witnesses appear to be disinterested and there is no motive whatever for their falsely implicating the two appellants, both of whom were recognised while stealing the cotton and one of whom was actually caught after a pursuit. I find therefore that they have been rightly convicted and affirm their convictions.

It has been urged that S. 75, I. P. C., should not have been invoked in this case as the offence was a very trivial one and in this connection *A. I. R.* 1929 *Lah.* 768, *A. I. R.* 1930 *Lah.* 100 and *Maulu* v. *Emperor*

(1) have been cited. The previous convictions of the two appellants were had in April 1929, when each was sentenced to two years' rigorous imprisonment under S. 457, I. P. C. While agreeing that the sentence imposed tend to be severe, I am not prepared to make such a substantial reduction as was made in the rulings cited. I therefore reduce the sentence in the case of each appellant to two years' rigorous imprisonment, remit the fines and direct that, if paid, they should be refunded. The order as to police surveillance is also set aside, the appeal being accepted to the above extent.

K.S. *Sentence reduced.*

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1. A I R 1929 Lah 787=1929 Cr C 419=121 I C 419=11 Lah 115.

✻ A. I. R. 1933 Lahore 148 (1)

COLDSTREAM AND JAI LAL, JJ.

Emperor

v.

Diwan Singh and *another*—Respondents.

Criminal Appeal No. 870 of 1931, Decided on 1st November 1932, from order of Sess. Judge, Gujranwala, D/- 22nd April 1931.

Penal Code (1860), S. 411—Criminal possession can be joint.

Two accused persons were bringing the stolen property towards the patrol and when questioned claimed them falsely to be their own.

Held: that the presumption was that they were both in possession of the stolen property and this possession not being explained by them both were guilty. [P 148 C 2]

C. H. Carden Noad—for the Crown.

Muhammad Rafiq—for Respondents.

Coldstream, J.—This is a Crown appeal against a judgment of the Sessions Judge of Gujranwala accepting an appeal by Diwan Singh and Jiwan Singh who had been convicted by a Magistrate under S. 411, I. P. C., and sentenced to eight months' rigorous imprisonment. The allegation was that the accused were caught by a patrol in possession of three goats which had been stolen the night before at Muridke. The accused declared that the case was wholly false and that they had not been arrested with the goats at the place alleged. The learned Sessions Judge agreeing with the convicting Magistrate found it established by evidence which amply justified the finding that the goats were "recovered from the appellants as alleged by the prosecution" and that the goats were the one stolen, but acquitted Diwan Singh and Jiwan Singh apparently because neither of them were proved to have been in exclusive possession of the animals.

There is no justification for the view adopted by the learned Judge that there can be no joint criminal possession. As pointed out by Boys, J., in *Ganeshi* v. *Emperor* (1) each case of the kind must depend on its own facts. In the present case the evidence which has been accepted is that Diwan Singh and Jiwan Singh were "bringing" the goats towards the patrol, and when questioned claim them falsely to be their own. In such circumstances the presumption is that they both were in possession of the stolen property and this possession not being explained by them the case against them was clear, their conviction proper and their acquittal manifestly wrong. I would accordingly accept the appeal, set aside the judgment of the Sessions Judge and restoring that of the trial Court convict Jiwan Singh and Diwan Singh under S. 411, I. P. C., and sentence them to eight months' rigorous imprisonment less the period already undergone. They must surrender to their bail and serve their sentences accordingly.

Jai Lal, J.— I agree.

K.S. *Appeal accepted.*

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1. A I R 1924 All 776=83 I C 892=26 Cr L J 188.

✻ ✻ A. I. R. 1933 Lahore 148 (2)

HARRISON AND ADDISON, JJ.

Khazan Shah—Plaintiff—Appellant.

v.

Atta Ullah—Defendant— Respondent.

First Appeal No. 28 of 1932, Decided on 13th October 1932, from decree of Senior Sub-Judge, Sialkot, D/- 10th October 1931.

✻ ✻ Stamp Act (1899), Ss. 12 and 2 (11)—One of stamps in promissory note not cancelled—Document is inadmissible.

Where in a promissory note out of four stamps only three were cancelled and one was not cancelled:

Held: the document was inadmissible: *A. I. R.* 1929 *Rang.* 270, *Rel. on.* [P 149 C 1]

Jagan Nath Aggarwal and *J. L. Kapur*—for Appellant.

Mohammad Amin Khan and *Fakir Chand*—for Respondent.

Judgment.—The plaintiff in this case claimed a sum of Rs. 5,000 and interest relying on a promissory note executed on 1st February 1927 and stated that it represented a cash transaction. The defendant did not admit execution or liability of any sort and as soon as the document was produced with a view to its being proved he, or rather his counsel took exception to its admissibi-

S. N. DAR
Vakil High Court.

lity and pointed out that one of the four stamps affixed to it had not been cancelled. The trial Court postponed the decision of this objection and proceeded to record the evidence in the case. The Judge who passed this order and began to record evidence was succeeded by another Subordinate Judge before the evidence was concluded and the second Subordinate Judge taking up and rightly the point of the admissibility of the promissory note, Ex. P-1 at the very commencement of the judgment held that it was not admissible, and dismissed the suit in consequence.

On appeal counsel would have us go into the evidence, but the first point which we must decide is whether the Subordinate Judge's decision is correct or not. An objection was taken as soon as the document was produced and an attempt made to lead evidence. There was no admission in the pleadings and the only question therefore is whether Ss. 2 (11) and 12, Stamp Act, render the document inadmissible. There has been no cancellation whatsoever. All that the counsel has been able to urge is that the first three stamps have been cancelled, and that he intended to cancel the fourth. Whatever his intentions may have been he did not put them into effect. The fourth stamp is not cancelled as required by S. 12. The stamp could certainly be used again and, as as held in *A. I. R.* 1929 *Rang*. 270 and as laid down in the two clear mandatory sections of the Statute, the document is inadmissible and the appeal must be dismissed with costs.

K.S. *Appeal dismissed.*

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* A. I. R. 1933 Lahore 149

TAPP, J.

G. V. Rattan Chand and *Company*—Decree-holders—Petitioners.

v.

Haveli Shah and *others*— Judgment-debtors— Opposite Parties.

Civil Revn. Petn. No. 216 of 1932, Decided on 7th November 1932, against order of Senior Sub-Judge, Gujrat, D/- 19th December 1931.

*** Civil P. C. (1908), S. 41 — Transferee Court certifying execution or failure to transferor Court becomes functus officio.**

Once a transferee Court has executed a decree in full or has completely failed to execute it and certifies such execution or failure to the transferor Court, as enjoined in S. 41, it becomes functus officio and ceases to have any jurisdiction over the execution proceedings: 20 *All.* 129 and *A. I. R.* 1926 *Pat.* 274, *Foll.* [P 150 C 1]

Bishan Narain Pandit — for Petitioners.

Amin Chand Mehta—for Opposite Parties.

Judgment.—The firm of G. V. Rattan Chand and Company obtained two decrees for Rs. 6,475 odd and Rupees 13,468 odd with interest in 1927 against the firm of Haveli Shah and Sardari Lal in the Court of the Senior Subordinate Judge, Rawalpindi. The decrees were transferred for execution to the Court of the Senior Subordinate Judge, Gujrat. Three payments aggregating Rs. 18,995 were made in July 1930 and on 4th October 1930, when an account was taken a sum of Rupees 5,105-15-11 was found to be still due. A cheque for this amount was accepted in full satisfaction of both the decrees by the counsel for the decree-holders on 24th October 1930 and the proceedings were struck off accordingly. The record does not show however whether the Gujrat Court certified the complete execution of the decrees to the Rawalpindi Court as required by S. 41, Civil P. C. On 24th July 1930 the decree-holder made an application to the Senior Subordinate Judge, Gujrat, claiming a further sum of Rs. 1,169-7-3 and invoking the inherent powers of the Court under S. 151 and praying for amendment of the order of 24th October 1930 under S. 152. The Senior Subordinate Judge found as a matter of fact that a sum of Rs. 518-2-9 under the decrees plus a sum of Rs. 560 on account of costs awarded by the High Court or a total sum of Rs. 1,078-9-2 was still due to the decree-holders. He however dismissed the application on 19th December 1931 following *Gurmukh Singh* v. *Mt. Mirza Nur* (1) and other authorities on the ground that S. 151 had no application where another remedy lay open. The order of the learned Senior Subordinate Judge seemed to indicate that the remedy lay by way of review and accordingly two such applications were made on 6th January 1932, but these were dismissed on 27th January 1932 there being no ground for review.

Against the above orders three separate petitions for revision have been preferred on behalf of the decree-holders and I have heard their learned counsel at some length on the applicability of the authorities relied on by the Court below and the inconsistency of its orders in first suggesting a remedy and when that was taken, refusing relief. I do not however think it necessary

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1. (1901) 63 P R 1901.

to enter into a discussion on the merits of the petitions or consider the rulings cited by the learned counsel, as in my judgment they should be rejected on the short ground that the learned Senior Subordinate Judge had no jurisdiction to entertain the applications made to him and consequently it cannot be urged that he failed to exercise a jurisdiction vested in him by law—Cl. (b), S. 115 of the Code relied on by counsel. Once a transferee Court has executed a decree in full or has completely failed to execute it and certifies such execution or failure to the transferor Court, as enjoined in S. 41, it becomes functus officio and ceases to have any jurisdiction over the execution proceedings.

As observed above, the record does not show that a certificate of complete satisfaction was sent to the Rawalpindi Court but any omission to do this (a mere ministerial act) would not in view of the clear order that the decrees had been satisfied in full and the proceedings should be struck off, enable the Court to retain jurisdiction. The above view was expressed by the Allahabad High Court in *Abda Begam* v. *Muzaffar Husen Khan* (2), and taken by the Patna High Court in *Muhammad Ibrahim* v. *Chhatto Lal* (3). Following these two authorities I would hold that the Senior Subordinate Judge, Gujrat. had no jurisdiction to entertain the application under Ss. 151 and 152 and the two petitions for review and that his orders thereon are not open to revision. Civil Revns. Nos. 216, 327 and 328 of 1932 are accordingly dismissed with costs.

K.S. *Petitions dismissed.*

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2. (1898) 20 All 129=(1898) A W N 218.
3. A I R 1926 Pat 274=94 I C 36=5 Pat 898.

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* A. I. R. 1933 Lahore 150

ADDISON AND AGHA HAIDAR, JJ.

Harjas Rai-Arjan Das—Defendants—Appellants.

v.

Hans Raj and *another*—Plaintiff and Defendants—Respondents.

First Appeal No. 1496 of 1927, Decided on 10th November 1932, from decree of Senior Sub-Judge, Sialkot, D/- 7th March 1927.

* **(a) Hindu Law—Joint family — Father and sons having different businesses but each helped by others—No evidence as to separation—All earnings are joint property.**

Where a Hindu family consisting of father and sons has different businesses run by father and the sons but each is helped by others and there is no evidence of separation, all the earnings are the joint earnings of the family. [P 151 C 1, 2]

(b) Practice—New plea involving question of law and fact cannot be taken in appeal.

A plea involving a question of law and fact not taken in the trial Court cannot be taken in appeal. [P 151 C 2]

* **(c) Hindu Law—Undivided interest of coparcener.**

The undivided interest of a coparcener in a specific property can be attached and sold. [P 151 C 2]

B. P. Khosla and *Mool Chand*—for Appellants.

Badri Das and *Achhru Ram*—for Respondents.

Addison, J.—The firm Harjas Rai-Arjan Das obtained a decree against one Tek Chand, son of Mathra Das. In execution of that decree a certain house was attached. Hans Raj, brother of Tek Chand, preferred an objection to the effect that the house belonged solely to him. His objection was dismissed and he instituted the present suit for a declaration that the attached house belonged to him and was not liable to sale in execution of the decree of Harjas Rai Arjan Das, defendant 1, against his brother Tek Chand, defendant 2. Defendant 3 is one Gian Singh with whom the plaintiff mortgaged the property a day before the decree was passed against Tek Chand in this Court. Tek Chand did not contest the suit or give evidence. Harjas Rai-Arjan Das pleaded that the house was joint Hindu family property belonging to the three brothers, Hans Raj, plaintiff, Tek Chand, defendant 2, and Mulkh Raj. The father Mathra Das died in 1917. At one time there were other brothers, including Dina Nath, but they are dead also, Mulkh Raj, the third brother who is alive, was not impleaded as a party by the plaintiff. In replication the plaintiff pleaded that all the brothers and their father were separate. He first admitted that his father had a shop in Sialkot but again said that the shop belonged to himself (the plaintiff). The plaintiff further pleaded that the house in dispute was purchased by him and that the sale deed was in his name. He then had to deny this and admitted that the sale-deed was in the name of his father and himself. The money, he said, was obtained from his maternal uncle at Amritsar, one Ram Mal, who left him his property when he died. He did not know however whether his uncle had left a will or not. The defendants' counsel admitted that only one-third of the house, namely Tek Chand's interest therein, was liable to attachment and sale.

The trial Judge held that the brothers and their father constituted a joint Hindu family and had never separated. It was not proved that the plaintiff's grand-father left any property but it was found that the father Mathra Das and his sons combined together and as a result of their labours set up a family business in Sialkot run by the father and the plaintiff, the other sons mostly working in Jammu, which is close at hand, though they also worked in the shop at Sialkot whenever they were there while the father and the plaintiff used to go to Jammu and work there. Though the finding is not very clear it amounted to this: that the joint earnings of the family were thrown into a common hotch-pot. As regards the money of Rama Mal, the maternal uncle of the plaintiff, being solely inherited by the plaintiff, the trial Judge held that this had not been established and that all the brothers must be held to have succeeded together to whatever was left by their maternal uncle Rama Mal. Finally the Subordinate Judge, First Class, held that Mathra Das, the father, intended that the plaintiff should be the owner of the house though the sale deed was in his name as well as in the name of his son and that the amount spent in purchasing it, namely, Rs. 1,500, must have come out of the plaintiff's share of the money left by Rama Mal. On this finding he decreed the suit and the firm Harjas Rai-Arjan Das has appealed.

On the recod there is not the slightest doubt that the brothers constituted a joint Hindu family and were also joint with their father up to his death. There is no evidence of separation and there is positive evidence that they are joint. It was contended however on behalf of the respondents that it had not been established that the house in question was joint family property. This contention has no force. On the evidence it is clear that whatever business each brother was carrying on he was helped by the other brothers and by the father. When Tek Chand came from Jammu to Sialkot he worked in what may be called the parent shop. One of the deceased brothers, namely, Dina Nath, used also to work in Sialkot shop. He however some times went to Jammu; so did the father and did the plaintiff. When they did so they worked in the shop there. Tek Chand though usually in Jammu used to draw hundis for the Sialkot shop when he was in Sialkot. On the record it must be held that the finding of the trial Judge is correct that all the earnings of the family were thrown into the hotch-pot. (His Lordship then held on the evidence that the house was purchased with the money from the common purse and proceeded). It was contended on behalf of the respondents that the third share of Tek Chand in the house could not be attached and sold and that it was necessary to attach the interest of Tek Chand in all the family property. This was not a plea taken at the trial and it cannot be allowed to be taken now as it involved questions of fact as well as of law Apart from that the undivided interest of a co-parcener in a specific property can be attached and sold and counsel was unable to produce any authority to the contrary. For the reasons given I would accept the appeal to the extent that the suit must be dismissed as regards Tek Chand's undivided one-third share. The decree of course will stand as regardst he other two-thirds share as admittedly that has nothing to do with Tek Chand against whom alone the decree was passed. As the appeal by Harjas Rai-Arjan Das was by some mistake against the whole decree and not merely on account of Tek Chand's share, I would leave the parties to bear their own costs.

Agha Haidar, J.—I agree.

K.S. *Order accordingly.*

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* A. I. R. 1933 Lahore 151

ADDISON AND AGHA HAIDAR, JJ.

Sheikh Mohammad Abdullah—Plaintiff—Appellant.

v.

Mohammad Yasin and *others*—Defendants—Respondents.

First Appeal No. 2226 of 1929, Decided on 5th December 1932, from decree of Sub-Judge, 1st Class, Lahore, D/- 13th May 1929.

*** (a) Transfer of Property Act (1882), Ss. 58 (d) and 67—Unsufructury mortgage—Mortgagee is not entitled to sue for sale merely by insertion of personal covenant in mortgage deed.**

The terms of the mortgage deed were as follows: "I have mortgaged with possession for Rs. 5,000 to *A*, for a term of six months, a house owned and possessed by me. I have received the mortgage money. The said mortgagee has been put in possession. In case I fail to redeem the house within the term of six months I shall be liable to pay interest at Rs. 1-8-0 per cent per mensem till redemption in addition to letting possession remain with the mortgagee. This interest I shall pay along with the mortgage money." The mortgagee brought the present suit for sale of the mortgaged property:

Held: that this was purely a usufructuary mortgage and that the mere insertion therein of a personal covenant to pay the mortgage debt on demand would not alter the character of the mortgage and give the mortgagee a right to sell the mortgaged property in the event of nonpayment of the mortgage debt: 28 *All.* 157; 20 *O. C.* 155 and 30 *I. C.* 224, *Rel. on.*

Held further: that the test in such cases is the remedy provided in the deed for the satisfaction of the mortgage debt. [P 152 C 1, 2]

(b) Transfer of Property Act (1882)—General principles as in amended Act are applicable to the Punjab.

Though the Act is not in force in the Punjab the general principles to be applied are those embodied in the amended Act of 1929 which must be held to be more in accordance with the principles of justice, equity and good conscience. [P 152 C 1, 2]

M. L. Batra and *S. K. Ahmad*—for Appellant.

Akbar Ali—for Respondents.

Addison, J.—One Abdul Aziz executed a mortgage-deed on 11th May 1925, in favour of Mohammad Abdullah, plaintiff who has instituted the present suit against the wife, son and daughters of Abdul Aziz, who has in the meantime died, for sale of the mortgaged property. The suit was resisted on various grounds, one of which has been decided, the trial Judge dismissing the suit, holding that the mortgage was a usufructuary one, and therefore a suit for sale did not lie. Against this decision the plaintiff has appealed. The terms of the mortgage-deed are as follows:

"I have mortgaged with possession for Rs. 5,000 to Sheikh Mohammad Abdullah, for a term of six months, a house owned and possessed by me. I have received the mortgage money. The said mortgagee has been put in possession. In case I fail to redeem the house within the term of six months I shall be liable to pay interest at Rs. 1-8-0, per cent, per mensem till redemption in addition to letting possession remain with the mortgagee. This interest I shall pay alone with the mortgage money. I have executed this usufructuary mortgage deed of my own accord."

The Transfer of Property Act was amended in 1929 and it seems to me that this is purely a usufructuary mortgage as now defined in S. 58 (d) of that Act. Under S. 67 therefore a suit for sale on the mortgage in question would be incompetent. The Transfer of Property Act is not in force in the Punjab, but the general principles thereof are commonly applied. The principle involved in the present case is one of the general principles. As the Act is not in force it seems to me that the general principles which this Court should now apply are those embodied in the amended Act of 1929 which must be held to be more in accordance with the principles of justice, equity and good conscience. For this reason alone I would dismiss the appeal. Even if it be held that the mortgage in question is an anomalous one I am still of opinion that the suit was properly dismissed. Certain Madras authorities were referred to. I do not propose to discuss them as the Allahabad High Court in *Kashi Ram* v. *Sardar Singh* (1), has taken the opposite view and I am in agreement with the learned Judges who decided the latter case. They said that where a mortgage in other respects is a usufructuary mortgage the insertion therein of a personal covenant to pay the mortgage debt on demand would not alter the character of the mortgage and give the mortgagee a right to sell the mortgaged property in the event of non-payment of the mortgage-debt. This disposes of a similar argument taken before us on behalf of the appellant.

This subject has also been considered by the Court of the Oudh Judicial Commissioners. That Court in *Shyam Sundar* v. *Dilganjan Singh* (2), laid down that in a mortgage a mere promise to pay the mortgage-money within a certain fixed period does not per se import a personal liability. The test in each case is the remedy provided in the deed for the satisfaction of the mortgage-debt. Similarly, the same Court in *Nazima Husain* v. *Mahabir Prasad* (3), held that personal liability cannot be inferred from a provision in the mortgage-deed promising to pay the money within a certain fixed period for such a covenant must be entered in every form of mortgage. These cases are conclusive on the point agitated before us and I have no hesitation in following them. I would therefore dismiss the appeal with costs.

Agha Haidar, J.—I agree.

K.S. *Appeal dismissed.*

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1. (1906) 28 All 157=(1906) A W N 266.
2. (1917) 20 O C 155=39 I C 540.
3. (1915) 30 I C 224.

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* A. I. R. 1933 Lahore 152

BROADWAY, C. J. AND ABDUL QADIR, J.

Bhola Ram—Defendant—Appellant.

v.

Arjan Das and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 2215 of 1926, Decided on 24th November 1932, from decree of Senior Sub-Judge, Gurdaspur, D/- 12th June 1926.

*** Civil P. C. (1908), S. 105—Order setting aside abatement cannot be questioned in appeal from suit—Civil P. C. (1908), O. 22.**

An order setting aside an abatement and allowing substitution of the heirs of the deceased party cannot be questioned in appeal from the decree in the suit whether such an order is passed before, or simultaneously with the decree, such an order not being one which affects the decision of the case with reference to its merits within the meaning of S. 105: *A. I. R.* 1925 *Cal.* 766, *Foll.*; 22 *All.* 430, *not Foll.*; *A. I. R.* 1925 *Cal.* 473, *Ref.* [P 153 C 2]

Mehr Chand and *Badri Nath*—for Appellant.

Mehr Chand Mahajan, *Hem Raj Mahajan* and *Din Dayal Kapur*—for Respondents.

Broadway, C. J.—A preliminary point is taken in this appeal to the effect that the matter raised in ground 1 of appeal relating to an order passed by the Court below setting aside an abatement, is not open to appeal in this Court. The facts briefly are that one Nanak Chand executed a bond in favour of Arjan Das and others for Rs. 5,500. Bija Ram signed this bond as a surety. Arjan Das and others were compelled in 1920 (the bond having been executed on 1st December 1913) to sue Nanak Chand and Bija Ram for the amount due on the bond which amounted to Rs. 6,940. On 17th June 1921 an ex parte decree was passed against Nanak Chand and Bija Ram as they failed to put in an appearance. This was subsequently set aside as against Bija Ram only on the ground that Bija Ram had died on 4th April 1921. The fact of Bija Ram's death had only come to the knowledge of the plaintiffs on 4th October 1921 and within a fortnight of that date the plaintiffs put in an application asking that Bija Ram's representatives be brought on the record in his place. This application was granted and in due course a decree was passed against Bija Ram's estate represented by his four sons. Subsequent to this it was found necessary to set aside the decree as it was discovered that two of the sons were minors and they were allowed through their guardian-ad-litem to put in pleas. They thereupon again pleaded that the suit had abated on the death of Bija Ram and should therefore be dismissed. On the merits they had practically nothing to say. The trial Court carefully examined the circumstances in which the plaintiffs made their application in October 1921 and came to the conclusion that the abatement should be set aside—a conclusion which on the merits appears to be perfectly sound. It then in the same judgment proceeded to deal with the remaining issues in the case and granted the decree against the estate of Bija Ram. In the present appeal in ground 1 the correctness of the decision of the trial Court on the question of abatement is attacked. Mr. Mehr Chand Mahajan objected that this matter could not be reopened and in support of his contention referred to the provisions of S. 105, Civil P. C., and a decision of the Calcutta High Court to be found printed in *A. I. R.* 1925 *Cal.* 473: *Mohammed Nuru Amin* v. *Manohar Saran Deb*, where it was held that an order setting aside an abatement and allowing substitution of the heirs of a deceased party cannot be questioned in appeal from the decree in the suit whether such an order is passed before, or simultaneously with the decree, such an order not being one which affects the decision of the case with reference to its merits within the meaning of S. 105.

Mr. Mehr Chand Dewan placed his reliance on *Hem Kanwar* v. *Amba Prasad* (1), a decision of a Single Judge which certainly supports his view. This case was however specifically referred to in the Calcutta case and not followed. I note that in the Allahabad case the setting aside the abatement formed a part of the decree, whereas no reference whatever is made to the question of abatement in the decree now under appeal. Mr. Mehr Chand Dewan further urged that inasmuch as the authority relied upon by him appeared in an authorized report and *Mohammed Nuru Amin* v. *Manohar Saran Deb* *A. I. R.* 1925 *Cal.* 473, appeared in an unauthorized report we should give preference to the Allahabad case. This is a matter which I do not think it necessary to discuss for I find that the same view was taken by a Division Bench of the Calcutta High Court in *Sayma Bibi* v. *Madhusudan Mohanta* (2), where the Allahabad authority was also considered and not followed. In my opinion the view taken by the Calcutta Court is a correct one and this question of abatement cannot be agitated before us. Mr. Mehr Chand Dewan had nothing further to say on the merits and the appeal is accordingly dismissed. In the circumstances however I would leave the parties to bear their own costs.

Abdul Qadir, J.—I agree.

K.S. *Appeal dismissed.*

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1. (1900) 22 All 430=(1900) A W N 136.
2. A I R 1925 Cal 766=85 I C 100=52 Cal 472.

A. I. R. 1933 Lahore 154

HARRISON AND ADDISON, JJ.

Devigir and *another*—Plaintiffs — Appellants.

v.

Chamla Mal and *others*—Defendants —Respondents.

Second Appeal No. 796 of 1927, Decided on 3rd March 1932, from decree of Dist. Judge, Hoshiarpur, D/- 21st December 1926.

Custom (Punjab) — Goshains of Kangra District—Property descending from guru to chela is not religious property and is liable to attachment in execution of decree against guru.

Among Goshains of Kangra District the mere fact that the property descends from guru to chela does not make such property religious; and it is not governed by the same rules as ancestral property descending from father to son is under Hindu law. Therefore such property is the personal property of the guru especially when other properties are entered in the name of the temple, such property is liable to attachment in execution of a decree passed against the guru in his lifetime: *A. I. R.* 1928 *All.* 257, *Dist.*; 136 *P. R.* 1889; *A. I. R.* 1923 *Lah.* 544 and *A. I. R.* 1921 *Lah.* 337, *Ref.* [P 154 C 2]

Kishen Dial, N. C. Mehra for *Jalal Din* and *Shamair Chand* — for Appellants.

Badri Das—for Respondents.

Harrison, J.—A suit was instituted by two Goshains of the Kangra District describing themselves respectively as the manager of Gaddi Mat and Samadh situated at Bohan, Tahsil Dehra, and as his chela. This sought a declaration that certain property was not liable to attachment in execution of a decree passed against the Guru of the first plaintiff in his lifetime because it belonged to Gaddi Mat and was ancestral. The declaration prayed for was granted by the trial Court, but on appeal the learned District Judge reversed this decision and dismissed the plaintiff's suit. The points agitated before us on second appeal are first that the property in question is shown to have belonged to the institution and in the second place that if it belonged to any Mahant in the present or past, it was protected from attachment in virtue of its ancestral nature, the descent from Guru to Chela being equivalent to descent from father to son. On the first point counsel has challenged the authorities *Ram Singh* v. *Nihal Singh* (1), *Goshain Sheoghulam Puri* v. *Shyamlal* (2), *A. I. R.* 1923 *Lah.* 544 and *Indar Singh* v. *Fateh Singh* (3). As against them he has relied upon para 89, Rattigan's Digest of Customary Law, and the two authorities on which it is based. As pointed out by the learned District Judge, these authorities do not afford any support to the generalisation. The first passes an order of remand for decision of the points in issue without expressing any opinion one way or the other, while in the second there is a finding of fact which has been converted in the head-note into something quite different. Counsel contends that the existence of natural heirs is immaterial and that whether or no there be any such heirs, the mere descent from Guru to Chela constitutes a declaration and changes the nature of the property which is the self-acquired property of the original purchaser or donee and in virtue of the fact that the inheritor is devoted to a religious life the property also becomes religious and cannot be attached. This is difinitely against the view taken in *Goshain Sheoghulam Puri* v. *Shyam Lal* (2), for it is the existence of natural heirs and their defeat by the religious heir which is the basis of that decision. In the present case there is a very significant fact that in addition to the land which descended from Guru to Chela as personal property, there was other land which was entered in the name of the temple and continues to be so entered. The plaintiffs are engaged in trade and the Goshains of this district are well-known as traders in addition to being members of a religious fraternity. It is therefore clear in our opinion that the District Judge has correctly found that the property is not protected in any way and can be attached in execution of the decree.

The second point is ingenious and was raised for the first time on appeal. Though an issue was framed as to whether the land was ancestral, it is not shown that this was ever taken to mean or argued to mean ancestral in the religious line as opposed to the lay or secular. No definite custom was ever pleaded to this effect and the preliminary point has not been established that property descending from Guru to Chela is governed by the same rule as that descending from father to son. The plaintiffs appellants have failed on both points and the appeal must be dismissed with costs.

Addison, J.—I agree.

K.S. *Appeal dismissed.*

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1. (1889) 136 P R 1889.
2. A I R 1928 All 257=107 I C 252=50 All 485.
3. A I R 1921 Lah 337=59 I C 734=1 Lah 540.

* A. I. R. 1933 Lahore 155

TEK CHAND AND MONROE, JJ.

(*Mian*) *Abdul Aziz*—Appellant.

v.

Rahmat Ullah & others—Respondents.

First Appeal No. 2671 of 1925, Decided on 11th October 1932.

*** (a) Punjab Courts Act (1918), S. 39—Redemption suit valued at Rs. 1,000—Preliminary decree for possession on payment of Rs. 9,050 passed by Sub-Judge—Appeal by mortgagee for enhancement of the amount lies to the High Court and not to District Court—Civil P. C. (1908), S. 96.**

A brought a suit against *B* for redemption of a house on the payment of Rs. 1,000. *B* pleaded inter alia that *A* had admitted *B* as owner of the house and that as such he had rebuilt the house incurring a cost of Rs. 15,000, which *A* must pay in addition to mortgage-money. The Subordinate Judge passed a preliminary decree for possession by redemption of the mortgage on payment of Rs. 9,050. *B* filed an appeal for enhancement of the amount.

Held: that the appeal lay to the High Court and not to the District Court as the value of the subject-matter in a redemption suit was the amount adjudicated by the trial Court, Rs. 9,050 and not the valuation given by the plaintiff Rupees 1,000: *A.I.R.* 1926 *Lah.* 376 (*F.B.*), *Foll.*; 106 *P. R.* 1895 (*F.B.*), *held* **overruled.** [P 156 C 2]

*** (b) Court-fees—Redemption suit—Preliminary decree for possession on payment of certain amount—Appeal by mortgagee on ground that transaction is sale and not mortgage and also that amount should be enhanced—Court-fee is to be paid on principal sum secured on mortgage and not on amount claimed.**

Where the mortgagee in an appeal against a decree in a redemption suit contests not only the finding of the lower Court as to the amount payable by the mortgagor before he can redeem the mortgage but also that the transaction is a sale and not a mortgage as held by the lower Court, the court-fee on the appeal is payable on the principal sum secured on the mortgage and not on the amount claimed. [P 156 C 2]

(c) Transfer of Property Act (1882), S. 58—Mortgagee authorized to construct house according to his liking at his own cost—Deed containing also stipulation that mortgagor would be liable for whole amount—Transaction is mortgage and not an out and out sale.

Where the mortgagees are authorized to reconstruct the transferred house "according to their liking at their own cost" and there is a stipulation in the deed that at the time of redemption, if it is found that the amount due to the mortgagees cannot be recovered in full from the mortgaged property, the mortgagors would be liable to make good the deficiency "from their own pockets as well as from their other property," the transaction is a mortgage and not an out and out sale. [P 156 C 2; P 157 C 1]

Jagan Nath Aggarwal, Asa Ram Aggarwal and *Azim Ullah*—for Appellant.

Parkash Chandra, Mohammad Amin and *Mehr Chand*—for Respondents.

Tek Chand, J.—This judgment will dispose of Civil Appeals Nos. 2671 of 1925 and 838 of 1926, both of which arise from the same suit. The plaintiff Abdul Aziz brought a suit for possession of a house, situate in the city of Lahore, by redemption, on the allegation that the original owners, Zulfiqar Ali Khan and Amir Ali Khan, fathers of defendants 1 and 2, respectively, had mortgaged it, by registered deed, dated 17th September 1908, for Rs. 1,000 in favour of defendants 3 and 4; that the mortgagees had assigned their mortgagee rights to defendants 5 and 6, and that the interest on the mortgage money and the rent realized by the mortgagees or their transferees balanced each other. He as the purchaser of the rights of Zulfiqar Ali Khan and Amir Ali Khan, claimed possession on payment of the principal sum, Rs. 1,000 only.

The suit wes resisted by the original transferees and their assignees on various pleas which it is not necessary to describe in detail for the purposes of these appeals. Briefly, they pleaded that the transfer of 17th September 1908, by Zulfiqar Ali Khan and Amir Ali Khan in favour of Murad Baksh and Rahmat Ullah, was in reality an out and out sale of the house and not a mortgage as it purported to be; and that, in any case, even if the transaction were held to be mortgage, the plaintiff's father had lost his right to redeem by having admitted the contesting defendants as the owners of the house. It was further pleaded that the transferees had rebuilt the house in accordance with the authority given to them in the transfer-deed and that the cost of reconstruction was about Rs. 15,000 which the plaintiff must pay, in addition to the principal sum secured on the mortgage, before he could obtain possession. The trial Court held that the transaction of 17th September 1908, was a mortgage and not a sale as alleged by the defendants. He also found that no estoppel or acquiescence on the part of the plaintiff or his father had been established disentitling him to maintain a suit for redemption. As regards the cost of reconstruction of the house the Subordinate Judge fixed the amount at Rs. 7,450 and allowing a further sum of Rs. 600 which the mortgagees had to pay to certain third parties who were laying a claim to the house, he passed a preliminary decree for possession, by redemption of the mortgage, on payment of Rs. 9,050, leaving the parties to pay their own costs.

Against this decree the plaintiff preferred an appeal to this Court praying for the reduction of the amount fixed by the lower Court by Rs. 1,800, and the defendants filed an appeal in the Court of the District Judge, Lahore, urging that the transaction of 17th September 1908 was a sale and not a mortgage as held by the trial Court and also praying that the amount held payable by the trial Court be enhanced to Rs. 16,050. When the defendants' appeal came up for hearing before the learned District Judge, a preliminary objection was raised on behalf of the plaintiff that that Court had no jurisdiction to hear it as the appeal should have been filed in the High Court. This objection was overruled by the learned District Judge on the authority of a Full Bench decision of the Chief Court reported as *Mahammad Khan* v. *Ashak Muhammad Khan* (1). On this finding the learned Judge proceeded to hear the appeal, but the plaintiff raised a further preliminary objection that the appeal was insufficiently stamped as it bore court-fee on Rupees 1,000 only but that ad valorem court-fee sould have been paid on the sum by which the defendants wanted the amount fixed by the lower Court to be enhanced. The learned District Judge upheld this preliminary objection and dismissed the defendants' appeal.

Against the decision of the District Judge the defendants have preferred a second appeal No. 838 of 1926 to this Court. On the two appeals coming up for hearing before us it was conceded by Mr. Jagan Nath Aggarwal, counsel for the plaintiff, that the learned District Judge had no jurisdiction to entertain and dispose of the defendants' appeal as the Full Bench judgment, *Muhammad Khan* v. *Ashak Muhammad* (1), on which the learned Judge had relied had since been overruled by a Full Bench decision of this Court reported as *Jaswant Ram* v. *Moti Ram* (2). Both counsel accordingly suggested that, instead of the judgment of the District Judge being set aside and he being directed to return the memorandum of appeal for presentation to this Court, Civil Appeal No. 838 of 1926 may be taken to have been filed in this Court as a first appeal against the decree of the trial Judge. This suggestion was reasonable and we accepted it, and directed both sides to address us on the merits of their respective appeals.

Mr. Jagan Nath Aggarwal at this stage re-agitated the question of insufficiency of court-fee paid in Civil Appeal No. 838 of 1926. He conceded that as the defendants in this appeal were contesting not only the finding of the lower Court as to the amount payable by the plaintiff before he could redeem the mortgage but also the finding that the transaction of 17th September 1908, was a sale and not a mortgage as held by the lower Court, the court-fee on this appeal, in accordance with certain rulings of this Court and the practice which had uniformly prevailed for a number of years, was payable on the principal sum secured on the mortgage. He however contended that this view was wrong. Counsel was, unable to point out any provision in the Court-fees Act to the contrary and after hearing him at length I am of opinion that no case has been made out for departing from the long established practice of this Court. I hold therefore that the preliminary objection cannot be sustained and over-rule it. On the merits the first question for decision is whether the transfer of 17th September 1908, by Zulfiqar Ali Khan and Amir Ali Khan in favour of Murad Bakhsh and Rahmat Ullah, defendants 3 and 4, was a mortgage as it purported to be, or a sale as contended by defendants. After examining the terms of the deed, as printed at pp. 43 to 45 of the paper book, and the other evidence bearing on the point produced by the parties, I have no hesitation in agreeing with the finding of the learned Subordinate Judge that the defendants have failed to establish that the transaction was in fact a sale and was given the form of a mortgage in order to defraud preemptors.

The learned counsel for the defendants has relied principally upon the terms in the deed which authorized the mortgagees to reconstruct the transferred house "according to their liking at their own cost." There is however nothing unusual in such a condition. The matter is put beyond all doubt by the further stipulation in the deed that at the time of redemption, if it were found that the amount due to the mortgagees could not be recovered in full from the mortgage property, the mortgagors would be liable to make good the deficiency "from their own pockets as well as from their other property." This clearly shows that the intention of the parties was that the property could be redeemed on certain

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1. (1895) 106 P R 1895 (F B).
2. A I R 1926 Lah 376=7 Lah 570 (F B).

conditions and that an out and out sale was not intended. The appellants' counsel has further drawn our attention to an agreement which has been executed by Zulfiqar Ali Khan and Amir Ali Khan on 28th Chet, Sambat 1964, in favour of Rahmat Ullah and Murad Bakhsh, for the sale of this very house and Rs. 125 had been received as earnest money. It is argued that this agreement embodies the real contract between the parties and that the deed of 17th September 1908, was subsequently executed in the form of a mortgage merely to ward off pre-emptors. It must however be borne in mind that this agreement was executed about 18 months before the transfer in question, and there is nothing to indicate that the mortgage-deed was executed in pursuance of this agreement. We find from the agreement of 28th Chet, Sambat 1964 that it was contemplated that a sale-deed would be executed within two weeks. This was admittedly not done, and it appears that the original owners soon discovered that the property was much more valuable than they had thought it to be at the time and therefore the proposed sale was superseded by a contract of mortgage. The oral evidence led by the defendants on this point is worthless and has been rightly rejected by the learned trial Judge. I hold therefore that the transaction of 17th September 1908 was a mortgage effected by the predecessors in interest of defendants 1 and 2 in favour of defendants 3 and 4. It has not been denied before us that the original mortgagors had assigned their rights in the equity of redemption to the father of the plaintiff by a registered deed dated 22nd July 1911. The plaintiff has therefore a right to redeem the mortgage. (After discussing the evidence regarding the other questions in the case, His Lordship concluded as follows.) The result therefore is that the decree of the lower Court must be maintained and both appeals dismissed with costs.

Monroe, J.—I agree.

K.S. *Appeals dismissed.*

A. I. R. 1933 Lahore 157

DALIP SINGH, J.

***(Sardar Sahib) Mehtab Singh*—Plaintiff—Petitioner.**

v.

***Secy. of State for India*—Defendant—Opposite Party.**

Civil Revn. No. 207 of 1932, Decided on 7th November 1932, against order of Senior Sub-Judge, Shahpur, D/- 18-2-32.

(a) Evidence Act (1872), S. 123—Unpublished documents—Scope of.

Where letters addressed by the head of a department reach the addressee, those letters would not be unpublished documents within the meaning of S. 123, Evidence Act, and the Court would be entitled to see the documents and decide under S. 162 as to their admissibility. [P 158 C 1]

(b) Evidence Act (1872), S. 123—Privilege should not be claimed unnecessarily.

Privilege in matters under S. 123 should not be claimed unnecessarily: *A. I. R.* 1931 *P. C.* 264, *Ref.* [P 158 C 1]

(c) Government of India Act, S. 107—Interlocutory order—Remedy by way of appeal open—No interference under S. 107.

The High Court should not interfere under S. 107 in any interlocutory order when the plaintiff has a remedy by way of appeal. [P 158 C 1]

(d) Appeal—Appellate Court has power to remand case if irreparable injury is done to party contrary to law.

An appellate Court can consider the merits of an interlocutory order and remand the case for redecision if irreparable injury is done to the party contrary to law: *A. I. R.* 1931 *P. C.* 254, *Rel. on.* [P 158 C 1]

S. L. Puri—for Petitioner.

C. H. Carden Noad—for Opposite Party.

Judgment.—The plaintiff in this case brought a suit against the Secretary of State and demanded inspection of certain documents in the office of the Superintending Engineer. These documents were divided into three heads in the schedule of documents with the inspection application: (a) consists of despatch and receipt registers of headquarters and camp, of letters and correspondence and demi official letters between the Executive Engineer, Shahpur, and Superintending Engineer and vice versa for the year 1929-30, the stamp register of the Superintendent Engineer's Office and receipt and despatch registers of letters from contractors in the same year. The learned counsel was unable to tell me how these registers were going to help his case and did not press the application here; (b) consists of letters and copies of letters official and demi-official between the Superintending Engineer and the Executive Engineer, Shahpur, and vice versa, concerning earthwork done by the plaintiff near Khushab for the year 1929-30. The Court disallowed inspection under a certificate from the Superintending Engineer under S. 123, Evidence Act. The plaintiff wishes me to revise this order under S. 107, Government of India Act. To my mind it is doubtful whether S. 107 applies to this kind of order, but, assuming it does, I do not see how the plaintiff can be helped in the matter. The learned counsel has cited *A. I. R.* 1931 *P. C.* 254, which is an authoritative pronouncement on the law relating to this question in England. But the merits of this application can be considered by the appellate Court, if necessary, and that very authority would show that the appellate Court would have power in a suitable case to remand the case for redecision if any irreparable injury had been done to the plaintiff contrary to the law. I further find that there was an application to inspect similar documents in the Executive Engineer's office and as far as I can see on the record the Executive Engineer has not claimed privilege for these documents. Therefore the plaintiff will be able to attain what he wants so far as these documents are concerned; (c) consists of reports received by the Superintending Engineer from the Executive Engineer regarding damage done to the earthwork in dispute by the floods of July and August 1929. Similar considerations apply to these reports.

The learned counsel further wished me to interfere with an order passed on the privilege claimed by the Executive Engineer. This is not in the grounds of revision before me. I find that the Executive Engineer has claimed privilege only for certain letters addressed to the plaintiff. It is not clear whether these letters reached the plaintiff or not; if they did, then they would not be unpublished documents within the meaning of S. 123, Evidence Act, and the Court would be entitled to see the documents and decide under S. 162 as to their admissibility. It seems to me that what really has happened in this case is that the plaintiff wanted to make a fishing enquiry among the documents that he wished to inspect. At the same time I would point out that the letters to the plaintiff, if duly received by him, would not come within the purview of S. 123. As pointed out by their Lordships of the Privy Council, privilege in these matters should not be claimed unnecessarily; but all this does not mean that I should interfere now under S. 107 in any interlocutory order when the plaintiff has a remedy by way of appeal. I therefore dismiss the petition. In the circumstances I make no order as to costs.

K.S. *Petition dismissed.*

A. I. R. 1933 Lahore 158

HARRISON AND ADDISON, JJ.

Ghulam Ali and *another*—Appellants.

v.

Inayat Ali and *others*—Respondents.

First Appeal No, 2246 of 1926, Decided on 20th October 1932, from decree of Sub-Judge, First Class, Sargodha, D/- 29th June 1926.

(a) Custom (Punjab) — Alienation— Bhatti Rajputs (Nangiana) of Shahpur District have unrestricted powers—Riwajiam.

By the custom as described in the riwajiam of the Shahpur District, Bhatti Rajputs (Nangiana) belong to the class of "Miscellaneous Musalmans" and have unrestricted powers of alienation. [P 158 C 2]

(b) Riwajiam—Entry regarding custom—Onus of disproving it is on him who denies such custom.

The onus of disproving a custom described in a riwajiam is on him who denies such custom. [P 159 C 1]

Nanak Chand and *Nanwa Mal*—for Appellants.

Mohsin Shah and *Tufail Muhammad*—for Respondents.

Judgment. — Inayat Ali, a Bhatti Rajput (Nangiana) of the Shahpur District, transferred the whole of his land to Allah Din and Chanan Din, whom he alleged to be his sons. Mutation was duly effected and the plaintiffs reversioners of Inayat Ali, brought the present suit, in the first place, for a declaration that these two men Allah Din and Chanan Din were not the sons of Inayat Ali; and, in the second place, for a further declaration that the alienation in their favour was null and void. The issues framed are: (1) Are Allah Din and Chanan Din sons of Karam, a Dhoba of Sahna, District Gujrat, and not of Inayat Ali, defendant? (2) Are the powers of Nangiana (Bhatti Rajputs) regarding alienation unrestricted? Issue 1 was decided in favour of the plaintiffs; the second against them, the finding being that Nangianas being Bhatti Rajputs belonged to the classification "Miscellaneous Musalman tribes," and as such, have unrestricted powers of alienation. From the decision on issue 2 the reversioners have appealed and the only question to be decided is whether the defendants have discharged the onus which was laid upon them or not. The riwaj-i-am of the Shanpur District, which has been followed, lays it down quite clearly in Answer 12:

> "A proprietor having no son or son's son, can without the consent of the agnate heirs, make a gift of immovable property, ancestral or acquired, divided or not, to a person not related to him."

This is very defenite and very comprehensive, and this being the entry in the riwajiam it lay upon the plaintiffs to disprove it. This they have wholly failed to do. They have adduced some oral evidence of witnesses who are unable to give any instance against the custom as described in the riwaj-i-am with the exception of one gift. This the Court has rejected, as neither mutation or judgment connected therewith had been produced. The Court therefore has rightly decided that the defendants have successfully established the right of all "Miscellaneous Musalmans" to make such an alienation and the introduction to the riwaj-i-am shows that these Nangianas are included in the comprehensive description "Miscellaneous Musanmans." The appeal must therefore fail and is dismissed with costs.

K.S. *Appeal dismissed.*

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* A. I. R. 1933 Lahore 159

HARRISON AND DALIP SINGH, JJ.

Emperor

v.

Kalu and *others*—Respondents.

Criminal Appeal No. 823 of 1932, Decided on 10th November 1932, from order of Sess. Judge, Karnal, D/- 29th April 1932.

*** (a) Criminal P. C. (1898), S. 54 (7)—Knowledge by policeman effecting arrest and actual existence of warrant are necessary.**

For an arrest under S. 54 (7) two things are necessary; (1) knowledge by the policeman who effects or attempts to effect the arrest; and (2) at the time the police takes action there must be in existence as a fact, as opposed to any belief which may be entertained by any person, a warrant which has been issued under the Extradition Act : *A. I. R. 1925 Cal. 278, Appr.* [P 160 C 2]

(b) Precedents—Obiter Dictum—Value.

The portion of a judgment although obiter has great value if the reasoning is cogent and convincing. [P 160 C 2]

(c) Evidence Act (1872), S. 114, Illus. (e)—Official acts — Presumption — Criminal P. C. (1898), S. 54 (7).

It may be presumed that official acts are regularly performed had a warrant once signed and issued remains actually in existence until such time it is known to have been destroyed. [P 161 C 1]

(d) Penal Code (1860), Ss. 225, 332 and 149—Unlawful assembly — Common object not to commit grievous hurt—Grievous hurt caused but by whom caused not known—Conviction must be under S. 332 and not under S. 225.

Sections 225 and 332 are to be read with S. 149 where the common object of an unlawful assembly is not to commit grievous hurt but only to release a person from arrest and grievous hurt is caused, but it is not known by whom it is caused, conviction of all must be only under S. 332 and not under S. 225. [P 162 C 1]

C. H. Carden Noad—for the Crown.

Vishnu Datta and *Makhan Lal*—for Respondents.

Harrison, J.—Twenty-six men of the village Pegan were sent up by the police before the S. 30 Magistrate under various sections: twenty-five of them under Ss. 225, 233 and 392/149 and one man Kundan under Ss. 224 and 392, I. P. C. Two were acquitted by the Magistrate, namely, Mewa and Shankar. They are both very young and were found not to have taken any part in the rioting. The remaining twenty-four were convicted: Kundan under Ss. 224 and 392, I. P. C.; the remaining twenty-three under Ss. 225 and 333/149. In addition Kalu was convicted under S. 392, I. P. C. They all appealed and, while accepting all the appeals and acquitting all the appellants, the Sessions Judge has expressed his opinion as to whom he would have convicted had he taken a different view on a somewhat technical point of law. This is whether the attempt made by the police to effect the arrests of Kalu and Kundan is covered by S. 54 (7), Criminal P. C. The Crown has presented an appeal against all these acquittals and it is urged, not only that the Sessions Judge has taken an erroneous view as to the applicability and meaning of S. 54 (7), but also that in addition to eleven men of whom the Sessions Judge was prepared to uphold the convictions, the remaining thirteen convicted by the Magistrate should now be found guilty.

The facts are briefly that, some-time about May 1931, the Agent to the Governor-General, Punjab States, sent two warrants to the District Magistrate, Karnal, requring him to effect the arrest of two men, Kalu and Kundan of the Jhind State who were believed to be in the Karnal district. This was duly endorsed and sent down to thana Rajaund and made over by the Sub-Inspector of that thana to Head-Constable Qamar Abbas for service. He went to the village where these two men were said to be, failed to effect their arrest, and endorsed the warrants accordingly. No more is known of the subsequent history of these warrants but, in the ordinary course of official business, they should have been sent on to the Superintendent of Police and by him forwarded, in due course, to the District Magistrate, after he had or had not ordered a further attempt to be made to arrest the absconders. We do know the negative fact that they did not reach the District Magistrate or the Agent to the Governor-General, for on 23rd December 1931, the District Magistrate issued a robkar, Ex. P. P. together with two fresh warrants, which had been received from the Agent, pointing out that the previous warrants had been lost and more care must be taken over the fresh ones. We also know that on 1st September 1931 the Assistant Superintendent of Police deputed Qamar Abbas, Head Constable, the same man who had failed to effect the arrest on the first occasion, to make another effort. Qamar Abbas took a party to the village where it arrived about sunset or 7 o'clock on 1st September 1931. Enquiries were made and eventually the party was divided into two: one remaining in the village and the other going out to try and find the two wanted men. They were both found together. Kundan was actually arrested and Kalu ran away. On their way back to the village the party was met by a large number of villagers. Kundan called upon them for assistance and they rescued him in spite of the police putting up a stout resistance during which a rifle was discharged, which did no harm as the barrel was pushed up by Kundan. The police were seriously injured, one man Sikandar Khan, more especially, sustaining an injury to the knee which is incurable, and the three others, Sher Khan, Dhani Ram and Duni Chand, being less seriously damaged. There were two rifles amongst the police party and one of these was eventually recovered from Kalu who was convicted by the trial Magistrate under S. 392, I. P. C. In effecting his escape Kundan took with him the handcuffs, which were still attached to his wrists and at the other end of these handcuffs, the belt of the constable who was detailed to guard him. He also was convicted under S. 392, by the trial Magistrate.

The contention put forward by the accused throughout is that the police were not authorized to attempt to arrest Kundan and Kalu, in virtue of S. 54, sub-S. (7), Criminal P. C. This deals with arrests on the strength of warrants issued from Native States. It lays down that any police officer may without warrant arrest any person regarding whom he has received credible information or entertains reasonable suspicion that he has committed any act outside British India which would be an offence in British India and

> "for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881; or otherwise, liable to be apprehended or detained in custody in British India."

This postulates the existence of two factors; the first, knowledge by the policeman who effects or attempts to effect the arrest and, secondly, the existence of the state of things defined in the second part of the subsection. It can be and has been argued that these words define the nature of the offence which must have been committed, that is to say it must be an extraditable offence. This contention has been disposed of in *Subodha Chandra Roy* v. *Emperor* (1), at pp. 331 and 337 (of 52 *Cal.*), and the conclusion there arrived at is, for the very sound reasons given in the judgment, that the possibility of the words referring to and defining the offence is negatived by the surrounding circumstances and the wording of of the section as a whole and that they can only mean that at the time the police take action there must be in existence as a fact, as opposed to any belief which may be entertained by any person, a warrant which has been issued under the Extradition Act. The consequence of accepting the alternative interpretation is very clearly explained in that judgment. In the event of a non-cognizable extraditable offence being supposed to have been committed in a State the police in British India would be clothed with greater authority than the police in the State in which the offence has been committed provided the Code of Criminal Procedure is in force there. It might have been urged that the portion of the judgment of Mukerji, J., which deals with this point is obiter in the sense that both Judges agreed that the condition laid down in the earlier part of the subsection had not been complied with, and so the case was concluded. Obiter or not, the reasoning is cogent and convincing and I am very clearly of opinion that there can be no sort of doubt that the latter part of the subsection lays down that there must be a warrant in existence which has been issued under the Extradition Act. It is not necessary that it should be present or available to any particular officer: It must merely exist. In this case the all important question is whether it can or should be inferred that the original warrants were in existence on 1st September 1931. The Sessions Judge looked at the matter in this way:

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1. A I R 1925 Cal 278=85 I C 913=26 Cr L J 625=52 Cal 319.

"The fact that he (the head constable) was asked to "arrest orally by the Superintendent of Police or Assistant Superintendent of Police shows that the warrants did not exist at the time."

This comes perilously near to presuming that the official act performed by the Superintendent of Police was a deliberate breach of the law and that having ascertained that the warrants were not in existence he deliberately passed an illegal order. The fact that this order, which incidently was not a request, was given by the Assistant Superintendent of Police, appears to me to point to a precisely contrary conclusion. It may be presumed that official acts are regularly perfomed and the fact that the Assistant Superintendent of Police orally, and presumably when in camp at the thana Rajaund, ordered the Head Constable to effect the arrest, points to the belief of the officer in question that the warrants were in existence and had not been destroyed.

Knowing as we do that a search was later made and that the warrants could not be discovered, it is certain that at the time the later search was made they had been lost in the sense of being mislaid and, I think, it is safe to infer that they had probably been lost in this sense by 1st September 1931. This however is a very different thing from saying that they ceased to exist. Under S. 114, Evidence Act, a presumption may be made that a thing or state of things, which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence. The presumption under this section appears to me to be that a warrant once signed and issued remains actually in existence until such time as we know it has been destroyed. It is, of course, possible that, having been mislaid, these pieces of paper were destroyed by mistake together with other papers which were no longer required and that a mistake was made by some subordinate in so destroying it. I can however see no reason for presuming that such a mistake had been made by 1st September 1931.

The fact again that the Assistant Superintendent of Police ordered the Head-Constable to try again points to a decision having been come to that futher efforts should be made to effect the arrest in accordance with the warrants and that they would not be sent back to the Agent with a note that it was impossible to execute them.

Taking everything into account I am of opinion that, on the facts as shown, the presumption is that the warrants were still in existence. The action of the police was therefore legal and it remains to be seen what findings should be given on the facts. The learned Sessions Judge does not consider that the evidence of the villagers, without any support from the evidence of the police constables present at the time and injured in the fight, is sufficient to warrant the conviction of any individual. The learned Government Advocate challenges this opinion and would have us hold that the evidence of these villagers, who know all the accused and say generally that they were present and took part in the fight, is by itself sufficient. It is impossible to lay down any sort of general rule, for each case must stand or fail on its own particular evidence. I am not prepared to hold that the standared fixed in this case by the learned Sessions Judge is unreasonable. It may therefore be taken that, in addition to the general evidence of the villagers, some supporting evidence is required from the police constables, and further as laid down by the Sessions Judge, that identification by one police constable is not sufficient and identification by two or more is required. Taking this standard and going through the record we find that the Sessions Judge has rightly reached his conclusion in all cases where he says that the conviction should be upheld, but that although the learned Government Advocate would have us accept all his conclusions as correct or supported by the record there are four men regarding whom he has stated that they are only identified by one constable whereas they are identified by two. These are Man Singh, Jhandoo, Singh Ram and Kehr Singh. There is a particular circumstance in the case of Singh Ram that the chief witness in the village, Udmi, states definitely that he was not present and took no part. It is true that a possible explanation of this portion of Udmi's statement is furnished by another witness from the village but, even so, I think it hardly safe to rely on the evidence against him; I would give him the benefit of the doubt and acquit him.

The other three Man Singh, Jhandoo and Kher Singh must be added to the eleven whom the Sessions Judge thinks should be convicted in the event of the legal point being decided against them subject to anything which counsel for the defence has been able to show and all that counsel, apart from the legal point, has urged is that there is considerable difference in the statements of the various witnesses as to the distance which separated Kalu and Kundan when the arresting party first came up to them, and that none of the witnesses specify any particular act or ascribe the striking of any particular blow to any one of the accused. This is natural enough in a general melee and I attach no importance to it. I find on the evidence of the three villagers, combined with that of the constables, that it is clearly established that Kundan called upon his fellow villagers to assist and release him, that thereupon Kalu, Lekha, Man Singh, Nathu, Baru, Mam Chand. Bishna, Sondoo, Laikhu, Daya Ram and Kehri came to his assistance, inflicted serious injuries upon all four constables and those members of the village who sided with them and released Kundan, and that the rifle of one of the constables was taken away by Kalu and later produced by him. It is not clear whether Kalu seized this rifle from the policeman or merely carried it off after the police constable had dropped it. The offences committed by these various persons are as follows: Kundan under S. 224. The Government Advocate has not pressed for the restoration of the conviction under S. 392, I. P. C., regarding the handcuffs and the belt attached thereto. He is sentenced to 1½ years' rigorous imprisonment. The other thirteen accused are convicted under Ss. 225 and 332. It is true that grievous hurt was caused to Sikandar Khan but this was not the common object of the lawful assembly and, as it is not known who inflicted this grievous hurt, the convictions of all must be under S. 332. These two Ss. 225 and 332, are to be read with S. 149, and in addition, Kalu is convicted under S. 379, Penal Code, of theft of the rifle.

While agreeing with the Magistrate that it is necessary to impose fines in this case in addition to substantial sentences of imprisonment, I am of opinion that the chief reason for doing so is to find compensation for the greviously injured man Sikandar Khan and, in a very much lesser degree, for the other three policemen who were less seriously injured. A fine of Rs. 50 on each of the accused will achieve this result. This will give a total of Rs. 700 out of which Rs. 500 will, as awarded by the Magistrate, be paid to Sikandar Khan who has been very seriously injured. Sher Khan and Dhani Ram will receive Rs. 50 each and Duni Chand, who sustained very slight injuries, Rs. 25. This gives a total of Rs. 625. The whole of the money realized, provided it does not exceed Rs. 625, will be divided in these proportions. The sentences on the remaining fourteen will be as follows: Under S. 331/149, Penal Code, 1½ years' rigorous imprisonment and Rs 50 fine. Under S. 225/149, Penal Code, one year's rigorous imprisonment as passed by the trial Court; the sentences to run concurrently. In addition Kalu is sentenced to six months' rigorous imprisonment under S. 379, Penal Code. This sentence to run consecutively after the sentences under Ss. 225 and 332. In default of payment of fine each of the accused will undergo three months' further rigorous imprisonment. To this extent the appeal is accepted.

Dalip Singh, J.—I agree.

K.S. *Appeal partly accepted.*

A. I. R. 1933 Lahore 162

ABDUL QADIR, J.

Nuru and *another* — Convicts — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 592 of 1932, Decided on 3rd August 1932, against order of Sess. Judge, Karnal, D/- 13th April 1932.

Penal Code (1860), S. 332—Court unable to free its mind from possibility of accused having been roughly treated and beaten under orders from public servant—S. 332 does not apply.

The Naib Tahsildar went to a village of the accused and demanded payment of the land revenue from the accused. Upon the raising of an outcry by the accused his sons came out and beat the Naib Tahsildar. The reason furnished for the raising of the outcry by the accused was that he was beaten and that his beard was pulled by the chaprasis of the Tahsil under orders from the Naib Tahsildar. Though the reason assigned could not be said to be satisfactorily established yet there was more than a probability of the accused having been treated in a manner alleged by the accused.

Held: that the accused were entitled to the benefit of doubt in their favour that they tried to resist an illegal act on the part of the official concerned and that S. 332 was inapplicable to the case independently of the fact whether the procedure adopted by the Naib Tahsildar for realizing the land revenue was in accordance with law or not. [P 164 C 1]

Shamair Chand—for Petitioners.

Ram Lal—for the Crown.

Judgment.—Nuru and Ismail, sons of Nizam Khan, and Nizam Khan himself, were challaned under Ss. 307, 332 and 353, Penal Code, for having murderously assaulted the Naib Tahsildar of Karnal, when he was on a visit to Gharaunda and resisted him in the discharge of his official duties, on 3rd September 1931. The trial Court convicted them under S. 307 read with S. 34, Penal Code, and also under S. 332/34, Penal Code, and sentenced each of them to rigorous imprisonment for three years under each count, but ordered the sentences to run concurrently. On appeal Nizam Khan was acquitted and the conviction of Nuru and Ismail under S. 307, Penal Code, was altered to one under S. 323, Penal Code, but their convictions under S. 332, Penal Code, were maintained. The sentence of Nuru was reduced to two years' rigorous imprisonment under S. 332, and one year's rigorous imprisonment under S. 323, Penal Code, and that of Ismail to six months' rigorous imprisonment under each section. These sentences were ordered to run concurrently. The two convicts have filed a petition for revision through Mr. Shamair Chand, and their main contention is that S. 332, Penal Code, does not apply to the case. The facts briefly are that on the 2nd September the Naib Tahsildar went to the village Gharaunda to which the convicts belong. Certain defaulters, including Nizam Khan, against whom there were arrears of land revenue, were called by him for the next morning. Nizam Khan owed Rs. 0-12-6 and his son Ismail also owed the same sum, as arrears of revenue. The Naib Tahsildar asked Nizam Khan to pay and he said he could not do so. The Naib Tahsildar threatened him with legal process being taken against him and was abused by Nizam Khan. He asked two of his chaprasis to take Nizam Khan into custody and they did so. Thereupon Nizam Khan raised an outcry and his sons Nuru and Ismail rushed to the spot, Nuru armed with a lathi and Ismail having a shoe in his hand. Nuru struck the Naib Tahsildar with his stick. One of the blows fell on the head, another on the shoulder and a third on an office box, which left its mark on the box. Nuru was then caught hold of by the by-stander, and the Naib Tahsildar, who was bleeding, was taken into a room the door of which was closed in order to avoid any further mischief.

The version of Nizam Khan is that the Naib Tahsildar was displeased because the former had taken part in certain complaints against the Patwari and Kanungo, with whom the Naib Tahsildar was siding and that he was called in connexion with a mutation which had already been attested. He adds that after some talk about the said mutation, he was asked to pay up Rs. 0-12-6 which were due from him as arrears of revenue, but on his saying that he could not do so the Naib Tahsildar ordered him to be shoe-beaten and his beard was pulled. He therefore raised an outcry and a tumult followed. He does not know what happened then and alleges that his sons were not there. The presence of Nuru and Ismail at the spot is established beyond doubt by the prosecution evidence and in this respect the statement of Nizam Khan is obviously false. It cannot however be said, with the same certainty, that his version on the point of his raising an outcry and the reason for that outcry is incredible. The fact that he raised a cry is admitted by Munshi lambardar (P. W. 4) who says that the words used by him in his outcry are "mar gera, mar gera" which meant either "killed, killed," or "beaten, beaten." This is the testimony of a man, who has been treated as a reliable witness by the learned Sessions Judge as well as the trial Court. No reasonable explanation of the cry of Nizam Khan is furnished by the prosecution.

This seems to support the story that Nizam Khan was handled roughly under the orders of the Naib Tahsildar before he raised an outcry. The Naib Tahsildar and the Kanungo, in their evidence in Court have tried to suppress this fact. In fact they do not mention even the fact that Nizam was caught hold of and taken on one side under the orders of the Naib Tahsildar, which is deposed to by Munshi, P. W. 4. Though one can understand the suppression of this incident by the two officials, it takes away very much from the value of their evidence against the accused. The learned Sessions Judge, who has taken a correct view of the case, on the whole, and has differed in several respects from the conclusions arrived at by the trial Court, which according to the Sessions Judge, appeared to be impressed by the fact that it was the Naib Tahsildar who received injuries, has not been able to find that the allegations of Nizam Khan as to his beard having been pulled and his having been beaten are untrue. He says that these allegations are not established satis-

S. N. DAR, B.A. LL.B.,
Vakil High Court,

factorily. This is not a proper way of looking at this question. The possibility of this incident happening is admitted in the above observation. In fact I think that it is more than possible that it did happen. In these circumstances the accused would be entitled to the benefit of the doubt in their favour on this point, that is they tried to resist an illegal act on the part of the official concerned. The story of the prosecution as put forward before the trial Court was undoubtedly exaggerated but the trial Court wrongly accepted the whole of it as established. Half of the evidence, which was produced to support that story, was according to the findings of the learned Sessions Judge, biased or tainted.

The contention that S. 332, Penal Code, was not applicable to the case and that the Naib Tahsildar was not resisted in the discharge of any duty that he was performing according to law, was raised by the accused from the outset. It is significant that before the trial Court, the Public Prosecutor frankly conceded that S. 332 did not apply to the case; but a prosecuting Police Inspector, who was supposed to be assisting the Public Prosecutor, argued to the contrary and the trial Court adopted his opinion in preference to that put forward by the Public Prosecutor. A good deal of time has been spent on both sides before the two Courts below in discussing whether the Naib Tahsildar had acted according to the procedure laid down in the Punjab Land Revenue Act and in the Land Revenue Manual. It seems to me that the procedure laid down for realizing the arrears of land revenue by serving a writ of demand and by a formal arrest and detention of the defaulter under a warrant properly issued has not been followed. In view however of the opinion I have formed as to the possibility of Nizam Khan having been treated in a manner unauthorized by law by the chaprasis of the Tahsil under the orders of the Naib Tahsildar, it is not necessary to make any pronouncement on the question of the validity or invalidity of the procedure adopted by him, before the alleged incidents referred to above. No official can seek the shelter of S. 332 in a case of the kind described above. In my opinion therefore S. 332, Penal Code, has been wrongly imported into this case, just as S. 307, Penal Code, was originally imported. The convictions and sentences of the petitioners under S. 332, Penal Code, therefore must be set aside. There is no doubt that injuries were caused to the Naib Tahsildar. One of them was serious though not grievous, and there is thus a clear case under S. 323, Penal Code, against Nuru petitioner. Considering the nature of the injury caused, I do not see any reason to interfere with the sentence of one year's rigorous imprisonment awarded to him under S. 323, Penal Code, and his conviction and sentence under S. 323 are upheld.

As regards the case of Ismail, I think on the findings of the learned Sessions Judge it is doubtful whether he has committed any offence. Before the trial Court the three accused were challaned together and the assistance of S. 34, Penal Code, was invoked, because the theory of the prosecution was that they all three acted in concert in pursuance of the common intention. The trial Court's opinion was that Nizam Khan raised a cry without any reason and that it was a pre-arranged signal to bring his sons to the spot. The allegation against Nizam Khan was that though he did not take any part in the beating, he called out to his sons, when they arrived at the spot, to kill the Naib Tahsildar and to put an end to his demands of land revenue once for all. The learned Sessions Judge has disbelieved both these stories. It is for that reason that he has acquitted Nizam Khan and he is distinctly of opinion that the sons came on hearing the cry of their father and the fact that one had a lathi and the other had only a shoe with him shows that there was no premeditation for this assault. They came as they were when they heard the cry. On this hypothesis there can be no presumption of a common intention on the part of both, and it is admitted that Ismail did not take any part in the beating, nor had an opportunity of making use of the shoe which he was holding in his hand. S. 34, I. P. C., is not applicable in such circumstances and without the aid of S. 34, I. P. C., Ismail cannot be said to have committed an offence under S. 323, I. P. C. The revision is therefore accepted and he is acquitted and will be set at liberty forthwith.

P.N./R.K. *Order accordingly.*

A. I. R. 1933 Lahore 164

ADDISON, J.

Mt. Saidan and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 969 of 1932, Decided on 18th November 1932.

Penal Code (1860), S. 494/109—Abetment of bigamy.

Where a person marries a woman unaware of her prior secret marriage he is not guilty of abetting bigamy as he is not supposed to know of the woman's secret marriage. [P 165 C 1]

Muhammad Amin—for Petitioners.

Facts.—Mt. Saidan was originally married to Ghulam Nabi, brother of Mehdi, petitioner. He died and Mt. Saidan continued to live with her father-in-law. Karam Ali, the complainant, alleges that she occasionally visited his house on account of relationship which has not been specified, and during these contacts she fell in love with him and then performed a secret marriage to which no relative of hers was invited. After living there with him for only a few days she came away and committed bigamy by marrying Mehdi.

Grounds.—Taking the prosecution evidence at its face value the alleged marriage with the complianant was a hole in the corner affair; hence Mehdi and Khuda Bakshsh were not supposed to know of this marriage and they were not abetting an offence of bigamy. The evidence regarding Mt. Saidan having gone to the complainant's village at a distance of 11 kos and then performed a nikah with him for repudiating it after a fortnight or so is apparently a myth and the evidence in support of it is by no means disinterested. Although a register of mirriage ceremonies is maintained in the complainant's village, this marriage was not registered. Hence the conviction of Mt. Saidan also should be set aside It is recommended that the conviction be set aside and the fine remitted.

Order.—For reasons given by the learned Sessions Judge I set aside the convictions of Mt. Saidan, Khuda Bakhsh and Mehdi as well as the sentences of fine passed upon them. The fines, if paid, will be refunded.

K.S. *Convictions set aside.*

A. I. R. 1933 Lahore 165

HARRISON AND DALIP SINGH, JJ.

Muhammad Zaman—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 690 of 1932, Decided on 21st December 1932, from order of Sess. Judge, Attock, D/- 8th March 1932.

Penal Code (1860), S. 304 (1)—Sentence reduced from transportation to that already undergone.

Accused, on seeing the deceased having sexual intercourse with his (accused's) wife, killed him. He was convicted under S. 304-I and sentenced to transportation for life:

Held: that a man who acts under grave and sudden provocation of this nature cannot be put on the same terms as an actual murderer, that the sentence was far too severe and that it should be reduced to imprisonment already undergone. [P 165 C 1]

Sundar Das—for the Crown.

Dalip Singh, J.—On 18th October 1931 one Abdur Rehman left his village and was not seen again. On 21st October the first information was lodged about his disappearance and on the night of 23rd the Sub-Inspector arrived at the village. He came to know from one Sahib Khan that Abdur Rahman had last been seen going into the dhok of Muhammad Zaman appellant some four or five days previously. Inquiry was made from Muhammad Zaman and others present at the dhok and the wife of Muhammad Zaman. Mt. Musahib Bano, then stated that Abdur Rehman had been killed by her husband Mohammad Zaman, appellant, and two other persons Muhammad Khan and Rasula because Muhammad Zaman was enraged at discovering Abdur Rehman in the act of having sexual intercourse with her. Thereafter Muhammad Zaman led the investigating party to a field and pointed out and dug up a place from which the dead body of Abdur Rehman was recovered. The dead body was identified by the father of Abdur Rehman P. W. 8, Abbas. On the person of Muhammad Zaman, appellant, being examined by the doctor several scratches, which might possibly be caused by finger nails, were discovered on it. Muhammad Zaman was charged under S. 304-1, I. P. C., while Muhammad Khan and Rasula were charged under S. 302/149, I. P. C. Muhammad Khan and Rasula have been acquitted by the learned Sessions Judge, while Muhammad Zaman has been convicted under S. 304-1, I. P. C., for having caused the death of Abdur Rahman under grave and sudden provocation. The learned Sessions Judge with some hesitation, accepting the statement of Mt. Musahib Bano as to the discovery of the deceased having sexual intercourse with her by her husband, he has sentenced him to transportation for life.

After going through the record I see no reason to consider that the statement of Mt. Musahib Bano is false. It is true that she resiled from that statement at the trial and her statement before the committing Magistrate had to be transferred to the record under S. 288, Criminal P. C. That statement is corroborated by the discovery of the dead body at the pointing out of the appellant and by the medical evidence showing numerous scratches on his person for which he does not at all account. I would therefore uphold the conviction under S. 304-1, I. P. C. As regards the sentence however it is in my opinion, far too severe. A man who acts under grave and sudden provocation of this nature cannot be put on the same terms as an actual murderer. I would therefore reduce the sentence to the imprisonment already undergone.

Harrison, J.—I agree.

K.S. *Sentence reduced.*

A. I. R. 1933 Lahore 166

JAI LAL, J.

Daulat Ram—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 680 of 1932, Decided on 22nd July 1932, against order of Dist. Magistrate, Ferozepore, D/- 21st April 1932.

(a) Arms Act (1878), S. 19 (d)—Prosecution for transporting cartridges in contravention of Arms Act—Prosecution must prove that cartridges exceeded number allowed by license.

Where a person is prosecuted for transporting cartridges in contravention of the provisions of the Arms Act, the onus is on the prosecution to prove definitely that a number of cartridges in the actual possession of the accused on any particular date exceeded the number covered by his licence. [P 166 C 2]

(b) Criminal P. C. (1898), S. 436—Order of discharge—Reversal of—Perversity must be shown.

Before an order of discharge can be set aside it must be shown that it is perverse. [P 166 C 2]

M. L. Puri—for Petitioner.

Mohammad Monier—for the Crown.

Judgment.—The petitioner Daulat Ram was tried by a Magistrate of an offence under S. 19 (d), Arms Act, for transporting cartridges in contravention of the provisions of the Act. The Magistrate found that the petitioner had a license for possession of a number of the cartridges that he transported on each occasion and he further held that it had not been established that when he deposited those cartridges with his firm called Daulat Ram Vidya Parkash that firm had more cartridges in its possession than it was permitted to possess by virtue of its licence. He therefore held that it must be presumed that Daulat Ram transported the cartridges for his own use and under his own personal license and it is obvious that this should be the ordinary presumption. The Magistrate therefore discharged the accused. The District Magistrate on a petition for revision having been presented to him has directed further inquiry in the matter. It may be mentioned that the whole of the evidence produced by the prosecution had been recorded by the Magistrate and it is conceded that no further evidence remains to be so recorded.

The District Magistrate has ordered further inqury holding that the accused had not established that he had used up the cartridges that he transported on each occasion before he transported the next lot of the cartridges. It has been found that he transported cartridges on three occasions and on each occasion the number of cartridges transported by him was covered by his license but it is suggested that he could not have used all of them before he transported the next lot. It was however for the prosecution to prove definitely that the number of cartridges in his actual possession on any particular date exceeded the number covered by his license. They merely invited the Court to draw an inference that he had in fact a larger number of cartridges in his possession on the conjectural ground that he could not have used those that he transported on the previous occasion in the meantime. Then the learned District Magistrate considers that in any case if the petitioner coult not be convicted of being in possession of a larger number of cartridges he could be convicted for having abetted that transportation of cartridges by the firm of which he was the owner. It is however conceded that the firm could keep the cartridges on behalf of the petitioner. It is not therefore proved by any evidence that the petitioner was acting on behalf of the firm and not in his personal capacity. Moreover this was not the case for the prosecution originally as the Magistrate's judgment shows. It has been laid down by this Court that before an order of discharge can be set aside it must be shown that it is perverse. No perversity has been pointed out in the present case. In my opinion there was no ground for ordering further inquiry and accepting this petition I set aside the order of the District Magistrate.

K.S. *Petition allowed.*

A. I. R. 1933 Lahore 167

JAI LAL, J.

Kala Singh and *another* — Convicts—Appellants.

v.

Emperor—Oppcsite Party.

Criminal Appeal No. 1146 of 1932, Decided on 4th January 1933, from order of Sess. Judge, Lahore, D/- 8th September 1932.

(a) Evidence Act (1872), Ss. 25 and 30—Scope.

Statement of an accused made at the police station against the co-accused is inadmissible and cannot be used as evidence as against the co-accused. [P 167 C 2]

(b) Penal Code (1860), S. 102—Extent of right of private defence—Held on facts right is not exceeded.

It is difficult to judge the extent of the right of private defence by any hard and fast rule and the accused cannot be expected to regulate the extent of force to be used by him by any precise standard. In deciding whether the right of private defence has been exceeded, regard must be had to the comparative physical strength of the accused and the deceased respectively and also to the antecedents of the deceased and his conduct at the time of the occurrence. [P 168 C 1]

Deceased, as trong man of a dangerous character and brutal nature and reputed to have killed a man previously, had some quarrel with the accused but was taken back to his house. Later he returned armed with a stick, entered the shop of the accused who was comparatively a weakling, threw him on the ground, pressed his neck and bit on his hand and chest. When the accused was extricated he took up a light hatchet and struck three blows on the head of the deceased as a result of which he died after three days:

Held : that the whole conduct of the deceased was aggressive and that even though no grievous hurt was actually caused to the accused, the circumstances were sufficient to raise a strong apprehension in his mind that he was under a reasonable apprehension of receiving such injury at the hand of his assailant unless he succeeded in disabling him and that he did not exceed the right of private defence. [P 167 C 2; P 168 C 1]

(c) Penal Code (1860), S. 102—Mere presence of persons does not take away the right of private defence.

The mere presence of persons who do not take steps to protect the accused from the assault of the deceased does not take away the right of private defence of the accused. [P 168 C 1]

M. L. Puri—for Appellants.

Abdul Majid—for the Crown.

Judgment. — Two brothers, Kala Singh and Bishan Das, have been convicted by the Sessions Judge of Lahore of culpable homicide not amounting to murder and under S. 304, part 2, I. P. C., have been sentenced to five years' and three years' rigorous imprisonment respectively. They are alleged to have caused injuries to one Din on 12th June 1932, as a result of which he died on 15th July 1932. The learned Sessions Judge has found that the deceased Din was a person of strong physique, dangerous character and brutal nature who was reputed to have killed a man previously. On the 12th June he was heavily drunk and had some quarrel with Kala Singh, but was taken back to his house. Later he returned armed with a stick and entered the shop of Kala Singh who is described to be comparatively a weakling, threw him on the ground pressed his neck and bit on his hand and his chest. During the struggle his stick fell on the ground and Bishan Das who was present on the occasion struck him with a stick. The learned Sessions Judge is of opinion that if Bishan Das had not caused more injuries to Din he would have been entitled to acquittal. When however Kala Singh was extricated he took up a hatchet which was lying in the shop and struck three blows on the head of the deceased. At that time Bishan Das also is alleged to have struck him with his stick, causing a fracture of the skull. It is on these facts that the learned Sessions Judge has convicted the appellants. The learned counsel for the Crown frankly concedes that there is no evidence to support the conviction of Bishan Das, the learned Sessions Judge having disbelieved two witnesses for the prosecution who directly implicated Bishan Das. The other two witnesses for the prosecution, Kartar Singh and Kundan Singh, do not implicate him at all. The statement of Kala Singh made at the police station has been used by the Sessions Judge as evidence against Bishan Das. Counsel frankly concedes that this statement is inadmissible.

With regard to Kala Singh, the facts found by the Sessions Judge are amply supported by the evidence on the record. The question however is whether on those facts Kala Singh can be held to have exceeded the right of private defence which he undoubtedly had; in deciding this fact regard must be had to the comparative physical strength of the accused and the deceased respectively and also to the antecedents of the deceased and his conduct on this occasion. It is true that the deceased did not cause any grievous hurt to Kala Singh before he was struck by him with the hatchet, which, it may be mentioned, was not a particularly heavy weapon. It is deposed to by the witnesses to be a comparatively light weapon. Though no grievous hurt was actually caused to Kala Singh the circumstances in my opinion were sufficient to raise a strong apprehension in his mind that he was under a reasonable apprehension of receiving such injury at the hand of his assailant unless he succeeded in disabling him. The whole conduct of the deceased was aggressive from the beginning and though two lambardars were present on the occasion, that is, Kundan Singh and Kartar Singh, they did not take any step to protect the appellant from the assault by the deceased. Their presence therefore on the occasion does not take away the right of private defence which the appellant had. In such cases it is difficult to judge the extent of the right of private defence by any hard and fast rule and the accused cannot as has already been remarked by this Court in some decided cases, be expected to regulate the extent of force to be used by him by any precise standard. I consider that both the appellants in that case are entitled to an acquittal, and accepting their appeal I set aside their convictions and acquit them. I direct that Bishan Das be discharged from his bail bond and Kala Singh be released from jail forthwith.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 168

TAPP, J.

Ghulam Ali and *others* — Judgment-debtors—Appellants.

v.

Sultan Muhammad Khan and *others*—Decrees-holders—Respondents.

Misc. Second Appeal No. 864 of 1932, Decided on 12th December 1932, from order of Addl. Dist. Judge, Amritsar, D/- 26th February 1932.

Civil P. C. (1908), S. 47—Waste committed by judgment-debtor (tenant) after decree for possession is not question relating to execution, discharge or satisfaction—*Obiter.*

Obitor.—Waste committed by a tenant after decree cannot relate to execution, discharge or satisfaction of the decree when such decree is for recovery of rent and delivery of possession. Hence compensation for such waste cannot be claimed in the execution of the decree for rent and possession but only by a separate suit: *A. I. R.* 1923 *Bom.* 391 and *A.I.R.* 1925 *Bom.* 385, *Ref.* [P 168 C 2]

Mohammad Monier—for Appellants.

L. C. Mehra—for Respondents.

Judgment.—The decree-holders respondents obtained a decree against the appellants judgment-debtors on 9th Februuary 1928, for the recovery of rent and possession of certain demised premises which when leased in 1921 comprised 2 kothas, a latrine and a wall. The tenants (judgment-debtors) were further permitted by the lease to construct at their own cost, a gate and any other buildings they might need. On vacation the materials of the latter could be removed but the gate must be allowed to remain and no compensation would be payable therefor. After dismissal of the appeal against the decree the decree-holders took out execution proceedings on 22nd January 1929 and on 2nd May 1929, made an application alleging that the judgment-debtors had demolished the two kothris, the latrine and the wall and removed the gate. They claimed to recover in execution proceedings the sum of Rs. 704 as compensation. The judgment-debtors traversed the contention of the decree-holders alleging that the kothris and the latrine had fallen owing to the weather and denied having removed the gate and wall. The Court of first instance dismissed the application holding that the decree-holders had failed to prove demolition of the kothris and latrine and removal of the gate and wall by the judgment-debtors. On appeal however the learned Additional District Judge awarded the decree-holders Rs. 352 as compensation and the judgment-debtors have come up in second appeal.

It is urged that the question arising between the parties is not one relating to the execution, discharge or satisfaction of the decree (S. 47, Civil P. C.). The matter is not free from doubt as in *Hari Sridhar* v. *Sakharam* (1) and *Lannubhai* v. *Mohan Lal Gokul Das* (2) it has been held that waste committed by a judgment-debtor (tenant) after a decree for possession is a question relating to the execution, discharge or satisfaction of the decree. I do not quite see how waste by a tenant which is alleged to have been committed, after decree can relate to execution, discharge or satisfaction of the decree when such decree is for recovery of rent and delivery of possession. A tenant is no doubt liable for voluntary and permissive waste and damages for such can be claimed in an action for recovery. If proved and allowed they can be realized in the course of execution but how it compensation for waste committed after decree to be realized? I am inclined to think that a separate suit should be brought for recovery of damages on account of waste committed after decree. It is unnecessary however to definitely decide the point as on other grounds I do not think the order of the lower appel-

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1. A I R 1923 Bom 391=73 I C 443.
2. A I R 1925 Bom 385=89 I C 205.

late Court can be maintained. The learned Subordinate Judge came to a clear finding on the facts that the judgment-debtors were not liable while the learned Additional District Judge has found to the contrary on the ground that the judgment-debtors were bound to restore the property in the condition in which they obtained it. This view ignores the pleadings of the judgment-debtors and no reasons have been given for doing so. It also overlooks the processes of time and weather which the learned Subordinate Judge found were responsible for the falling of the kothris and latrine. He also observed that there was ample evidence to show that the gate and wall were in existence when the judgment-debtors vacated the premises. I therefore accept the appeal and setting aside the order of the lower appellate Court, restore that of the Court of first instance with costs throughout. The cross-objections of the decree-holders claiming the full amount of Rupees 704-15-0 consequently fail and are dismissed with costs.

K.S. *Appeal accepted.*

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* A. I. R. 1933 Lahore 169

BHIDE, J.

Kanshi Ram and *another*—Defendants—Petitioners.

v.

Diwan Chand and *another*—Plaintiff and Defendants—Opposite Parties.

Civil Revn. Petn. No. 436 of 1932, (formerly Civil Appeal No. 2143 of 1931), Decided on 11th July 1932, against order of Sub-Judge, First Class, Amritsar, D/- 17th November 1931.

(a) Civil P. C. (1908), O. 43, R. 1 (w) and O. 47, R. 7—Appeal under O. 43, R. 1 (w) lies only on grounds specified in O. 47, R. 7.

An appeal from an order granting an application for review can only be made on grounds specified in O. 47, R. 7. But the appeal may be treated as petition for revision, if it is alleged that there was no ground for review falling within the scope of O. 47, R. 1 and that the order granting review was passed on the same material on which the original order was based: *A. I. R.* 1927 *Lah.* 435 and *A. I. R.* 1928 *Lah.* 608, *Foll.* [P 170 C 1, 2]

(b) Civil P. C. (1908), O. 47, R. 1—Mistake on point of law is not good ground for review.

The fact, that the Court has made some mistake on point of law is not a good ground for review: *A. I. R.* 1922 *P. C.* 112, *Rel. on.* [P 170 C 2]

(c) Civil P. C. (1908), S. 115 and O. 47, R. 1—Order under O. 47 held to be without jurisdiction.

An order granting review under O. 47 was based on the grounds: (1) that the plaintiff though a resident of Lahore, was carrying on his business at Calcutta; (2) that the plaintiff had been prosecuting his suit vigilantly before the default; (3) that the suit was of a large value and that application for restoration was made on the same day on which the suit was dismissed; (4) that counsel was present when the suit was first called:

Held: that the order was entirely without jurisdiction. [P 170 C 2]

(d) Civil P. C. (1908), S. 151 and O. 47, R. 1—Court having jurisdiction to set aside order under O. 47—Recourse to S. 151 is not permissible.

No recourse to inherent powers under S. 151 is permissible in a case where the Court has jurisdiction to set aside a previous order, under O. 47, as O. 47, R. 1 specifically provides for the cases in which review is allowed by law: *A. I. R.* 1927 *Cal.* 158, *Rel. on.* [P 171 C 1]

(e) Civil P. C. (1908), S. 115—Order setting aside ex parte decree is open to revision.

An order setting aside an ex parte decree is not merely an interlocutory order in the suit and is open to revision: *A. I. R.* 1926 *Lah.* 379, *Rel. on.* [P 171 C 1]

(f) Civil P. C. (1908). O. 47, R. 1—Order under O. 47 passed without jurisdiction—Fact that inquiry is reopened is not sufficient ground for non-interference.

The mere fact that an inquiry has been reopened is not a sufficient ground for non-interference in revision when the order under O. 47 setting aside an ex parte decree is without jurisdiction. [P 171 C 1]

(g) Civil P. C (1908), O. 9, R. 9—Suit dismissed in default should only be restored on showing sufficient cause for default.

The law contemplates that when a suit is dismissed in default, it should be restored only when sufficient cause for the default is made out and not otherwise: *A. I. R.* 1920 *Mad.* 640 (*F. B.*); *A. I. R.* 1927 *Lah.* 622 and *A. I. R.* 1930 *Nag.* 48, *Foll.* [P 171 C 1]

Mehr Chand Mahajan — for Petitioners.

Ram Lala Anand II—for Opposite Parties.

Judgment.—This is an appeal from an order of the Subordinate Judge, First Class, Amritsar, granting an application for review. The material facts are briefly as follows: The plaintiff had instituted a declaratory suit claiming an equitable mortgage in his favour of a certain property which was sought to be attached and sold in execution of a decree. The case was set down for hearing on 16th February 1931 and was taken up at 11-45 a. m. Lala Duni Chand, counsel for the plaintiff, appeared and stated that one of the witnesses who was expected to come from Lahore, had not arrived and requested that the case may be taken up at 1 p. m. The case was accordingly taken up at 1 p. m. but neither the plaintiff nor his counsel was present. The Court waited for about an hour and then dismissed the suit under O. 9, R. 8, Civil P. C. An application for restoration of the suit was presented on the same day, alleging that the plaintiff, who lived at Calcutta, was ill and could not appear in person and that his counsel was engaged in another Court when the case was called. Some evidence was produced but was disbelieved by the learned Subordinate Judge and the application was rejected on merits. An application for review was then presented. The learned Subordinate Judge has set out in his order the grounds on which the review was sought, but he has based his decision especially on two grounds which were as follows: that (1) the plaintiff though a resident of Lahore is carrying on business at Calcutta and that (2) the suit out of which the application was pending from 4th February 1929 and before its dismissal on 16th February 1931, the plaintiff had been conducting the suit in a vigilant manner. In view of the facts stated above the learned Subordinate Judge granted the application for review and restored the suit to his file. From this decision the present appeal has been preferred.

A preliminary objection was raised that the appeal is not competent. It is urged that an appeal from an order granting an application for review can only be made on grounds specified in O. 47, R. 7, Civil P. C., and that the present appeal does not come within the purview of that rule. This contention appears to be sound. There is no doubt that an appeal would not lie except on the grounds specified in O. 47, R. 7, Civil P. C.: see *Sikandar Khan* v. *Baland Khan* (1) and *Bakhtan* v. *Gulam Hasan* (2). In the present instance no such ground is alleged. The learned counsel for the appellant admitted that the only ground which he could possbly urge was contravention of R. 4, O. 47. But in the present case the application for review was not based on the discovery of any new matter which was not within the knowledge of the applicant and hence no question of any contravention of that rule seems to arise. I accordingly hold that the appeal is not competent.

The learned counsel for the appellant next requested that the appeal may be treated as a petition for revision as the order passed by the learned Subordinate Judge was in any case wholly without jurisdiction. His contention was that there was no ground for review falling within the scope of O. 47, R. 1, and that the order of review was passed on the same material on which the original order was based. This contention seems to be well-founded. The order of the learned Subordinate Judge dismissing the application for restoration of the suit was passed on merits after taking evidence and after considering all the facts. He found that the plaintiffs' plea of illness was false and that no good cause had been shown for the non-appearance of counsel. The grounds of review to which the learned Subordinate Judge referred in his subsequent order were: (1) that the plaintiff, though a resident of Lahore, was carrying on his business at Calcutta; (2) that the plaintiff had been prosecuting his suit vigilantly before the default; (3) that the suit was of a large value and that application for restoration was made on the same day on which the suit was dismissed; (4) that counsel was present when the suit was first called.

Now, there was nothing new in any of these grounds. The fact that the plaintiff was residing at Calcutta was mentioned in the original application also. The character of the suit and its value and the manner in which it was conducted were facts patent on the record. But these had no material bearing on the question before the Court as the main point for consideration was whether any sufficient cause had been shown for the non-appearance of the plaintiff or his counsel and the Court had definitely found that none had been shown. There was thus no error apparent on the face of the record, nor any discovery of any new matter justifying a review. The learned Subordinate Judge has referred to certain rulings which were cited before him. It was pointed out that the rulings were not relevant for the purpose of review. The learned Subordinate Judge has conceded this but has remarked that the principles therein should be followed. The remark is not very intelligible. But if the learned Subordinate Judge meant to say that he had made some mistake on a point of law, even that would not be a good ground for review: see *Chhajju Ram* v. *Neki* (3). It seems to me clear therefore that the learned Subordinate Judge had no jurisdiction to set aside his previous order, under O. 47, Civil P. C. The learned Subordinate Judge did not purport to act under S. 151, Civil

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1. A I R 1927 Lah 435=107 I C 596=8 Lah 617.
2. A I R 1928 Lah 608=112 I C 518=9 Lah 293.
3. A I R 1922 P C 112=72 I C 566=49 I A 144=3 Lah 127 (P C).

P. C., and no recourse to inherent powers under S. 151, would have been permissible in the circumstances as O. 47, R. 1 specifically provides for the cases in which review is allowed by law: see *A. I. R.* 1927 *Cal.* 158.

The learned counsel for the respondent contended that no revision lies as the order passed by the learned Subordinate Judge on review was of an interlocutory nature and that in any case it should not be interfered with in revision, as the inquiry has been reopened and will serve the ends of justice. As regards the first point, it has been held in *Piroj Shah* v. *Qarib Shah* (4) that an order setting aside an ex parte decree is not merely an interlocutory order in the suit and is open to revision. The present case seems to me to stand on a similar footing. I accordingly overrule the objection. As to the next point the mere fact that an inquiry is re-opened cannot be considered to be a sufficient ground for non-interference in revision when the order passed by the learned Subordinate Judge was without jurisdiction. The order was I think clearly illegal. The law contemplates that when a suit is dismissed in default, it should be restored only when sufficient cause for the default is made out and not otherwise: *Neelaveni* v. *Marappa Reddy Gari Narayana Reddy* (5); cf *A. I. R.* 1927 *Lah.* 622; *A. I. R.* 1930 *Nag.* 48. In *A. I. R.* 1925 *Mad.* 209 where no sufficient cause for the restoration had been made out and the suit was restored as a matter of grace, the order was set aside though the suit had been subsequently tried and decreed. (His Lordship then remarking that the suit was of a collusive nature, discussed the evidence on the point and proceeded as follows): Treating the appeal as a petition for revision under S. 115, Civil P. C., I set aside the order passed by the learned Subordinate Judge on review and restore his previous order dismissing the suit and the application for the restoration of the same. The petitioner will have his costs in this Court.

R.M./R.K. *Order accordingly.*

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4. A I R 1926 Lah 379=95 I C 124=7 Lah 161.
5. A I R 1920 Mad 640=53 I C 847=43 Mad 94 (F B).

A. I. R. 1933 Lahore 171

TAPP, J.

Ghulam Mohammad and *another*—Defendants—Appellants.

v.

Sansar Chand and *another*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1073 of 1932, Decided on 10th December 1932, from decree of Dist. Judge, Jullundur.

(a) Civil P. C. (1908), S. 11—Auction-purchaser is party claiming under judgment-debtor within meaning of the section—Civil P. C. (1908), S. 47.

An auction-purchaser at a Court sale acquires only the right, title and interest of the judgment-debtor and while he is not a representative of the judgment-debtor for the purpose of S. 47, Civil P. C., he is a party claiming under the judgment-debtor for the purposes of S. 11. [P 172 C 1]

(b) Transfer of Property Act (1882), S. 52—Lis Pendens—Applicability.

The doctrine of lis pendens applies both to involuntary and voluntary sales. [P 172 C 1]

Saunders—for Appellants.

Achhru Ram, *Faqir Chand*, *Ajit Prasada* and *Mehr Chand Sud*—for Respondents.

Judgment.—This appeal arises out of a suit brought by the two sons of Hukam Chand defendant 2 for a declaration that four shops were not liable to attachment and sale in execution of a decree obtained by the defendant Shadi Ram against the said Hukam Chand. The suit was brought on 25th June 1929, against only the decree-holder Shadi Ram, and the judgment-debtor Hukam Chand. The property was then under attachment and before an injunction prohibiting its sale could become effective, the four shops were sold, two of them being bought by Karam Chand, one by Ghulam Mohammad and the fourth by Amritsaria Ram all three of whom were subsequently impleaded as defendants. The plaintiffs alleged that the debt in respect of which this property had been sold was tainted by immorality and that this question had been decided in their favour in a former suit betwween them and the judgment-creditor and the judgment-debtor. The question therefore was res judicata and the decision in the former suit was binding also on the auction-purchasers Karam Chand, Ghulam Mohammad and Amritsaria Ram. This contention has prevailed before both the Courts below and the sole quuestion which arises for determination now is whether the question as to the debt in respect of which the property in suit has been sold being tainted with immorality is res judicata and the decision is binding on the three auction-purchasers two of whom are appellants before me.

Now it is well settled that an auction-purchaser at a Court sale acquires only the right, title and interest of the judgment-debtors and while he is not a representative of the judgment-debtor for the purpose of S. 47, Civil P. C., he is a party claiming under the judgment-debtor for the purpose of S. 11 of the said Code. The authorities cited by the learned counsel for the appellants all relate to the status of an auction-purchaser in connexion with any question arising under S. 47 and not under S. 11, Civil P. C. Further as urged by the learned counsel for the plaintiffs-respondents on the application of the doctrine of lis pendens which applies both to involuntary and voluntary sales, the sale of the four shops in question during the pendency of the present suit was invalid. For the above reasons I hold that the suit of the plaintiffs has been rightly decreed and the appeal of the auction-purchaser rightly dismissed. Accordingly the present appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 172

TAPP, J.

Attar Singh and *another*—Plaintiffs—Appellants.

v.

Nuru and *others*— Defendants—Respondents.

Second Appeal No. 1571 of 1931, Decided on 7th December 1932, from decree of Dist. Judge, Hoshiarpur, D/- 17th June 1931.

(a) Provincial Small Cause Courts Act (1887), Arts. 35 (ii) and 15—Suit regarding right to enter on another's land and to cut grass.

A suit regarding a right to enter on another's land and to cut grass is one falling under Art. 35 (ii), Sch. 2 and is excluded from the cognizance of Small Cause Court. [P 172 C 2]

(b) Civil P. C. (1908), S. 100—Second appeal—Finding of fact.

A finding of fact arrived at by both the lower Courts is not open to question in second appeal. [P 172 C 2]

Faqir Chand—for Appellants.

Nawal Kishore and *Ajit Prasad*—for Respondents.

Judgment. — Attar Singh and Mt. Indar Devi, residents of Tika Barohi, Tappa Chauki Maniar in the Hamirpur, tahsil of the Kangra district, and ala maliks in the Tika, brought the present suit against ten defendants, adna maliks in the same Tika, for recovery of Rs. 150 on account of damages alleged to have been caused by the defendants unlawfully cutting grass from khasras Nos. 1180, 1181, 1687 and 1688, which were alleged to have been in the possession of the plaintiffs. The defendants while admitting that khasra Nos. 1180 and 1181 belonged to the plaintiffs and were in their possession, denied having cut any grass therefrom. In regard to other 2 khasra numbers they admitted having cut grass from these field but pleaded that they were entitled to do so because they were shamilat and the defendants were equally members of the proprietary body as the plaintiffs. The trial Court dismissed the suit holding that the plaintiffs had failed to prove that the defendants had cut any grass from Nos. 1180 and 1181 and as regards the remaining two numbers upheld the plea taken by the defendants. These findings were affirmed on appeal by the learned District Judge and a second appeal has been preferred to this Court by the plaintiffs. A preliminary objection was taken on behalf of the respondents that a second appeal was barred under S. 102, Civil P. C., as the suit was one of a nature cognizable by a Court of Small Causes, the amount of value of the subject-matter of the suit being less than Rs. 500. The reply to this objection is that the suit is one falling under Act 35 (ii), Sch. 2, Provincial Small Cause Courts Act, and by virtue of S. 15 of the said Act, such suits are excluded from the cognizance of Courts of Small Causes. Art. 35 (ii) relates to a suit for an act which is, or save for the provisions of Chap. 4, Penal Code, would be an offence punishable under Chap. 17 of the said Code. In my opinion the suit is of a nature referred to in the above article, as the act of the defendants in cutting the grass from the khasra numbers would amount to criminal trespass. I therefore overrule the objection.

The finding of both Courts as to the defendants not having cut any grass from khasra Nos. 1180 and 1181 which were admitted as belonging to the plaintiffs and in their possession is one of fact and this matter is therefore concluded and not open to question in second appeal. As regards the cutting of grass from khasra Nos. 1687 and 1688 it was found by both the Courts below that defendants as adna maliks in the village were entitled to cut grass from these two fields which were recorded as shamilat tika hasaf rasad malguzari maqbuza malikan. The only document which shows these two fields to have been in the possession of the plaintiffs is the khasra girdawari for rabi Sambat 1985 or A. D. 1928. As observed by the learned District Judge no presumption of truth attaches to the entry in this document and it seems to me on a full consideration of all the facts that the plaintiffs had no exclusive right to the grass in these two fields and under the wajibularz the defendants as adna maliks have as much right to cut this grass or graze their cattle in these fields as the plaintiffs. For the above reasons I find that the conclusion arrived at by the learned District Judge is correct and I dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 173

ADDISON AND AGHA HAIDAR, JJ.

K. L. Khanna and *Co.* and *others*—Plaintiffs—Appellants.

v.

Model Town Society, Ltd.—Defendants—Respondents.

First Appeal No. 785 of 1930, Decided on 14th December 1932, from decree of Sub-Judge, First Class, Lahore, D/- 27th January 1930.

(a) Arbitration Act (1899), as amended by Punjab Amendment Act (1911), S. 2—Applicability to Lahore.

Though the Arbitration Act has been made applicable to Lahore it does not apply to a case where it is not specially mentioned in the agreement that it is to apply, this being necessary under S. 2, Punjab Act (1 of 1911). [P 173 C 2]

(b) Civil P. C. (1908), Sch. 2, Paras. 20 and 8—Award given after time fixed in agreement—No evidence as to extension of time—Award is not valid.

Under Sch. 2, Civil P. C., the time fixed in the agreement for giving the award can be orally extended. Where an award is given after the period fixed in the agreement and there is no evidence that the time has been extended, the award is not binding on the parties as the arbitrator has no power to give it after the date fixed. [P 173 C 2; P 174 C 1]

M. L. Puri and *S. L. Puri*—for Appellants.

Badri Das and *Achhru Ram*—for Respondents.

Addison, J.—The plaintiffs sued the Model Town Society Ltd., Lahore, for Rs. 5,889-12-0 on account of bricks supplied together with interest amounting Rs. 1,649-3-3, total Rs. 7,538-15-3. The defendant pleaded that the matter in dispute had been referred to the arbitration of Raja Narindra Nath who had given his award and that the suit could not therefore proceed. The Court below has sustained this preliminary plea of the defendant and dismissed the suit with costs. Against this decision the plaintiffs have appealed. There is no doubt that there was a valid reference to arbitration dated 22nd April 1928, but there was a condition in that agreement to the effect that if the arbitrator did not give his award within two months, that is, up to 22nd June 1928, the agreement would become ineffective and any award given after that date would not be binding upon the parties. The award is printed at p. 37. There is a note at the end of it that it was pronounced on the evening of 26th June but only signed on 2nd July 1928. The question of dates is not important as both are after the time fixed in the agreement. The question for decision is, Was the time extended? Though the Arbitration Act has been made applicable to Lahore it does not apply in the present case as it was not specially mentioned in the agreement that it was to appy, this being necessary under S. 2, Punjab Act (1 of 1911). Sch. 2, Civil P. C., is therefore applicable. It was not disputed that in these circumstances the time fixed could be orally extended. The plaintiff went into the witness box and emphatically denied that he had at any time consented to the time being extended. On the other hand the arbitrator Raja Narindra Nath has given evidence which is not very definite. He stated that he told the plaintiffs to go to Court but they replied that they would rather be cursed by him than blessed by the Court. He then gave his award a couple of days after this talk. He was not sure however whether the conversation with the plaintiffs took place within or after the expiry of the two months' time given by the agreement.

The words "couple of days" are indefinite and do not mean two days. They mean a short period of time. It was sought to argue that, as the award was pronounced on 26th June, the conversation between the arbitrator and the plaintiffs must have taken place on 24th June, that is after the time fixed in the agreement and expired. This however does not follow from the words used and the matter is made clear in the subsequent sentence when the arbitrator stated that he could not say whether the conversation took place before or after the expiry of the two months' period fixed by the agreement. If it took place prior to the expiry of the time fixed it cannot be held that an extension was given. If however the arbitrator had been able to say that the conversation took place after the expiry of the time fixed in the agreement then the words would certainly amount to an extension of time. As however the arbitrator is not sure whether the conversation was before or after and the plaintiffs have denied the allegation in toto there is no certain evidence that the conversation took place after the time fixed in the agreement. This being so it must be held that the arbitrator had no power to give the award as it was made after the time fixed in the agreement. I would accordingly accept the appeal, set aside the order of the Court below and remand the suit under O. 41, R. 23, Civil P. C., for disposal in accordance with law. Costs up to date will abide the event.

Agha Haidar, J.—I agree.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 174

BHIDE, J.

Badri Das—Plaintiff—Appellant.

v.

Besu and *others*—Defendants—Respondents.

Second Appeal No. 1640 of 1931, Decided on 21st November 1932, from decree of Dist. Judge, Hoshiarpore, D/- 9-5-31.

(a) Transfer of Property Act (1882), S. 58 (c) — Mortgage by conditional sale—Mortgagee cannot give up condition as to sale and sue for amount.

The essential characteristic of a mortgage by way of conditional sale is that on breach of the condition of re-payment within the stipulated period the contract exhausts itself and the transaction is closed and becomes one of absolute sale to be enforced by foreclosure; and hence it is not open to the mortgagee to give up the condition as to sale and treat the mortgage as an ordinary mortgage: *A. I. R.* 1926 *All.* 493, *Rel. on.* [P 175 C 1]

(b) Transfer of Property Act (1882), S. 68 (d)—Mortgage by conditional sale—Mortgagor is not bound to put mortgagee in possession — On failure to give possession mortgagee cannot sue for mortgage money.

In a mortgage by conditional sale, in the absence of a specific agreement to that effect, it is not the duty of the mortgagor to put the mortgagee in possession of the property after the expiry of the stipulated period and the mortgagee is not entitled to sue for the mortgage-money for the failure of the mortgagor to do so. [P 175 C 1]

(c) Limitation Act (1908), S. 19—Acknowledgment—Mortgage by conditional sale—Failure of mortgagee to take possession after expiry of stipulated period — Unregistered acknowledgment as to payment of interest and outstanding amount by mortgagor — Effect—Contract Act (1872), S. 62.

According to the terms of a deed of mortgage executed on 10th July 1911, money was payable within five years and, if it was not so paid, the mortgagee was entitled to take possession as owner of the house. The mortgagee however did not take possession of the house and on 9th March 1927 the mortgagor made an acknowledgment in plaintiff's bahi to the effect that interest on the mortgage-debt had been paid up to date and that a sum of Rs. 950 was due under the registered mortgage-deed:

Held: that the mortgagee was not entitled to recover the mortgage-debt by sale of the property on the strength of the acknowledgment, that the acknowledgment did not amount to a novation of contract and that being unregistered, could not by itself create a fresh charge on the property.

Held further: that the remedy of the mortgagee to sue for money, even if he had, was barred by time. [P 175 C 1]

(d) Transfer of Property Act (1882), S. 58 (c)—Suit for possession does not lie without foreclosure proceedings under Bengal Regulation (17 of 1806).

Where the mortgagee in a mortgage by conditional sale, has not taken foreclosure proceedings under the Bengal Regulation 17 of 1806, no suit for possession can lie. [P 175 C 2]

Mehr Chand Mahajan—for Appellant.

Fakir Chand—for Respondents.

Judgment.—This second appeal arises out of a suit for recovery of Rs. 1,900 by the sale of a house, which was alleged to have been mortgaged in plaintiff's favour by the deed dated 10th July 1911. According to the terms of the deed the mortgage money was payable within five years and, if it was not so paid, the mortgagee was entitled to take possession as owner of the house. The mortgagee however did not take possession of the house. On 9th March 1917, the mortgagor made an acknowledgment in plaintiff's bahi to the effect that the interest on the mortgage-debt had been paid uptodate and that a sum of Rs. 950 was due under the registered mortgage-deed. On 21st February 1929, the mortgagee instituted the suit for recovery of Rupees 1,900. The defendant resisted the suit on the ground that the mortgagee was only entitled to claim possession of the mortgaged property according to the terms of the mortgage-deed and the present suit for recovery of Rupees 1,900 by sale of the house was not maintainable. This plea has been upheld by the Courts below and the suit has been dismissed. Plaintiff has preferred the second appeal. The learned counsel for the appellant has urged that it was open to the mortgagee to give up his right to claim possession of the mortgaged property and to sue for recovery of the amount due to him by sale and that in any case he was entitled to do so on the basis of the acknowledgment made by the defendant on 9th March 1917, which has been referred to above.

It was suggested in the grounds of appeal that the mortgage-deed was only in the nature of a hypothecation bond, but on a perusal of the deed, there seems to be no doubt that the mortgage was in the form of a mortgage by way of conditional sale. The learned counsel's contention that it was open to the mortgagee to give up the condition as to sale and treat the mortgage as an ordinary mortgage is not supported by any authority. It was observed in *Sheo Ram Singh* v. *Babu Singh* (1) at p. 309 (of 48 *All.*), that the essential characteristic of a mortgage by way of conditional sale is that on breach of the condition of re-payment within the stipulated period the contract exhausts itself and the transaction is closed and becomes one of absolute sale to be onforced by forclosure. It was next suggested that it was the mortgagor's duty to put the mortgagee in possession of the property after five years and as he failed to do so, the mortgagee was entitled to sue for recovery of the mortgage-money on the principle of Cl. (d), S. 68, T. P. Act. But there seems to be nothing in the deed to show that it was the mortgagor's duty to put the mortgagee in possession. The mortgagee had admittedly made no such demand, and, in the circumstances, I do not think, the principle of Cl. (d), S. 68, T. P. Act, can have any applicability to the circumstances of this case.

The next contention of the learned counsel for the appellant was that, in view of the acknowledgment of the 9th March 1917, which was made after the default, i. e., after the expiry of the first five years within which redemption was permissible but was not effected, the mortgagee was entitled to recover the mortgage debt by sale of the property. But this contention also does not seem to be sound. The acknowledgment was merely to the effect that interest had been paid up and that Rs. 950 were still due on the basis of the registered deed of mortgage. Even if this acknowledgment was held to import a promise to to pay, it could at the most heve enabled the mortgagee to sue for a money decree. The acknowledgment was made in 1917, and the period of limitation even for a suit had expired long before the institution of the present suit. The learned counsel next urged that the acknowledgment should be looked upon as a novation of the contract and pointed out that there is no bar in S. 92, Evidence dence Act to the terms of the original contract being varied by the acknowledgment in writing. The wording of the acknowledgment, however, does not show any novation of the contract. All that it says is that Rs. 950 was due on the registered deed. The acknowledgment is not registered and by itself it could not create any fresh charge on the property. Lastly, the learned couunsel requested that if it was held that the mortgagee was only entitled to possession, the plaintiff may be permitted to amend the plaint and sue for possession. But the learned counsel had to admit that he had not taken the necessary foreclosure proceedings under Bengal Regulation 17 of 1806, which is in force in this province and subsequently no suit for possession can lie at present. The decision of the Courts below must therefore, be upheld. The appeal is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 175

BHIDE, J.

Kailash & Bros. — Defendants — Petitioners.

v.

Durga Prashad and *others*—Plaintiffs and Defendants—Opposite Parties.

Civil Revn. No. 150 of 1932, Decided on 14th July 1932, from order of Dist. Judge, Dehli, D/- 2nd March 1931.

Civil P. C. (1908), S. 115—Revision—Delay.

It is not the usual practice to interfere in revision after great delay unless reasonable explanation is given for the delay. That the client did not get proper advice in time is not a good excuse: 39 *I. C.* 570 and 8 *I. C.* 528, *Ref.* [P 175 C 2; P 176 C 1]

Arjan Das—for Petitioners.

Shamair Chand—for Opposite Parties.

Judgment.—This is a petition for revision of an order of the District Judge, Delhi, restoring a suit, which had been dismissed in default. The learned District Judge's order was passed on 2nd March 1931, and the present petition for revision was filed on 7th March 1932, i. e., after over a year. The learned counsel for the petitioner cannot give any reasonable explanation of this delay. All that he can say is that his client did not get proper advice in time. This cannot be accepted

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1. A I R 1926 All 498=94 I C 849=48 All 802.

as a good excuse. It is not the usual practice to interfere in revision after great delay: see *Jhaman Lal* v. *Manni Ram* (1) and *Manturna Kuari* v. *Bani Singh* (2) and I see no good reason to do so in the circumstances of the case. I dismiss the petition but leave the parties to bear their costs.

K.S. *Petition dismissed.*

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1. (1917) 39 I C 570.
2. (1910) 8 I C 528.

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* A. I. R. 1933 Lahore 176

ADDISON AND AGHA HAIDAR, JJ.

Devi Ditta Mal Kirpal Singh—Defendants—Appellants.

v.

Partap Singh Harnam Singh and *others*—Plaintiff and Defendants—Respondents.

First Appeal No. 45 of 1927, Decided on 19th December 1932, from decree of Sub-Judge, First Class, Lahore, D/- 1st October 1926.

*** (a) Negotiable Instruments Act (1881), S. 64— Construction—Non-presentation for payment on due date does not affect liability of acceptor.**

Section 64 is undoubtedly ambiguous and in order to get over the apparent contradiction between the section and the exception it is necessary that the section should be given its plain meaning and the exception to it must be read more or less as an independent rule of law and not as controlling the plain language of the section. Hence the non-presentation of hundis for payment on the due dates does not affect the liability of the maker, acceptor or drawee: 32 *Bom.* 247 and *A. I. R.* 1929 *Lah.* 240, *Ref.*; *A. I. R.* 1930 *All.* 648, *Foll.*; *A. I. R.* 1930 *Oudh* 191, *not Foll.* [P 177 C 1]

(b) Civil P. C. (1908), O. 17, R. 1—Defendant taking steps to summon necessary and important witnesses—Witnesses not appearing for no fault of defendant—Adjournment to be given for production of such witnesses.

Where in a suit on a hundi, the defendant who had to prove want of consideration summoned important and necessary witnesses to establish his case, but they did not appear owing to the death of one and non-service on others and the defendants request to give an adjournment was refused:

Held: that the defendant was not at fault and that adjournment should be allowed. [P 177 C 2]

M. C. Mahajan and *Hemraj Mahajan*—for Appellants.

Achhru Ram—for Respondents.

Addison, J.—The plaintiff firm Partap Singh-Harnam Singh sued Ratan Lal and the firm Devi Ditta Mal-Kirpal Singh on two connected causes of action. According to the plaint Ratan Lal, defendant, 1, executed three pro-notes for a consideration of Rs. 2,500 each on 16th May 1922, in favour of the plaintiff firm. After this, towards the end of May, it is alleged in the plaint, defendant 1, made over two hundis, dated 12th May 1922, for Rupees 2,500 each to the plaintiff firm in part payment of the debt owned by defendant 1 to the plaintiff firm. These hundis were accepted by Ram Narain uncle of Ratan Lal, defendant 1 who is a partner in the firm, defendant 2, the acceptance being dated 13th May 1922. Defendant 1 made certain cash payment towards the pro-notes and the amount sued for was Rs. 6,000 as against defendant 1 out of which sum a decree was asked to the extent of Rs. 5,830-4-0 against the firm defendant 2 on the basis of the hundis. Ratan Lal defendant 1 confessed judgment and then took no further part in the action. Harnam Singh of the plaintiff firm stated before issues that defendant 1 borrowed from him Rs. 7,500 on 16th May 1922. He made no allegation in the plaint or in this statement that the sum of Rs. 7,500 was already due by defendant 1 to his firm and both the plaint and the statement read as if there was a cash advance on 16th May 1922 and that defendant 1 gave him the two hundis drawn on defendant 2 and accepted on the 13th May by Ram Narain, a partner of that firm, after 16th May 1922. On the other hand the firm defendant 2 pleaded that the suit on the hundis should be dismissed as they were not presented for payment on due dates. On the merits it was said that the hundis were written and accepted without any consideration. That is, it was pleaded that no doubt was due from defendant 1 to plaintiff firm at the time the hundis were drawn on 12th May 1922, and accepted on 13th May 1922, while nothing was due by the firm defendant 2 to defendant 1 at the same time and that therefore there was no consideration for the hundis, Ram Narain having merely signed them to oblige his nephew. In replication the plaintiff firm for the first time clearly alleged that the pro-notes of 16th May, 1922 were executed in lieu of a previous debt due by defendant 1 to the plaintiff firm. It was added that the plaintiff firm had been demanding payment from defendant 1 and as a result of this demand the two hundis of 12th May 1922, were drawn by defendant 1 and accepted by the firm, defendant 2.

The trial Judge held that the hundis of 12th May were not presented for payment on the due dates but that this did not matter as presentation was not necessary to bind the acceptor, that is, the firm defendant 2. As to whether the hudis were executed without consideration he held that they were not and accordingly he decreed the claim to the extent of Rs. 5,585 with proportionate costs, of which sum the firm defendant 2 was liable to the extent of Rs. 5,437-8-0. It was further decreed that the principal debt of Rs. 5,100 would carry interest at 6 per cent per annum until realization. Against this decision the firm defendant 2 has preferred this appeal. It was not disputed before us that the hundis were not presented for payment on the due dates. There is however a long course of decisions to the effect that this does not affect the liability of the maker, acceptor or drawee. The first of these is *Ardeshir Sorabshah* v. *Khushal Das Gokul Das* (1) which has been followed in *Ghaniya Lal* v. *Karam Chand* (2) and *Benares Bank Ltd.* v. *Hormusji Rustomji* (3). The section of the Negotiable Instruments Act which is applicable is S. 64 and it is undoubtedly ambiguous. In the Allahabad decision it was stated that this section should be given its plain meaning and the exception to it should be read more or less as an independent rule of law and not as controlling the plain language of the section. It is necessary to do this in order to get over the apparent contradiction between the section and the exception. There is one authority of a Division Bench of the Court of the Judicial Commissioner of Oudh, which does not follow the other decisions referred to [*Oudh Commertial Bank Ltd.* v. *Gur Din*(4)]but I would hold that even though the hundis were not presented for payment on the due dates the firm, defendant 2, who accepted them, are liable thereunder.

It was admitted before us that the only other issue which is now in dispute is issue 5, namely, whether the hundis were executed without consideration. The burden of proof was on the firm defendant 2. Throughout it had summoned the witnesses it considered necessary to establish this issue. Obviously the principal evidence available is the books of the plaintiff firm and of Ratan Lal, defendant 1. These latter were with the Official Receiver as Ratan Lal had been adjudicated an insolvent. The case was transferred from Judge to Judge till finally it came to the Court of the Judge who decided it. On 12th March 1926 he fixed 24th August 1926, for the next hearing. The firm, defendant 2, put in its list of witnesses on 24th March 1926. The persons it wanted summoned were Harnar Singh of the plaintiff firm with his books, Ratan Lal, defendant 2, Ram Narain, one of its own partners, and the clerk to the Official Receiver with the books of Ratan Lal. The Court ordered the summonses upon Ratan Lal and the clerk to the Official Receiver to be sent to the Official Receiver. This was done and a reminder was sent to him on the intermediate date, i. e., 28th June 1926. The Official Receiver however did not serve the summonses upon Ratan Lal or his own clerk but returned both unserved on 28th August 1926, with the report that Ratan was ill and that some other date should be fixed for his evidence and that of his clerk. It was also reported that Harnam Singh of the plaintiff firm had died but the plaintiff firm knew well enough that its books were required along with some person to prove them. Ram Narain, the partner of the firm, defendant 2, who was also wanted, was present in Court. Harnam Singh could not come as he was dead though the plaintiff firm might well have seen that some one else was there; while Ratan Lal and the clerk to the Official Receiver had not been served and in the case of the two latter this was certainly not the fault of the firm, defendant 2. Besides, it was usless to examine any witness until evidence had been given as regards the accounts of the plaintiff firm and defendant 1 in each other's books, as an important question with regard to consideration is whether anything was due by defendant 1 to the plaintiff firm on or before 12th May 1922. In these circumstances the Judge was wrong in refusing to allow an adjournment to the firm, defendant 2 to get these witnesses examined.

I would therefore under O. 41, R. 25, Civil P. C., remand the case to the Court of the Senior Subordinate Judge, First Class, Lahore, for taking the evidence of Ratan Lal, Ram Narain and a member of the plaintiff firm and to give defendant 2 a further opportunity to get the books of Ratan Lal and of the plaintiff firm examined and proved. If defendant 2 has any other witnesses ready in Court he may also examine them, if he so desires, but no adjournment shall be given to produce others. The plaintiff firm will of course be allowed to rebut the evi-

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1. (1908) 32 Bom 247.
2. A I R 1929 Lah 240=115 I C 860=10 Lah 755.
3. A I R 1930 All 648=125 I C 449=52 All 696.
4. A I R 1920 Oudh 191=59 I C 604=23 O C 364.

dence produced by the firm, defendant 2. When evidence has been completed the Senior Subordinate Judge will report his opinion to this Court. The report should reach this Court by 31st March 1933, and this appeal should be posted for hearing in April 1933. We have directed the parties and their counsel to appear on 16th January 1933, in the Court of the Senior Subordinate Judge, Lahore, when a date will be fixed for evidence.

Agha Haidar, J.—I agree.

K.S. *Case remanded.*

A. I. R. 1933 Lahore 178

TAPP, J.

Guari Shankar and *another*—Plaintiffs—Appellants.

v.

Mangal and *others*—Defendants—Respondents.

Second Appeal No. 1382 of 1931, Decided on 14th November 1932, from decree of Dist. Judge, Ambala, D/- 9-7-31.

(a) Contract — Third party to contract can claim as beneficiary — Contract Act (1872), S. 2.

Where in a contract entered into between *A* and *B*, *B* undertakes to pay *C* a debt due to him by *A*, *C* has got an equitable claim against *B* and though not a party to the contract he can claim as a beneficiary under the contract and enforce it: *A. I. R.* 1932 *Lah.* 566, *Foll.* [P 179 C 1]

(b) Jurisdiction—Plea as to want of jurisdiction—Appeal.

Plea of want of jurisdiction, not taken in the trial Court, cannot be taken up in the appellate Court. [P 179 C 1]

Mehr Chand Mahajan—for Appellants.

Madan Gopal—for Respondents.

Judgment.—The plaintiffs-appellants who are money-lenders residing in Mullanpur-Gharibdas in the Kharar Tahsil of the Ambala District had dealings with one Dheru, a resident of the Mehlog State. Dheru died in 1913 and in 1925 his son Mangal admitted liability for these debts and struck a balance for Rs. 1,600 in favour of the plaintiffs. Mangal being unable to discharge this debt of Rs. 1,600 applied on 12th June 1926 to the State to acquire his land and pay off the debt of the plaintiffs. On the same date Kishan Chand and others defendants-respondents residents of the Mehlog State, applied for permission to purchase Mangal's land and use the consideration for discharging the debt due by Mangal to the plaintiffs-appellants. Permission was accorded by the Ruler of the State on the same day and mutation of Mangal's land in favour of Kishan Chand and others was effected on 18th June 1927. It was alleged that on 13th June 1926 Kishan Chand and others entered into an agreement with the plaintiffs-appellants to pay Rupees 1,600 in full discharge of Mangal's debt and on 6th August Kishan Chand paid Rs. 1,000 at Mullanpur-Gharibdas and promised to pay the balance after mutation of Mangal's land had been effected. This promise not having been kept the plaintiffs brought a suit against Mangal, Kishan Chand and other purchasers for recovery of Rs. 966 being the balance of Rs. 600 plus interest. Kishan Chand and the other defendants denied having entered into any agreement with the plaintiffs-appellants while admitting the payment of Rupees 1,000 in August 1926. Mangal did not appear and the suit proceeded ex parte against him. The trial Court dismissed the suit on the ground that as the plaintiffs-appellants had failed to establish the alleged agreement between them and Kishan Chand and the others, and as the plaintiffs were not parties to the contract between Mangal and the purchasers of his land, they could not enforce it. On appeal by the plaintiffs the learned District Judge held that the evidence regarding the alleged oral agreement of 13th June was unworthy of acceptance and that while the purchasers of Mangal's land had undoubtedly agreed to discharge the debt due by him to the plaintiffs-appellants this agreement could not be enforced in the present suit. The decree of the trial Court was therefore affirmed and the appeal dismissed.

Now, it is obvious that the suit against Mangal was wrongly dismissed even if the claim against Kishan Chand and the other purchasers could not be enforced. The original balance of Rs. 1,600 was struck by Mangal on 22nd April 1925. The present suit was brought on 11th June 1929, and as against Mangal would no doubt be barred by time. There is however the application of Mangal to the State authorities, dated 12th June 1926, in which he acknowledges his liability for this debt of Rs. 1,600. This acknowledgment undoubtedly has the effect of extending the period of limitation and consequently the suit as against Mangal is within time. The only other question which arises for consideration and which has been argued before me is whether the plaintiffs can claim as beneficiaries under the contract entered into between Mangal of the one part and Kishan Chand and the others of the other part to utilize the purchase money of Mangal's land towards the payment of the debt due to the plaintiffs. In my opinion they can, as they undoubtedly have an equitable claim against Kishan Chand and the other purchasers under the agreement in question. Courts in this country are Courts of both equity and law and where a party has an equitable claim such claim should, in my judgment, be enforced. The question has been dealt with at some length by a learned Judge of this Court in *Torabaz Khan* v. *Nanak Chand* reported as *A. I. R.* 1932 *Lah.* 566. The Division Bench held in the ruling cited that the principle that a person who is not a party to a contract could not take advantage of its provisions is inapplicable to India. The various authorities relied on by the learned counsel for the appellants have been set out and discussed in the ruling cited above and in the circumstances it is unnecessary for me to do so. The authorities cited by the learned counsel for the respondents have no bearing on the point under consideration. Finally it was urged on behalf of the respondents that the contract between Mangal and the purchasers of his land was entered into outside British India and a claim under it could not, be brought therefore in a British Indian Court. No plea was taken as to want of jurisdiction and I therefore see no force in this contention. For the above reasons I hold that there is an equity in favour of the plaintiffs-appellants and they can claim as beneficiaries under the contract entered into between Mangal and the purchasers of his land. I accordingly accept the appeal and grant the plaintiffs a decree for Rs. 600 and costs throughout in proportion against the defendants. I am not prepared to allow the claim on account of interest. The decree will be ex parte against Mangal.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 179

TEK CHAND, J.

Fakir Khan and *others*—Plaintiffs—Appellants.

v.

Ismail Khan and *others*—Defendants—Respondents.

Second Appeal No. 277 of 1928, Decided on 4th July 1932, against decree of Dist. Judge, Gurdaspur, D/- 15th October 1927.

(a) Punjab Redemption of Mortgages Act (1913), S. 12—Suit under S. 12 is not suit for redemption—O. 34, Civil P. C., is not applicable—Civil P. C. O. 34.

A suit under S. 12 is really one to get rid of the order passed by the Collector allowing, or refusing to allow, redemption, and is not in form or in substance a suit for redemption. The cause of action for such a suit is not the original contract but the order of the Collector which aggrieves the party suing, and therefore O. 34, Civil P. C., has no application to such a suit: *A. I. R.* 1925 *Lah.* 385, *Foll.* [P 181 C 2]

(b) Civil P. C. (1908), O. 22, R. 3 (2)—Suit for possession by co-mortgagees each having distinct share—Death of one during pendency of suit—His representative not brought on record in time—Suit abates only as regards deceased plaintiff's share.

Five co-mortgagees brought a suit in civil Court for possession of land on the ground that defendants had no right to redeem the land and the Collector had erroneously granted their application under the Redemption of Mortgages Act. All the five plaintiffs were shown in revenue record as co-mortgagees, each having a well defined and divisible share. One of the plaintiffs died after the institution of the suit and his representatives were not brought on record within time.

Held: that the suit abated *qua* deceased plaintiff's share only, but it could proceed in respect of the remaining shares held by the surviving plaintiffs: *A. I. R.* 1928 *Lah.* 572 (*F B*), *Foll.* [P 182 C 1]

(c) Punjab Redemption of Mortgages Act (1913), S. 10—Redemption suit—Mortgagee can put the party seeking redemption to proof of his title.

In litigation arising out of proceedings under (Punjab) Act 2 of 1913, as in a suit for redemption, a mortgagee can put the party, who seeks to redeem the mortgage, to proof of his title, unless of course such person is the original mortgagor whose title the mortgagee cannot deny on the principle that a grantee cannot deny his grantor's title. [P 182 C 1]

(d) Practice—New plea—Estoppel—Plea of estoppel cannot be raised for the first time in appeal.

A plea of estoppel cannot be raised for the first time in appeal where the question is not one purely of law to be decided on facts apparent on the record, but is one, which if raised at the proper time, would necessitate further investigation. [P 183 C 1]

(e) Evidence Act (1872), S. 115—Party raising plea of estoppel must be shown to have been misled to act to his detriment.

In order to sustain the plea of estoppel it must be proved that the defendants, relying on the declaration made by the plaintiffs, were misled to act to their detriment in such a manner as they would not otherwise have done. [P 182 C 2]

(f) Evidence Act (1872), S. 17—Admission—Entire statement must be considered together — Particular passages cannot be selected.

If a party wished to have a statement made by the opposite party treated as an admission, the whole statement must be taken into consideration. It is not open to him to split up the statement and pick out the portion which may be favourable to him and ignore the rest: *A. I. R.* 1930 *P. C.* 245, *Foll.* [P 183 C 1]

M. C. Mahajan—for Appellants.

Shamair Chand and *Muhammad Amin*—for Respondents.

Judgment.—The property in dispute is plot of agricultural land, 34 kanals 3 marlas in area, situate in Mauza Bastan in the Shakargarh Tahsil of the Gurdaspur District. The land originally belonged to one Malle Khan, Afghan, who owned 1/6th share in a khata of 100 ghumaons. On some date between 1865 and 1870, Malle Khan mortgaged with possession 34 kanals 3 marlas out of this khata to Buland Khan, son of Ashraf Khan, for Rs. 43. Mutation was duly effected in favour of the mortgagee and he has been continuously shown in the revenue papers as in possession up to the date of this litigation. The mortgagee Buland Khan, son of Ashraf Khan, has since died and the present plaintiffs-appellants are his descendants. On 10th September 1873 Malle Khan gifted his share in the aforesaid khata, including the equity of redemption in the land which he had mortgaged to Buland Khan, son of Ashraf Khan, to his sister's son Nazar Din. Mutation of gift was duly effected in the revenue papers and in the order dated 24th January 1874 sanctioning the mutation, it is stated that Jiwan Khan, collateral of Malle Khan, had consented to the gift. It may be stated that Jiwan Khan was an absentee from the village and had been living for some years in the Jammu State territory. After Malle Khan's death sometime in the eighties of the last century, Jiwan Khan's sons came to Mauza Bustan and attempted to get the possession of the property which he had gifted to Nazar Din. Thereupon, Nazar Din brought a suit against them for a declaration that the land had been gifted by Malle Khan to him, that Jiwan Khan had consented to the gift and that his sons had no right in it. This suit was decided on 27th July 1887, the gift being upheld and a decree passed in favour of Nazar Din.

In accordance with this decision Nazar Din should have been entered in the revenue papers as the mortgagor of the land in dispute which had been mortgaged by Malle Khan to Buland Khan, son of Ashraf Khan, but by some oversight the names of Jiwan Khan's sons were shown in the revenue papers from 1899 and 1910 as "absentee" mortgagors. In the course of the last Settlement, the Assistant Collector, by order dated 18th September 1910, directed the removal of the names of Jiwan Khan's sons from the revenue papers and Nazar Din's descendants were entered as the mortgagors and Buland Khan, son of Ashraf Khan, as the mortgagee. When Jiwan Khan's sons came to know of this order, they made an application for restoration of their names. The Assistant Collector, on what was an evidently incomplete inquiry, set aside the order of his predecessor dated 18th September 1910 and directed that the names of Nazar Din's descendants be removed and those of Jiwan Khan's descendants be restored as mortgagors of the land in dispute. It appears, that about the same time, Nazar Din's heirs, who had been entered in the revenue papers as mortgagors by order of the revenue officer dated 18th September 1910, filed an application before the Collector under (Punjab) Act 2 of 1913 for redemption of the land in dispute from the present plaintiffs who are the sons of Buland Khan. This application also was disposed of by the same Collector on 15th December 1915, who dismissed it on the ground that the mortgagors were the descendants of Jiwan Khan, absentee, and not Nazar Din's sons. No suit under S. 12 of Act 2 of 1913 was brought by Nazar Din's descendants within one year to contest the Collector's order.

The result of his litigation was that the mortgagee continued in possession until 1922, when the present defendants, who are the descendants of Jiwan Khan, the "absentee" collateral of Malle Khan, applied to the collateral under Act 2 of 1913 for redemption of the land. The Collector granted the application and on payment of the mortgage money, Rs. 43, put the defendants in possession. On 1st October 1923 the plaintiffs, five in number, brought a suit in the civil Court for possession of the land on the ground that the defendants, as the representatives of Jiwan Khan, had no right to redeem the land and that the Collector had erroneously granted their application under Act 2 of 1913. The suit was decreed by the trial Judge, and against this decree the defendants preferred an appeal to the District Judge. During the pendency of this appeal it was discovered that one of the plaintiffs, Ghazi Khan, had died two days after the institution of the suit in the trial Court, that the factum of his death had not been brought to the notice of the trial Judge, and that a decree had been passed in favour of the plaintiffs, including Ghazi Khan, deceased, in ignorance of the fact that he had died. The learned District Judge, Mr. Skemp, dismissed the defendants' appeal but added a declaration in his decree that "the decree of the trial Court was a nullity" by reason of one of the plaintiffs having died during the pendency of the suit and his representatives not having been brought on the record within the time prescribed by law for the purpose.

Against this order of the learned District Judge the plaintiffs preferred a petition for revision to this Court, which was disposed of by a Single Bench judgment reported as *Sikandar Khan* v. *Baland Khan* (1). It was held that the order of the learned District Judge dismissing the defendants' appeal and embodying in this decree for declaration aforesaid was erroneous, and the case was sent back to him for rehearing and redecision. Mr. Skemp having been succeeded by Mr. J. D. Anderson, the defendants' appeal was reheard by him. In a lengthy judgment the learned Judge has held that the death of Ghazi Khan during the pendency of the suit and the failure of the plaintiffs to bring his representatives on the record had resulted in a total abatement of the suit and that the decree of the trial Judge in favour of the plaintiffs was a nullity. On the merits the learned Judge has held that it was not necessary for him to decide whether the equity of redemption in the land in dispute vested in the defendants-respondants or in the descendants of Nazar Din, as he was of opinion that that was a matter for decision between the defendants and the descendants of Nazar Din and that the plaintiffs were bound to surrender the land to the persons, who were recorded as mortgagors in the revenue papers, on payment of the mortgage-money. The learned Judge has further held that the plaintiffs were estopped from denying the right of the present defendants to redeem the land, by reason of a certain admission which they had made before the Collector in the proceedings taken in 1915 on the application of Nazar Din's sons for redemption of the land under Act 2 of 1913. On these findings he accepted the defendants' appeal and dismissed the suit with costs.

The plaintiffs have come up in second appeal to this Court and have assailed the findings of the learned District Judge on all the three points mentioned above.

The first question for determination is whether the suit in the trial Court has been rightly held to have abated in its entirety by reason of the death of Ghazi Khan and the failure of the plaintiffs to have his representative substituted within 90 days. After hearing both counsel I have no doubt that the decision of the learned District Judge on this point is erroneous and cannot be substained. The learned Judge has treated the suit as if it were one for redemption to which all the co-mortgagees are necessary parties under O. 34, R. 1, Civil P. C. As one of the mortgagees, Ghazi Khan, had died and his heirs were not brought on the record, the learned Judge has held that the suit could not proceed, and had therefore abated in its entirety. It must be noted however that the present suit is not one for redemption by the mortgagor against the mortgagees. As stated already, it is a suit by the mortgagees instituted under S. 12, Redemption of Mortgages Act (Punjab) 2 of 1913, to get rid of the order of the Collector passed under S. 10 of the Act, directing redemption to take place on payment of Rs. 43 by the defendants to the plaintiffs. It is obvious that the provisions of O. 34 have no application to a suit of this kind. The nature and scope of such a suit have been considered at length by Moti Sagar, J., in *Ram Chand* v. *Kaura* (1a), and, on appeal from his decision by the Letters Patent Bench, in the judgment which is reported as *Kaura* v. *Ram Chand* (2). There it was held that a suit under S. 12 was really one to get rid of the order passed by the Collector allowing, or refusing to allow, redemption and is not in form or in substance a suit for redemption (p. 212 of 6 Lah.). As pointed out by Le Rossignol, J., who delivered the judgment of the Letters Patent Bench:

> "the suit referred to in S. 12 of the Act is a suit to set aside an order of the Collector. From the very wording of that section it is clear that the cause of action for such a suit is not the original contract but the order of the Collector which aggrieves the party suing. It is a suit to establish the erroneous nature of that order."

It will thus be seen that the very basis of the decision of the learned District Judge is wrong. It follows from what has been stated above that the rules which govern the impleading of parties to a suit for redemption do not apply to the suit before me. Here we find from the revenue entries that the five plaintiffs are shown as co-mortgagees, each holding a well-defined and divisible share. Each of them is "aggrieved" by the order of the Collector and under S. 12 possesses an individual right "to establish the erroneous

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1. A I R 1927 Lah 485=107 I C 596=8 Lah 617.

1 (a). A I R 1924 Lah 690=79 I C 885.

2. A I R 1925 Lah 385=88 I C 945=6 Lah 206.

nature of that order." I fail to see how, in such a case, the death of one of the plaintiffs, Ghazi Khan, and the absence of his heirs from the record can possibly result in the abatement of the suit as a whole. Ghazi Khan's share in the land in dispute is admittedly one-fourth and the suit was one for possession of the entire land by all the five co-mortgagees. In these circumstances it must be held under the authority of the Full Bench decision in *Sant Singh* v. *Gulab Singh* (3) that the suit abated *qua* Ghazi Khan's one-fourth share only, but that it could proceed in respect of the remaining 3/4th share held by the surviving plaintiffs. Thus the decree of the trial Judge was good in so far as it granted possession of three-forths of the land in dispute to plaintiffs 1, 3, 4 and 5, but it was a nullity in respect of the one-fourth share of Ghazi Khan. The decision of the learned District Judge on the merits also is vitiated by errors of law and cannot be sustained. He had held in the present suit it is not necessary to decide whether the defendants have a subsisting interest in the equity of redemption and that this is a matter between them and the descendants of Nazar Din, to be settled in a dispute between themselves. The learned Judge has observed that as the defendants are recorded in the revenue papers as the mortgagors therefore they have a right of redemption unless the mortgagees can show that they are prevented by limitation or other special cause from exercising their right. In my opinion this view is entirely erroneous. In litigation arising out of proceedings under (Punjab) Act 2 of 1913—as in a suit for redemption—a mortgagee can put the party, who seeks to redeem the mortgage, to proof of his title, unless of course such person is the original mortgagor whose title the mortgagee cannot deny on the principle that a grantee cannot deny his grantor's title. In the present case however as has been stated above, the defendants are not the original mortgagors, but they claim a derivative title from Malle Khan, who had created the mortgage in question in favour of the ancestors of the plaintiffs. The law applicable to such a case is thus enunciated by Ghose in his standard work on the Law of Mortgage, Vol. 1, Edn. 5, p. 278:

> "The mortgagee may also put any person claiming derivatively from the mortgagor to proof of his title. For he is not bound to give up the property to any person who may start up with the allegation that he has succeeded to the rights of the original mortgagor; on the contrary, it is his duty to admit no claim upon it, until assured of the title of the claimant."

The learned District Judge has cited no authority in support of his conclusion and Mr. Shamair Chand for the respondent has frankly admitted his inability to support it. It is conceded that the original mortgagor Malle Khan had gifted his property, including the equity of redemption in the land in dispute, to Nazar Din and in a suit between him and the ancestors of the defendants the gift was upheld. The defendants are bound by that decision and have therefore no subsisting interest in the equity of redemption and it has not been shown how they are entitled to possession of the land on payment of the mortgage-money. The mere fact that the revenue authorities had erroneously entered their names as mortgagors in the revenue papers, cannot confer any title on them, in face of the clear judicial decision in the litigation of 1887. The third ground on which the learned District Judge has dismissed the suit is that the present plaintiffs are estopped by reason of a certain admission made by them before the Collector in the course of the proceedings under Act 2 of 1913 which were started on the application of the descendants of Nazar Din in 1915. The alleged admission is contained in the written statement (**Ex.** D-1) which the present plaintiffs filed in those proceedings on 22nd July 1915, to the effect that the then applicants (the descendants of Nazar Din) had no right to redeem the land in the presence of the defendants, who were the heirs of the original mortgagor Malle Khan, but who, too, had lost their rights to redeem, with the result that the mortgagees (present plaintiffs) had become absolute owners of the land. The learned District Judge has held that this admission operated as estoppel against the plaintiffs and it was no longer open to them to urge in this suit that the right to redeem vested in the descendants of Nazar Din and not in the defendants.

Now the first point to be noticed in this connexion is that the plea of estoppel was not raised in the trial Court, nor is it covered by the issues. It appears to have been urged for the first time before the learned District Judge after the case had gone back to him on remand from this Court. The question is not one purely of law to be decided on facts apparent on the

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3. A I R 1928 Lah 572=114 I C 417=10 Lah 7 (F B).

record, but is one, which if raised at the proper time, would have necessiated further investigation. In these circumstances, the learned District Judge was not justified in allowing it to be raised at the appellate stage and basing his decree on it. But leaving this aspect of the case out of consideration, there can be no doubt that the plea is without any substance whatever. It will have been noticed that the so-called "admission" is a qualified one and taken as a whole is not by any means an admission but is in fact a repudiation, of the defendants' right to redeem the land. It is a settled rule of law that if a party wishes to have a statement made by the opposite party treated as an admission, the whole statement must be taken into consideration. It is not open to him to split up the statement and pick out the portion which may be favourable to him and ignore the rest: *Jwala Das* v. *Sant Das* (4). Further, in order to sustain the plea of estoppel it must be proved that the defendants. relying on the declaration made by the plaintiffs, were misled to act to their detriment in such a manner as they would not otherwise have done. There is not allegation, much less proof, that the defendants were aware of the alleged representation made by the plaintiffs in the proceedings of 1915, or that from that time to the date when the present litigation began they had taken any action detrimental to themselves by reason of the representation supposed to have been contained in the so-called admission. I hold therefore that the plaintiffs were not estopped from denying the defendants' right to redeem the land.

For the foregoing reasons I accept the appeal, set aside the judgment and decree of the learned District Judge and in lieu thereof pass a decree in favour of Sikandar Khan, Alaf Khan, Maula Dad and Nazir Khan, plaintiffs 1, 3, 4 and 5 for possession of 3/4th of the land in dispute. The suit relating to the remaining 1/4th share has abated and is dismissed. The defendants shall be entitled to take back 3/4ths of the sum of Rs. 43 which they had deposited in accordance with the order of the Collector passed in the proceedings under (Punjab) Act 2 of 1913. Having regard to all the circumstances, I leave the parties to bear their own costs in all Courts.

B.R./R.K. *Appeal accepted.*

A. I. R. 1933 Lahore 183

TAPP, J.

Salig Ram-Amar Nath—Plaintiffs—Appellants.

v.

Natha Mal-Shadi Ram—Defendants—Respondents.

Second Appeal No. 981 of 1929, Decided on 5th December 1932, from preliminary decree of Addl. Dist. Judge, Ludhiana, D/- 28th January 1929.

Contract Act (1872), S. 1—Agent authorized to sell by trade—Usage—Question as to agent's power to do so is not governed by Contract Act.

Section 1, Contract Act, provides that nothing therein contained shall affect any usage or custom of trade. Therefore where an agent by the trade usage sells goods, the question whether he is authorized to do so is not governed by the provisions of Contract Act. [P 184 C 2]

Badri Das—for Appellants.

Nand Lal—for Respondents.

Judgment. — The appellant firm of Salig Ram-Amar Nath of Jullundur City, brought a suit against the respondent firm Nathu Ram-Shadi Ram of Ludhiana (respondents) for rendition of accounts in respect of five transactions entered into by the defendant firm on behalf of the plaintiff firm. The defendant firm pleaded that in addition to the five transactions in respect of which the accounts were required, there were three other transactions which had resulted in a loss to the plaintiff firm and the accounts of these should also be taken. The trial Court granted a preliminary decree for rendition of accounts in respect of eight transactions. During the hearing of the appeal against this decree it transpired that one kotha of 445 bags of wheat and 40 bags of mungi involved in transactions Nos. 7 and 8 had been sold by the defendant firm during the pendency of the suit, and so the District Judge remanded the case for inquiry and report as to whether the sale of the above commodities was within the scope of the authority of the defendant firm and otherwise justified. The finding by the trial Court was in favour of the defendant firm and this was confirmed by the lower appellate Court. Against this decree a second appeal has been preferred to this Court (No. 981 of 1929) and the first question which arises for determination in connexion therewith is whether accounts could be rendered in connexion with transactions Nos. 6, 7 and 8. It is conceded by the learned counsel for the appellant firm that in respect of transactions Nos. 6 and 8 there is a clear finding

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4. A I R 1930 P C 245=127 I C 746.

S. N. DAR, B.A., LL.B., Vakil High Court. SRINAGAR (Kashmir)

S. N. DAR. Vakil High Court. SRINAGAR (Kashmir)

of fact and this cannot be challenged. He questions the findings in respect of transaction No. 7 relating to one kotha of 445 bags of wheat alleged to have been purchased by the defendant firm on behalf of the plaintiff firm on 7th March 1925. In regard to this transaction the learned District Judge has dealt with all the evidence bearing on the matter and arrived at the conclusion that there was no doubt that this kotha of wheat had been purchased by the defendant firm for the plaintiff firm. This is also undoubtedly a clear finding of fact and I am not prepared to agree with the contention of Mr. Badri Das that this conclusion was reached on a misreading and misconception of the evidence relating thereto. The evidence to which reference has been made clearly supports the finding arrived at by the learned District Judge.

There remains for determination the second point which has arisen in connexion with this appeal and that is the authority of the defendant firm to sell the wheat and mungi contained in transactions Nos. 7 and 8. These two commodities were purchased on 7th and 10th March 1925, respectively, and the present suit was instituted by the plaintiff firm on 25th July 1925. On 2nd September 1925, the defendant firm sent a notice to the plaintiff firm giving them three days to take over the wheat and the mungi failing which they would be sold at the risk and loss of the plaintiff firm. The wheat remaining in the hands of the defendant firm was sold on 25th October 1925, and the 40 bags of mungi on 14th and 16th September 1925. At the time when the sales were made the plaintiff firm had a credit of Rs. 6,247-11-9 with the defendant firm and the amount involved in connexion with transactions Nos. 7 and 8 came to Rs. 6,661-14-3; thus there was a debit of little over Rs. 440 against the plaintiff firm. The view of the trial Court was that the sale was justified and within the scope of the authority of the defendant firm in accordance with the provisions of S. 189, Contract Act. This provides that an agent has authority in an emergency to do all such acts for purposes of protecting his property from loss as would be done by a person of ordinary prudence in his own case under similar circumstances. The evidence in the case shows that the wheat and mungi were deteriorating and therefore in order to avoid further loss accruing the defendant firm sold the goods. In my opinion their action was dictated not by any loss they might suffer in consequence of the debit of Rs. 400 but more because they wished to save the plaintiff firm from losing on these transactions. However this may be it is clear that according to trade usage the defendant firm were authorized to sell the goods. Mr. Badri Das submitted that this point was not put in issue, but it seems to me that it is sufficiently covered by the issue remitted for inquiry and report. It was contended that the defendant firm only had a lien on this wheat and mungi under S. 221, Contract Act, but had no right of sale. In my opinion the question is not governed by any provisions of the Contract Act in view of its having been shown that the defendant firm had a right to sell the wheat and mungi according to trade usage. Now S. 1. Contract Act, provides that nothing therein contained shall affect any usage or custom of trade and in the circumstances it seems to me that the application of S. 189 or S. 221 to the matter is unnecessary. I would therefore hold that the conclusion arrived at by the learned District Judge in connexion with the appeal against the grant of the preliminary decree is correct and I dismiss Appeal No. 981 of 1929 with costs. (The rest of the judgment is not necessary for the purpose of this report).

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 184

BHIDE, J.

Feroze Din and *others*—Plaintiffs—Appellants.

v.

Khair Din and *another*—Defendants—Respondents.

Second Appeal No. 304 of 1929, Decided on 30th November 1932, against decree of Dist. Judge, Gurdaspur.

(a) Custom (Punjab)—Barbers residing in Gurdaspur town — Mahomedan Law, Applicability.

Barbers residing in Gurdaspur town are not governed by custom but by Mahomedan law. [P 185 C 1]

(b) Punjab Tenancy Act (1887), S. 59—Alienation in contravention of section—Parties not governed by custom—Reversioner is not entitled to challenge.

Alienation of occupancy rights in contravention of S. 59, Tenancy Act, cannot be challenged by the reversioner where the parties are not governed by custom: 98 *P. R.* 1907, *Foll.* [P 185 C 2]

(c) Punjab Tenancy Act (1887), S. 59—Will by occupancy tenant with consent of wife, a life tenant—Next reversioner is entitled to sue for declaration—Specific Relief Act (1877), S. 42.

Where an occupancy tenant made a will in respect of the tenancy with the consent of his wife and a nephew challenged the will:

Held **: that though the parties were Mahomedans the wife being only a life tenant under the statute her consent was not sufficient and that the nephew as the next reversioner was entitled to a declaration under S. 42, Specific Relief Act.** [P 185 C 2]

Abdul Rashid—for Appellants.

M. C. Mahajan—for Respondents.

Judgment.—This second appeal arises out of a suit by Shahab Din, a barber, to challenge a will in respect of an occupancy tenancy made by his uncle Loku. After the death of Loku, his widow, Mt. Kako, was entitled to succeed, but she supported the will made by Loku in favour of Khair Din who was her relation and mutation was accordingly effected in favour of Khair Din. The plaintiff then instituted the present suit to challenge the will and get a declaration as regards his right to succeed. The pleadings were not very precise but the plaintiff eventually relied solely on custom while the defendants relied on Mahomedan law. Both the Courts below have held that the parties, who are barbers and residents of Gurdaspur town, are not governed by custom but by Mahomedan law. The trial Court held that the will of Loku could be valid according to Mahomedan law only to the extent of one-third share of the land and granted a declaration to that effect. The learned District Judge on the other hand, was of opinion that as the plaintiff had relied on custom only and as he had failed to establish it, the plaintiff was not entitled to any decree. He accordingly accepted the appeal and dismissed the suit. From this decision the present appeal has been preferred. The learned counsel for the appellant contended that succession to occupancy rights being governed by statute (S. 59, Punjab Tenancy Act), Loku was not entitled to divert the succession by making a will, in contravention of the statute. This contention does not seem to be correct. The Punjab Tenancy Act makes transfers in contravention of the rule of succession laid down in S. 59, voidable at the option of the landlord, but no similar option seems to be conferred by the Act itself on the reversioners. The question whether an alienation of occupancy rights can be challenged by a reversioner was considered by a Full Bench of the Punjab Chief Court in *Abdullah* v. *Allah Dad* (1) and it was held therein that when such alienation of proprietary land can be challenged according to custom, alienation of occupancy rights can also be similarly challenged, provided the person challenging the alienation is entitled to succeed to the occupancy holdings. In the present instance the plaintiff has been found to be entitled to succeed to the occupancy tenancy after the death of Mt. Kako, but it has been also found that the parties are not governed by custom. The principle laid down in *Abdullah* v. *Allah Dad* (1), cannot therefore help the appellant.

It was urged next that at any rate even according to Mahomedan law on which the respondents relied the will could be valid only to the extent of one-third share of the property and hence the decree granted by the trial Court was correct. In reply to this contention, the learned counsel for the respondents urged that the next heirs of Loku under Mahomedan law, viz., his widow and daughter had consented to the will and hence the plaintiff had no right to challenge it. Reliance was placed in this respect on para. 104 of Mulla's Principles of Mahomedan Law. But according to S. 59, Punjab Tenancy Act, Mt. Kako is entitled only to a life tenancy, and the next person entitled to succeed is the appellant. The learned counsel for the respondents urged that the consent of the next heirs under Mahomedan law, (viz., Mt. Kako and her daughters) only should be considered. But Mahomedan law is modified by statute in the matter of succession to an occupancy holding. The rule of Mahomedan law that a will bequeathing more than one-third share in an estate becomes valid, if the next heir's consent is intelligible enough, as the heirs under Mahomedan law are full owners; but when that law is modified by statute and only a life estate is conferred on Mt. Kako, her consent cannot be considered to be sufficient. The consent of the daughter is immaterial as she is not an heir according to the provisions of S. 59, Punjab Tenancy Act. I therefore hold that Mt. Kako being merely a life tenant and the appellant being the next reversioner, he is entitled to obtain the declaration prayed for according to the provisions S. 42, Specific Relief Act, provided of course the will is in fact invalid to any extent. As regards the latter point, it was urged that it has not been shown that the occupancy tenancy which was bequeathed exceeded one-third of the estate of the deceased. But this point has not been raised till now. It must be noted in this connexion that the trial Court had granted a decree in favour of the plaintiff to the effect that

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1. (1907) 91 P R 1907=62 P W R 1907=18 P L R 1908.

the will was valid to the extent of one-third share only. The defendants preferred an appeal to the learned District Judge, but they did not contest the trial Court's decree on the above ground. In these circumstances, it may be presumed that the trial Court's finding in that respect was accepted by the defendants. I accept the appeal and restore the decree of the trial Court. Plaintiff will get one-third of his costs throughout.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 186

BHIDE, J.

Roshan Lal Prithi Mal—Judgment-debtors—Appellants.

v.

Shanti Lal and *others*—Decree-holders—Respondents.

Misc. First Appeal No. 2100 of 1931, Decided on 24th November 1932, from order of Sub-Judge, First Class, Gurgaon, D/- 5th November 1931.

Civil P. C. (1908), O. 21, Rr. 68 and 90—Material irregularity resulting, substantial loss illustrated—Sale can be set aide if judgment-debtor gives security for making up deficency, if any, on resale.

A sale was held before the expiry of 30 days from the date on which the proclamation was affixed on the court-house and the decree-holder himself purchased the property for about half the value estimated by himself at the time of attachment. It was also in evidence that the number of bidders present was small:

Held: that the holding of the sale within 30 days was a material irregularity: that taking into consideration the number of bidders present and the low price fetched, the material irregularity has resulted in substantial loss and that the sale can be set aside and resold if the judgment-debtor gave security for making up the deficiency, if any, on the resale: 20 *I. A.* 176, *Rel. on.* [P 186 C 2]

Jagan Nath Aggarwal—for Appellants.

Fakir Chand—for Respondents.

Judgment.—This is an appeal from an order of the Subordinate Judge, First Class, Gurgaon, confirming the sale of certain houses and shops at Hodal and Palwal in execution of a decree. The judgment-debtor raised objections to the sale on the ground of material irregularities in the proceedings resulting in substantial loss, but these objections were dismissed by the learned Senior Subordinate Judge and the sale was confirmed. From this decision the judgment-debtors have preferred this appeal. The learned counsel for the appellant has urged that the proceedings as regards the auction of the property were entirely fictitious, but this contention does not appear to be borne out by any evidence on the record. There were apparently bidders at both the places and the bids were duly recorded. It is not shown that the bidders were fictitious persons or were even connected with the decree-holder in any way. The second contention of the learned counsel was that the sale proclaimed had not been affixed on the court-house and that the sale had taken place before the expiry of 30 days even from the affixation of the proclamation of the properties which were to be sold. The sale took place on 17th April 1931. The learned Subordinate Judge has held that the proclamation must have been affixed on the court-house between the 2nd and 7th March, 1931, but this finding appears to be based on mere conjecture. There was no positive evidence to show whether the proclamation was affixed on the court-house and if so on what day. According to the provisions of O. 21, R. 54, the proclamation should have been affixed on the court-house after it was affixed on the property. It was held in *Tasaduck* v. *Ahmed Hossein* (1) that holding of sale before the expiry of 30 days from the date on which the proclamation is affixed on the court-house is a material irregularity.

The learned counsel for the respondent urged that even if the irregularity in question is held to be material there is no positive evidence to show that there was any substantial loss. But it appears from the evidence that the price for which the decree-holder has purchased the properties is about half of the value estimated by the decree-holder himself at the time of attachment. Considering the small number of bidders at the sale and the low price realized it seems to me fair to infer in the circumstances that the material irregularity complained of has resulted in substantial loss. The learned counsel for the respondent stated that if the properties are to be resold, the appellants should give security for making up the deficiency, if any, on the resale. This seems reasonable and the learned counsel for the appellants has no objection to this. I accordingly accept the appeal; and setting aside the order of the learned Senior Subordinate Judge direct that the properties be resold. The judgment-debtors will give security for making up of the deficiency in case the properties are eventually sold at less than the price at which they were purchased by the decree-holder. The

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1. (1894) 21 Cal 66=20 I A 176 (P C).

properties will be resold subject to the filing of the security in the Court below within such time as may be fixed by the learned Senior Subordinate Judge. The appellants will get costs of this appeal.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 187 (1)

BHIDE, J.

Duni Chand-Daulat Ram—Plaintiffs—Appellants.

v.

Jita Ram and *others*—Defendants—Respondents.

Second Appeal No. 2255 of 1929, Decided on 20th October 1932, from decree of Dist. Judge, Amritsar, D/- 27th June 1929.

Provincial Insolvency Act (1920), S. 51—Annulment of adjudication — Debt not included in schedule—Creditor can pursue his remedy.

The consequences of annulment of adjudication are different to those of a discharge, and on the annulment of adjudication there is nothing to prevent a creditor from pursuing his remedy in a Court of law if his debt has not been scheduled in the insolvency proceedings. In such a case S. 51 is no bar: *A. I. R.* 1926 *Lah.* 489, *Rel. on.* [P 187 C 2]

J. G. Sethi—for Appellants.

Judgment.—This appeal was heard ex parte as the respondents failed to appear though sufficiently served. The material facts are briefly as follows: The plaintiff had obtained three decrees against defendants 1 and 2 and taken out execution. He attached certain money belonging to defendant 1 in the hands of Bawa Basant Singh who had been appointed receiver in another case. In pursuance of the attachment three cheques were given to the plaintiff in satisfaction of his decrees but before the cheques could be cashed defendants 1 and 2 were declared insolvents and the insolvency Court issued an injunction to the Punjab National Bank restraining them from paying the cheques. During the insolvency proceedings the plaintiff applied for the payment of the cheques, but the learned Judge of that Court rejected the application, holding that the property had vested in the trustees who were appointed to take charge of the insolvency estate according to a composition scheme agreed to by the creditors. Subsequently the plaintiff instituted the present suit for recovery of the amount of the cheques with interest thereon. The suit was decreed by the trial Court but was dismissed on appeal by the District Judge. The plaintiff has now preferred a second appeal. The learned counsel for the appellant has urged that the adjudication of the defendants was annulled after the composition scheme had been sanctioned, and that in the circumstances there was no reason why the plaintiff should not have been granted a decree on the basis of the cheques which had been issued in his favour. The learned District Judge has relied on S. 51, Provincial Insolvency Act, but that section does not appear to be a bar in the way of the plaintiff as the adjudication was annulled. It has been pointed out in *Khalilul Rahman* v. *Ram Sarup* (1) that the consequences of annulment of adjudication are different to those of a discharge; and that on the annulment of adjudication there is nothing to prevent a creditor from pursuing his remedy in a Court of law if his debt has not been scheduled in the insolvency proceedings. In the present case the plaintiff's debt had not been so scheduled. I am therefore of opinion that the plaintiff's case should have been decreed. I may note that the plaintiff does not now claim any decree against the trustees who were appointed in the insolvency proceedings. I accordingly accept the appeal and grant the plaintiff a decree for Rs. 1,453-12-0 (as awarded by the trial Court) with proportionate costs throughout against defendants 1 and 2

K.S. *Appeal accepted.*

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1. A I R 1926 Lah 489=95 I C 201.

A. I. R. 1933 Lahore 187 (2)

TAPP, J.

Fateh Alam and *another*—Appellants.

v.

Ghulam Sarwar and *another*—Respondents.

Second Appeal No. 1748 of 1928, Decided on 21st November 1932, from decree of Addl. Dist. Judge, Jhelum, D/- 13th April 1928.

(a) Custom (Punjab)—Gujrat District—Property bequeathed to daughter making her absolute owner—Son-in-law made khanadamad—Daughter acquires absolute estate.

By the custom in Gujrat District where a father bequeaths property in favour of his daughter making her absolute owner of his property after his death and appoints the son-in-law as his khanadamad, the daughter acquires an absolute estate to which there is no reversion; and an alienation by her cannot be challenged by another female in the absence of a custom to that effect: 16 *P. R.* 1910; *A. I. R.* 1924 *Lah.* 187; 135 *P. R.* 1908 and 48 *P. R.* 1916, *Ref.* [P 189 C 1]

(b) Custom (Punjab)—Alienation by female—Right of another female to contest.

A female has no right to contest an alienation by another female unless she is an immediate heir and the alienor possesses a limited estate. [P 189 C 2]

Fakir Chand and *Asad Ullah Khan*—for Appellants.

Ghulam Mohiyuddin — for Respondents.

Judgment.—Gilani Bakhsh a Gujar of Gordhanwala in the Kharian Tahsil of the Gujrat District, who died on 28th January 1894, by a will dated 29th September and registered on 2nd October 1891, bequeathed the whole of his estate in equal shares to his two daughters, Mt. Nur and Mt. Niamat Bibi. Mt. Nur married Fazal Ilahi and Mt. Niamat Bibi married one Nawab Shah. Both Fazal Ilahi and Nawab Shah were Khanadamads. Mt. Nur bore no children while Mt. Niamat Bibi Bore a son named Ghulam Sarwar, and he and his mother Mt. Niamat Bibi are the plaintiffs which Fateh Alam, the son of Fazal Ilahi by another wife (Mt. Afzal Bibi), his step mothers, Mt. Fateh Bibi and Mt. Nur, the two widows of Fazal Ilahi, are the defendants in the suit to which this second appeal relates.

After the death of Gilani Bakhsh his landed property was mutated in favour of his widow on 23rd July 1894, in contravention of the will of Gilani Bakhsh. The widow however effected a gift of half the estate in favour of Ahmad Bakhsh, a son of Mt. Niamat Bibi, and on the death of Ahmad Bakhsh this half-share was mutated in favour of his brother, Ghulam Sarwar, plaintiff, on 15th June 1897. It appears that Mt. Nur brought a suit against her mother, the widow of Giliani Bakhsh, for her half-share in the estate as conveyed by her father's will and there was a decree by consent on 17th December 1894, mutation being effected as regards this half-share in favour of Mt. Nur on 17th February 1895. On 12th December 1896, Mt. Nur made a gift of her share in the estate by a mutation to her husband Fazal Ilahi. A dispute arose in connexion with this alienation by Mt. Nur and it appears that some settlement was arrived at by which it was agreed that the half-share of Mt. Nur would revert to her on the death of her husband Fazal Ilahi. He died in 1917, and the share held by Mt. Nur was then mutated in equal shares in her name and the name of Mt. Fateh Bibi, the other widow of Fazal Ilahi and Fateh Alam, the son of Fazal Ilahi by Mt. Afzal Bibi. This mutation was attested on 28th December 1918, and the present suit was brought by Ghulam Sarwar, and Mt. Niamat Bibi, for a declaration that the alienation in favour of Mt. Fateh Bibi and Fateh Alam should not affect the reversionary rights on the death of Mt. Nur. The suit was decreed by the trial Court and an appeal against this decree was dismissed by the District Judge. On second appeal the case was remanded to the District Judge for re-decision after determination of the following points: (1) the nature of the estate acquired by Mt. Nur under the will of her father Gilani Bakhsh; and (2) whether the plaintiffs, one of whom is a female, have established a custom to contest the alienation made by Mt. Nur.

The learned District Judge had held that the estate acquired by Mt. Nur under her father's will was a limited one and that the plaintiffs had established their right in the circumstances to impeach the alienation in favour of the defendant Fateh Alam and Mt. Fateh Bibi. The appeal was again dismissed and the defendants have come up to this Court on second appeal. Now, a persual of the will of Gilani Bakhsh clearly shows, in my opinion, that an absolute estate was conferred by the deviser on both his daughters, Mt. Nur and Mt. Niamat Bibi. Gilani Bakhsh refers to his daughters as being his heirs and states that after his death they will be the owners malik of all his property moveable and immovable, and that they alone will have any concern with his estate. The testator further mentions that he has no collaterals whatever and that the husbands of his daughters are his khanadamads or resident sons-in-law. At the end of the document there is a clause to the effect that if a son is born to Gilani Bakhsh, after execution of the will he is to be the heir according to custom. I am not prepared to agree with the contentions of Mr. Ghulam Mohiuddin that by this will Gilani Bakhsh conveyed nothing more that a mere khanadamad estate limited in nature and that the will was only made in order to provide evidence of the husbands of his two daughters being khanadamads. In devising his property as he did, Gilani Bakhsh appears to have followed custom as it prevailed in the Gujrat District and as contained in the Customary law of that district, Vol. 9. According to the questions and answers at p. 28 of the volume in question the custom of khanadamadi prevails in

every principal tribe and on the death of the proprietor his property devolves on the daughter. On the death of the daughter it goes to her son or her daughter and on the extinction of the khanadamadi line, male or female, it reverts to the original owner. Further at p. 26 of the same volume, the answer to question 60 shows in regard to all tribes, that as regards ancestral immovable property, daughters inherit in the absence of male lineal descendants through males, the widow and collaterals of the fifth degree. Further, that daughters inherit like sons if they are khanadamads. At p. 27 the answer to question 63 shows that the daughter who is a full heir has power to alienate the property which she inherits. It is true that the principle underlying the custom of khanadamadi is to benefit the daughter and her issue and, on the extinction of her line the property ordinarily reverts to the line of the original owner, and, in such circumstances, prima facie the plaintiffs as grandson and nephew of the original owner might perhaps be regarded as reversioners. In the present case however it is clear that, from the terms of the will and, according to the custom prevailing in the Gujrat District, Mt. Nur acquired an absolute estate to which there was no reversion.

As regards the right of the plaintiffs to challenge the alienation by Mt. Nur in favour of Fateh Alam and Mt. Fateh Bibi, reference has been made to *Maqsudulnisa* v. *Kaniz Zohra* (1), *Diwan Singh* v. *Amir Singh* (2) and *Nawaz Khan* v. *Zohrajan* (3), and was urged, as regards Mt. Niamat Bibi, that she as a female can object to an alienation by another female if she is an immediate heir and the alienor has only a life-interest. The learned District Judge has followed *Dalipa* v. *Suraj Kaur* (4) in which it was held that the rights and privileges of a female heir have to be decided on the evidence of each particular case and that the plaintiff in that case, a married daughter, who had succeeded to her father's estate had failed to prove that by custom among Dhillon Jats of the Ambala District, she had a right to contest alienations effected by her mother or step-mother. The learned District Judge has quoted a reference, in the course of the judgment in the 1916 case, to the refusal by a Full Bench to lay down any general proposition regarding a female's right to challenge the alienation of an earlier female life incumbent and deciding that the rights and privileges of a female heir had to be decided on evidence of each particular case. The learned Judge in *Dalipa* v. *Suraj Kaur* (4), further went on to observe that the decision of the Full Bench would preclude them from giving effect to the contention that a right of inheritance must of necessity comprise a right to protect the estate. I do not quite see how the observations in *Dalipa* v. *Suraj Kaur* (4), have affected the principle laid down in the ruling of 1908, that a female has no right to contest an alienation by another female unless she is an immediate heir and the alienor possesses a limited estate. The facts in the present case clearly indicate that Mt. Nur acquired an absolute estate and thus one of the conditions precedent to the right of challenge is not fulfilled. Secondly, the plaintiffs have entirely failed to establish any custom entitling a female to challenge an alienation by another female. I hold therefore for the reasons stated above, that the plaintiffs were not entitled to the declaration they sought and, accepting the appeal, I set aside the decree of the Courts below and direct that the plaintiffs' suit be dismissed, parties bearing their own costs throughout in the circumstances.

K.S. *Appeal accepted.*

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1. (1908) 135 P R 1908.
2. (1910) 16 P R 1910=5 I C 814.
3. A I R 1924 Lah 187=73 I C 583.
4. (1916) 48 P R 1916=34 I C 581.

A. I. R. 1933 Lahore 189

ADDISON AND AGHA HAIDAR, JJ.

Chandu Lal—Defendant— Appellant.

v.

Rampat Mal and *another*—Plaintiffs and Defendants—Respondents.

First Appeal No. 540 of 1927, Decided on 15th November 1932, against preliminary and final decrees of Senior Sub-Judge, Delhi, D/- 29-11-1926.

Hindu Law — Religious endowment — Essential ingredient in sankalp and samarpan.

The essential ingredient when dedicating to the public or to God which constitutes a gift whether of moveable or immovable property in the Hindu law is the sankalp and the samarpan whereby the property is completely given away and the owner completely divests himself of the ownership in the property. Therefore in the absence of such sankalp and samarpan, the mere fact that marriage parties used to be put up in a dharmasala built by a person or the fact that the dharmasala is built as a memorial to a dead man without an express dedication to the public does not make such dharmasala a public trust: *A.I.R.* 1924 *Pat.* 657 and *A. I. R.* 1931 *Pat.* 275, *Foll.*; 16 *All.* 412 and *A. I. R.* 1921 *Sind* 1, *Appr.*

[P 191 C 1, 2

Mehar Chand Mahajan and *Hem Raj Mahajan*—for Appellant.

Shamair Chand, Qabul Chand and *Ajit Parshad*—for Respondents.

Addison, J.—This suit was brought by Rampat Mal and Chhuttan Lal, Jain Aggarwals of Najafgarh in the Delhi Province, against Molar Mal, under the provisions of S. 92, Civil P. C. According to the amended plaint of 1st April 1926, it was alleged that there was a dharamsala in Najafgarh which had attached to it a shop with one room as well as a shop containing two rooms and that this dharamsala had been built for the public welfare with funds left by one Fateh Chand cousin of the defendant and in pursuance of his will. It was further alleged that the Jain Panchayat had effected certain repairs, that the defendant Molar Mal had been appointed muttawali and that as on 17th December 1924, Molar Mal had sold the shop with two rooms he should be held not to be discharging his duties property as a muttawali of the trust founded by the deceased Fateh Chand. It was therefore prayed that Molar Mal be removed from office and certain other persons be appointed muttwalis and that a declaration should be given that the dharamsala along with both the shops was wakf property. In his pleas Molar Mal denied that Fateh Chand had left any will. He alleged that he was Fateh Chand's heir and that with some of the money inherited from Fateh Chand he built the dharamsala in memory of Fateh Chand but the shops he kept for his personal use. He further stated that there was a compromise with the brotherhood about this matter, entered into on 16th April 1917. This compromise is evidenced by duplicate deeds signed by Molar Mal and witnessed by four of the panches. One of these deeds was kept by Molar Mal and the other was kept by one of the panches Mattamal, D. W. 4. It was stated in this agreement that Molar Mal would not alienate the dharamsala built by him or the shop with one room but that he had full power to alienate the shop with two rooms. It may be noted here that this shop has its doors facing away from the dharamsala and can be used without any interference with the dharamsala.

Chandu Lal, defendant 2, to whom this shop with two rooms was first mortgaged on 12th November 1919 and then sold on 17th December 1924 pleaded that the shop had no connexion with the dharamsala if there was any public dharamsala which he denied. The Subordinate Judge, First Class, held that the dharamsala was not built in accordance with the will of Fateh Chand though it was built by Molar Mal his heir according to the wishes of Fateh Chand expressed before he died. He then went on to hold that the mere building of a dharamsala as a memorial in the very nature of things showed that a public trust was intended. In his judgment there is no mention of any dedication to the public by Molar Mal as there should be on his finding, that the trust was not established by the will of Fateh Chand. But he held that as some petty repairs had been done by the public and as marriage parties used the dharamsala, this was further evidence, apart from the fact that it was built in accordance with Fateh Chand's wishes, of its being a public trust. The person who sold the land, on which the dharamsala was built, to Molar Mal on 3rd April 1914, stated in the deed that the vendee intended constructing a dharamsala for the public welfare. This too was considered an important piece of evidence by the Subordinate Judge. He therefore gave the declaration asked for that the dharamsala with the shops constituted a public trust and he gave further directions as to the trustees, etc. Against this decision the vendee of the shop with two rooms, Chandu Lal, has preferred this appeal. This is not a case of a trust founded long ago, as to which there can be no evidence of dedication.

It was only founded in 1915-16, and we must expect that if there was any dedication, persons would still be alive who were present at the dedication and who could give evidence as to this. Admittedly there is no such evidence. Counsel for the respondents however attempted to argue that it was established on the record of evidence that the dharamsala was founded in accordance with the oral will of Fateh Chand whose heir Molar Mal was. If that were so, of course there need have been no dedication by Molar Mal. It is clear however from the evidence that there was no oral will by Fateh Chand to the effect that the dharamsala should be built in his memory by his heir though he did express before his death a pious wish that some memorial should be built in his memory. (Evidence was then discussed and the judgment proceeded). Molar Mal therefore must be held to be the founder of the trust, if any. It was thus necessary to prove dedication. In para. 438 of Mayne's Hindu Law. 9th Edn., occur the following words:

> "The last case arises where the founder applies his own property to the creation of a pagoda or any other religious or charitable foundation, keeping the property itself, and the control over it, absolutely in his own hands. The community may be greatly benefited by this arrangement, so long as it lasts, but its continuance is entirely at his own pleasure. It is like a private chapel in a gentleman's park, and the fact that the public have been permitted to resort to it will not prevent its being closed, or pulled down, provided there has been no dedication of it to the public."

These remarks apply with full force to the present case. Similarly, in *Dakhni Din* v. *Rahimunnissa* (1), it was held that the mere fact of the owner of land having erected a temple and planted a grove thereon did not of itself, without any further evidence, indicate a dedication to God and a cessation of the rights of private ownership in respect of such land. This disposes of the argument of the Subordinate Judge, First Class, that the mere fact that Molar Mal built the dharamsala in accordance with the wishes of Fateh Chand showed that he meant to constitute a public trust: see also, *Goverdhan Gir* v. *Vishin Gir* (2). Further, the evidence as to user is consistent with the fact that it remained a private institution. Molar Mal used to keep the keys and permission to use it was obtained from him. Marriage parties used to be put up there but that does not constitute a public trust. There is some evidence that one Jia Ram once whitewashed the building but Molar Mal has denied this and stated that what happened was that he begged some money from Jia Ram with which he himself did the white-washing. Again, there is some evidence that one Durga Pershad of Ferozpore built a pardha wall on the roof in order to protect the privacy of the Mahomedan neighbours when marriage parties used the roof. The books of Durga Pershad have not been called nor has he been put into witness box. In my judgment the evidence does not establish that he spent any money on this institution. In fact, there is no realible evidence of any kind as to dedication or endowment unless the duplicate documents of 1917 be looked at. If they are admissible in evidence they afford some proof that Molar Mal set aside the dharamsala and one shop for public use but retained the shop in dispute as his own. This of course he had a perfect right to do as he was the founder. It was not necessary for him to dedicate more than he wished to do.

In *Deosaran Bharthi* v. *Deoki Bharthi* (3) and *Bhekdhari Singh* v. *Sri Ramchand Raji* (4) there is a long discussion as to what is essential when dedicating to the public or to God such like property as a dharamsala, etc., "Creation of a trust for religious purposes," it is said "no doubt finds favour in the Hindu law just in the same way as it does in the other communities and the essential ingredient which constitutes a gift whether of moveable or immovable property in the Hindu law is the sankalp and the samarpan whereby the property is completely given away and the owner completely divests himself of the ownership in the property. In Hindu law there must be a true sankalp and samarpan." Of this ceremony there is no evidence and as I have already remarked in such a recent case of alleged dedication proof of user only would scarcely be sufficient; while such proof that there is of user is consistent with the private ownership of Molar Mal. Of course as there is no appeal by Molar Mal as regards the dharamsala and the shop with one room, the decree must stand as regards them. For the reasons given however I would accept the appeal of Chandu Lal, the vendee of the shop with two rooms, and set aside the preliminary and final decrees of the Court below as regards that shop. That is, the suit will be dismissed so far as that shop is concerned and a declaration given that it belongs to the vendee. The appellant will get his costs in both the Courts from the plaintiffs.

Agha Haidar, J.—I agree.

K.S. *Order accordingly.*

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1. (1894) 16 All 412=(1894) A W N 134.
2. A I R 1921 Sind 1=68 I C 370=15 S L R 88.
3. A I R 1924 Pat 657=80 I C 980=3 Pat 842.
4. A I R 1931 Pat 275=136 I C 290=10 Pat 388.

A. I. R. 1933 Lahore 191

BHIDE, J.

Kalwant Rai and *others*—Plaintiffs—Petitioners.

v.

Fonseca & Co.—Defendants — Opposite Parties.

Civil Revn. Petn. No. 469 of 1932, Decided on 1st December 1932, for revision of order of Sub-Judge, Third Class, Ambala, D/- 18th March 1932.

Civil P. C. (1908), Ss. 10, 115 and 151—Stay order—Revision.

An order staying proceedings in a suit under S. 10 being of an interlocutory character no revision is competent: *A. I. R.* 1922 *Lah.* 54; *A. I. R.* 1923 *Lah.* 615; *A. I. R.* 1924 *Lah.* 567; *A. I. R.* 1929 *Lah.* 662 and *A. I. R.* 1924 *Lah.* 425, *Foll.*; 61 *I. C.* 830 and *A. I. R.* 1925 *Lah.* 144, *not Foll.*

And the High Court will not interfere under S. 151, Civil P. C. or S. 107, Government of India Act, unless the circumstances of the case justify such interference. [P 192 C 1]

Achhru Ram—for Petitioners.

Bishan Narain and *Sri Ram* — for Opposite Parties.

Judgment.—This is a petition for revision of an order of the Subordinate Judge, Third Class, Ambala, staying proceedings in a suit under S. 10, Civil P. C. A preliminary objection is raised that the order being of an interlocutory character no revision is competent. The following authorities have been cited viz., *A. I. R.* 1922 *Lah.* 54, *A. I. R.* 1923 *Lah.* 615, *A. I. R.* 1924 *Lah.* 567, and *A. I. R.* 1929 *Lah.* 662. The learned counsel for the petitioners has referred to *Bishen Devi* v. *Bishen Chand* (1) and *A. I. R.* 1925 *Lah.* 144. There seems to be a conflict of authority on the point, but the weight of authority in this Court seems to be against the petitioner. The Full Bench decision in this Court in *Lal Chand Mangal Sen* v. *Behari Lal Mehr Chand* (2) is also against him. The learned counsel has suggested interference under S. 151, Civil P. C., or S. 107 of the Government of India Act, and has referred in this connexion to *A. I. R.* 1930 *Lah.* 525. But I do not think there is any justifiication for adopting this course at least in the circumstances of this case. I dismiss the petition with costs.

K.S. *Petition dismissed.*

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1. (1921) 61 I C 830.
2. A I R 1924 Lah 425=84 I C 259=5 Lah 288 (F B).

✻✻ A. I. R. 1933 Lahore 192

JAI LAL, J.

Bishan Singh — Judgment-debtor — Petitioner.

v.

Gurmukh Ram Wadhawa Ram—Decree-holder—Opposite Party.

Civil Revn. Petn. No. 296 of 1932, Decided on 17th October 1932, against order of Dist. Judge, Lyallpur, D/- 18th April 1932.

✻✻ Provincial Insolvency Act (1920), S. 52 —Interim receiver appointed—Money decree-holder—Execution proceedings by, are without jurisdiction.

According to S. 52 as no amended, there is no difference between a receiver appointed after adjudication and an interim receiver so far as the right of a decree-holder in a simple money-decree to execute his decree by attachment and sale of the insolvent's property is concerned and that such property vests in the interim receiver in the same manner as in a receiver appointed after adjudication. The execution proceedings taken at the instance of the decree-holder, are against the provisions of S. 52 and without jurisdiction and must therefore be set aside : *A. I. R.* 1930 *Lah.* 851, *Diss. from.* [P 192 C 2]

Madan Lal for *J. G. Sethi*—for Petitioner.

Shah Nawaz—for Opposite Party.

Judgment.—The facts are stated in detail in the judgment of the learned District Judge and need not be repeated here. The respondent has attached certain property of his judgment-debtor in execution of a simple money decree. It appears that the respondent is also a mortgagee of the same property and attachment is subject to his rights as a mortgagee. In the meantime proceedings are being taken to adjudicate the judgment-debtor as an insolvent and an interim receiver has been appointed. The learned District Judge has, following *A. I. R.* 1930 *Lah.* 851, the correctness of which however he is inclined to doubt in view of a decision of the Madras High Court, held that the appointment of an interim receiver cannot affect execution proceedings taken at the instance of a decree-holder and that in this respect there is a difference between a receiver apponited after adjudication and an interim receiver. A contrary view to that taken in *A. I. R.* 1930 *Lah.* 851 was taken by a Division Bench of this Court in *Madho Ram Budh Singh* v. *Raj Kishan* (1). In that case the previous cases of the Madras High Court and of other Courts were considered and it was held that, according to S. 52, Provincial Insolvency Act, as now amended, there is no difference between a receiver appointed after adjudication and an interim receiver so far as the right of a decree-holder in a simple money decree to execute his decree by attachment and sale of the insolvent's property is concerned and that such property vests in the interim receiver in the same manner as in a receiver appointed after adjudication. That being so, the execution proceedings which have been taken in the Courts below at the instance of the decree-holder, the respondent, must be held to be against the provisions of S. 52, Provincial Insolvency Act, and without jurisdiction and must therefore be set aside.

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1. A I R 1932 Lah 471=138 I C 821.

The respondent claims to be a mortgagee of the property which has been attached. It is obvious that his rights as a mortgagee, whatever they may be, cannot be affected by this order and those rights must be dealt with as provided in the Provincial Insolvency Act, in case the receiver proceeds to dispose of the property. If the property was attached from the possession of the respondent or was taken possession of by the receiver from his possession then presumably it will have to be returned to him if the insolvency proceedings subsequently fail. This is however a matter which is not directly before me and I have merely mentioned it as the learned counsel for the respondent was apprehensive that his rights as mortgagee may suffer by this order. I accept this appeal and, setting aside the order of the learned District Judge and also of the executing Court, hold that the rights of the insolvent (judgment-debtor) vest in the receiver and are not capable of being sold in execution proceedings at the present stage. In view of the fact that the judgments of the Courts below had the support of a judgment of this Court, I leave the parties to bear their own costs.

R.K. *Appeal accepted.*

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* A. I. R. 1933 Lahore 193

ADDISON AND AGHA HAIDAR, JJ.

Fazal Din and *others*—Defendants—Appellants.

v.

Milkha Singh—Plaintiff—Respondent.

Second Appeal No. 1469 of 1926, Decided on 8th November 1932, from decree of Dist. Judge, Amritsar, D/- 8th March 1926.

* **(a) Transfer of Property Act (1882), S. 58 (d)—Suit for possession by mortgagee—Court need not consider as to passing of full consideration at this stage.**

Where a mortgagee files a suit for possession simpliciter on the mortgage-deed the Court need not consider as to whether the full consideration has passed. If it finds that much of the consideration is paid the mortgagee is entitled to possession. The exact sum to be paid need not be determined till the time of redemption : 66 *P. R.* 1912; *A. I. R.* 1919 *Oudh* 78 and *A. I. R.* 1928 *Lah.* 668, *Ref.* [P 193 C 2]

(b) Practice — Court cannot grant more than what is asked in plaint.

Where the plaintiff asks, for possession of one-fourth of a land, the Court cannot allow him to take possession of the whole land. [P 194 C 1]

Shamair Chand and *Qabul Chand*—for Appellants.

Badri Das, *Fakir Chand* and *Chandar Gupta*—for Respondent.

Addison, J.—One Milkha Singh sued Fazal Din, Ghulam Mohammad, Rahim Bakhsh and Diwan Chand for possession of 151 kanals 4 marlas of land on the basis of four mortgage-deeds. Diwan Chand was an alienee from the other defendants of a small portion of the mortgaged land. The first three mortgages were in favour of the plaintiffs' father while the fourth, dated 21st December 1919, was entered into after the plaintiff's father had died and while the plaintiff was a minor. It was arranged by the plaintiff's mother in conjunction with one of his father's relatives Wadhawa Singh. Certain pleas were taken as to want of part of the consideration, etc. It was also pleaded that the last mortgage-deed had been cancelled by the plaintiff himself. The trial Judge held that consideration had passed for the first three mortgages and further held that the plaintiff himself had cancelled the fourth mortgage by notice dated 7th November 1922. It was also held that Diwan Chand was bound by the first three mortgages. Accordingly a decree was given to the plaintiff for possession of 202 kanals 14 marlas of land on the basis of the first three mortgage-deeds. Against this decision Diwan Chand preferred one appeal while the three original mortgagors preferred another appeal in the Court of the District Judge. Diwan Chand's appeal was dismissed but the appeal of the mortgagors was accepted to the extent that the area of the land was reduced from 202 kanals 14 marlas of land to 75 kanals 16 marlas of land as it was held that the plaintiff was only entitled to possession of that area.

Against this decision the original mortgagors have preferred this appeal. The first point taken was that the District Judge had not held that full consideration had passed so far as the first three deeds were concerned and that he should have gone into this question and settled it at this stage though the suit was one for possession simpliciter on the mortgage-deeds. In the first place the the District Judge has given a finding that the defendants, i. e., the original mortgagors, have not proved want of consideration. Even if he had not done so there is ample authority that this is not the stage at which this matter should be gone into. Much of the consideration certainly was paid and the mortgagee is entitled to possession. The exact sum to be paid need not be determined till the time of redemption. The only authorities on this point which need be referred to are *Kuman* v.

Sultani Mal (1), *Gokul Prasad* v. *Sitla Prasad* (2) and *Hari Ram* v. *Mahim Shah* (3). The second point taken was that the learned District Judge had made a mistake in allowing the whole of 6 kanals 2 marlas comprised in khasra No. 2968 to be taken possession of by the mortgagee as in his plaint he only asked for one-fourth of that khasra number. This is correct and the appeal must be technically accepted and the area decreed reduced to 71 kanals 1½ marlas, i. e., khasra No. 2968 is not decreed in whole but only as regards a one-fourth share in it. This relief the appellants could have got without coming here as it was merely a clearical error which could have been corrected by the learned District Judge. I would therefore allow the respondent-mortgagee his costs of this appeal.

Agha Haidar, J.—I agree.

K.S. *Order accordingly.*

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1. (1912) 66 P R 1912=13 I C 559.
2. A I R 1919 Oudh 78=56 I C 348.
3. A I R 1928 Lah 668=111 I C 519.

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* A. I. R. 1933 Lahore 194

BHIDE, J.

Punjab National Bank, Ltd.—Defendant—Appellant.

v.

Mathra Das and *another*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1238 of 1929, Decided on 1st November 1932, from decree of Dist. Judge, Ambala, D/- 31st January 1929.

*** Evidence Act (1872), S. 91—Bahi entry regarding partition unregistered and consequently inadmissible—Factum of partition can be proved by oral evidence and bahi entry is admissible to prove nature of possession, but not terms of partition.**

In a suit brought in 1927 for declaration that a certain property had fallen to the plaintiff by virtue of a partition plaintiff relied on a bahi entry of 1912 in support of the partition which was held to be inadmissible in evidence for want of registration.

Held: that oral evidence was admissible to prove the factum of partition, that the bahi entry can be looked into for ascertaining the nature of plaintiff's possession, that the date of the entry was not a term in the partition within the meaning of S. 91 and that it was admissible to prove plaintiff's adverse possession from that date: *A. I. R.* 1919 *P. C.* 44 and *A. I. R.* 1923 *Lah.* 495, *Rel. on.*; 98 *I. C.* 940, *Ref.* [P 194 C 2]

Mukand Lal Puri—for Appellant.

Fakir Chand—for Respondents.

Judgment.—Civil Appeals Nos. 1238, 1685 and 1686 of 1929 are connected and can be disposed of together. These appeals arise out of three different suits instituted for a declaration that the properties in dispute had fallen to the share of the plaintiffs by virtue of a partition. The plaintiffs relied upon an entry in a bahi in support of the alleged partition. This entry was held to be inadmissible in evidence for want of registration, but the Courts below have held that oral evidence was admissible to prove the factum of the partition and that the bahi entry could be looked at for ascertaining the nature of the plaintiffs' possession. Relying upon the oral evidence and the document for these purposes it has been held that the plaintiffs had succeeded in establishing their claim and the suits have been accordingly decreed. From this decision the Punjab National Bank, (who is the defendant in all the cases) has preferred second appeals.

The only point for decision in the appeals is whether the learned District Judge was right in holding that oral evidence was admissible to prove the factum of partition and whether the bahi entry could be looked at for ascertaining the nature of the possession of the plaintiffs. The view taken by the learned District Judge is undoubtedly supported by *Sheo Karan* v. *Chiranji Lal* (1) to which he has referred. The learned counsel for the appellant conceded that although the bahi entry was not admissible to prove which of the properties had been allotted to the plaintiffs the fact that the plaintiffs were no longer members of the joint family but were separate in status could be proved by oral evidence. He however contended that the bahi entry was not sufficient to prove that the plaintiffs had acquired title by adverse possession over 12 years. The entry being of the year 1912 and the suit having been instituted in the year 1927 the exclusive possession enjoyed by the plaintiffs over 12 years would seem to be sufficient to establish their claim. The learned counsel for the appellant however urged that the date of the bahi entry was a part of the terms of the document within the meaning of S. 91, Evidence Act, and was therefore not admissible in evidence. This argument does not appear to me to be sound. The fact that the bahi entry was executed on a particular date does not seem to me to be a part of the terms of the partition. This view receives support from the remarks of their Lordships of the Privy Council (at p. 251 of 43

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1. (1926) 98 I C 940.

Mad.), *Varada Pillai* v. *Jeevartnammal* (2), and also from *Qadar Baksh* v. *Mangha Mal* (3) in which a similar question arose, and in which adverse possession was held to be proved from the date of the document, the terms of which were otherwise inadmissible. In my opinion the decision of the learned District Judge is correct. I accordingly dismiss the appeals with costs.

K.S. *Appeal dismissed.*

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2. A I R 1919 P C 44=53 I C 901=46 I A 285=43 Mad 244 (P C).
3. A I R 1923 Lah 495=73 I C 889=4 Lah 249.

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* A. I. R. 1933 Lahore 195

ADDISON AND AGHA HAIDAR, JJ.

Mohammad Habit Khan—Plaintiff—Appellant.

v.

Badiulzaman Khan—Defendant—Respondent.

First Appeal No. 590 of 1928, Decided on 20th December 1932, from decree of Sub-Judge, First Class, Lahore, D/- 25th November 1927.

Specific Relief Act (1877), S. 42—Dispute as to land—Attachment of property and appointment of receiver by Magistrate under S. 146 (2), Criminal P. C.—Suit for declaration of ownership lies and suit for possession is not necessary—Criminal P. C. (1898), S. 146 (2).

Where the property has been attached by the Magistrate and a receiver has been appointed under the provisions of S. 146 (2), Criminal P. C., it may be taken that the property is in custodia legis, that the Magistrate is in the position of a stake holder who must be taken to be holding the property for and on behalf of the person who ultimately establishes his claim in the civil Court; in such a case a suit for declaration is maintainable and no suit for possession is necessary: *A. I. R.* 1922 *Cal.* 419; *A. I. R.* 1915 *All.* 104 and *A. I. R.* 1926 *Oudh* 43, *Rel. on.* [P 195 C 2]

Amar Nath Chona and *Har Bhajan Das*—for Appellant.

Jagannath Agarwal, Jiwan Lal Kapur for *Jagannath, Hukam Chand Bhasin* and *Sarvmiter Sikri*—for Respondent.

Agha Haidar, J.—This appeal arises out of a suit for a declaration that a certain property situate at Qila Gujar Singh, Lahore, belongs to the plaintiff and that the defendant has no right or interest in it. The plaintiff's suit having been dismissed by the trial Court, he has come up to this Court in appeal. The plaintiff came into Court on the allegation that, under two sale-deeds, he purchased the property in dispute, that disputes and differences arose between the parties who are related to each other as uncle and nephew, and that the plaintiff succeeded in obtaining mutation in his favour in the revenue papers. He further alleges that, in April 1925 differences between the parties became acute and the police obliged to take action under S. 145, Criminal P. C. On 29th June 1925, an order was passed by Mr. Disney, Magistrate First Class, Lahore, under S. 146, Criminal P. C., by which he attached the property in suit and appointed one Mohammad Israel as receiver ordering him to realize rents and profits of the property attached until the parties had got their rights settled by a competent civil Court. The plaintiff further alleged that he was not in actual possession of the property as it was under the attachment of the Magistrate under the order dated 29th June 1925. On these allegations he prayed for the declaration that he was the absolute owner of the property in suit and the defendant had no concern or connexion therewith. The defendant raised the plea that the plaint was not properly framed, that the plaintiff ought to have sued for possession and that, as he had not done so, his suit should be thrown out on the ground of its being misconceived.

The learned Subordinate Judge, after framing issues and recording evidence, held that the property was in the possession of the defendant and that the plaintiff therefore ought to have brought a suit for possession and paid the proper court-fee. He gave time to the plaintiff to amend the plaint and pay up the extra court-fee, but the plaintiff persisted in the attitude, which he had taken up while filing the plaint, and did not either amend the plaint or pay the additional court-fee. The result was that on 25th November 1927, the learned Subordinate Judge dismissed with costs the plaintiff's claim.

The contention on behalf of the plaintiff in effect is that, as the property had been attached by the Magistrate under his order dated 29th June 1925, and a receiver had been appointed under the provisions of S. 146 (2), Criminal P. C. it may be taken that it was in custodia legis, and the Magistrate was in the position of a stake-holder who must be taken to be holding the property for and on behalf of the person who ultimately establishes his claim in the civil Court. This contention seems to be well-founded. A number of authorities were quoted by the learned counsel for both parties, and I refer to the case reported as *Panna*

Lal Biswas v. *Panchu Ruidas* (1), where the learned Judges laid down the proposition of law as enunciated above and further held that, as the possession of the Magistrate was in law the possession of the true owner, the defendant's possession, if any, was determined upon the Magistrate's taking possession under the attachment. To the same effect is the decision reported as *Jagannath Gir* v. *Tirguna Nand* (2). This case was followed by a learned single Judge of the Judicial Commissioner's Court, Oudh, in case reported as *Harkishen Das* v. *Mt. Sundro Bibi, A. I. R.* 1926 *Oudh* 43. With these decisions I entirely agree, and in my judgment on general principles no other view is possible. There was a scramble over the property at the time when the police took action under the provisions of S. 145, Criminal P. C., and in order to prevent any breach of the peace, the Magistrate proceeded under S. 146 and ordered that the property in dispute be attached. He further ordered that none of the parties should interefere with that property. He appointed one Mohammad Israel as receiver, providing distinctly that he should work under the control of the Court and manage the property and exercise all the powers of a receiver appointed under the Civil Procedure Code. In view of these proceedings the plaintiff had no alternative except to bring a suit for a declaration. I may point out that Mr. Jagannath Aggarwal, who appeared to support the judgment of the Court below, argued that, nothing was done in pursuance of the order of the Magistrate dated 29th 1925, and that, in fact, the defendant continued in possession as heretofore. He relied upon a number of rent deeds which were filed by his client in support of his possession. But these documents cover a period when disputes and differences had already arisen between the parties and therefore much importance cannot be attached to them. Besides, these documents have not been properly proved and none of them is a registered document. There is nothing easier in a case of this description than for a party to produce a number of fictitious documents like those in question.

Another argument put forward by Mr. Jagan Nath Aggarwal was that Mohammad Israel, who had been appointed a receiver, did not realize any rents of the property in dispute and therefore did not take effective possession of the property, hence the order dated 29th June 1925, passed by the learned Magistrate remained a dead letter. There is no substance in this argument. A reference to the evidence of the defendant on his own behalf shows that Mohammad Israel was appointed as receiver of the property and that the order of the Magistrate stood intact. Mohammad Israel, D. W. 2, in his evidence has stated that he went to the spot to take possession of the property in dispute, but the tenants refused to recognize him or to give him possession of the property, saying that they would pay rent to him if he brought an order of the Court, though they never said that they would not pay the rent until the decision of the civil Court. The witness, according to his own evidence, remained a receiver for a period of eight months and made efforts to realize rents but was unsuccessful in discharging his functions as receiver. He says that he sent his resignation, but there is nothing on the record to show that this resignation was ever accepted. The fact however remains that the Court, after attaching the property, took action under S. 146 (2), Criminal P. C., and appointed Mohammad Israel as receiver. Under these circumstances the plaintiff could not ask for possession of the property since the same was not in the possession of the defendant but under attachment by the Court and in the possession and management of the receiver appointed by it. The suit therefore for a declaration was properly framed and the learned Judge was in error in holding that the plaintiff ought to have brought a suit for possession.

I may point out that the trial Judge made a slight error of fact in his judgment where he says that the property was not actually delivered to the receiver, Mohammad Israel. The evidence of Mohammad Israel is directly contrary to this statement and there cannot be any doubt that Mohammad Israel received a parwana from the criminal Court and, armed with this document of authority, went in the discharge of his duty to collect the rents of the property. Possession therefore must be taken to have been given to him by the Court. As to whether he was successful in realizing rents of the property or not is a matter which does not really touch the point in controversy. I would therefore allow this

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1. A I R 1922 Cal 419=65 I C 200=49 Cal 544.
2. A I R 1915 All 104=28 I C 139=37 All 185.

appeal and, setting aside the judgment and decree of the trial Judge dated 25th November 1927, remand the case to the Senior Subordinate Judge, Lahore, under O. 41, R. 23, Civil P. C., for trial and disposal in accordance with law. The appellant shall get his costs in this Court. Other costs shall abide the result. As the case has been decided on a preliminary point and the decision of the Court below on that point has been reversed, the plaintiff-appellant is entitled to have a refund of the court-fee paid on the memorandum of appeal in this Court. Parties are directed to appear before the Senior Subordinate Judge, Lahore, on 16th January 1933, in order to get a date fixed for evidence on the remaining issues in the case.

Addison, J.—I agree.

K.S. *Appeal allowed.*

A. I. R. 1933 Lahore 197 (1)

TAPP, J.

Mt. Sanjirat—Objector—Petitioner.

v.

Ramchandar Gupta and *another*—Insolvents—Opposite Parties.

Civil Revn. Petn. No. 406 of 1932, Decided on 30th November 1932, from order of Dist. Judge, Ambala, D/- 25th May 1932.

Provincial Insolvency Act (1920), S. 53—Section is no bar in the case of a fictitious transfer.

Section 53 protects only voluntary transfers made before and in consideration of marriage or made in good faith and for valuable consideration and other proper and valid transactions entered into more than two years before the presentation of a petition in bankruptcy. It does not operate as a bar in the case of a fictitious transfer: *A. I. R.* 1926 *All.* 470, *Rel. on.* [P 197 C 2]

Kashi Nath Aggarwal — for Petitioner.

Judgment.—Mt. Sanjirat, wife of one Rahim Bakhsh, who was adjudicated an insolvent on 9th October 1930, prefers this revision application against the order of the District Court affirming that of the Senior Subordinate Judge, rejecting her objection to the sale of a house by the receiver and which she alleged had been given to her by her insolvent husband in discharge of her prompt dower of Rs. 75. The receiver alleged that the transaction was voidable under S. 53 of the Act and was also fictitious. The petitioner relied on a document purporting to have been executed on 25th July 1917, and prima facie the transfer cannot be impugned under S. 53 as it obviously took place more than two years before the petition to be adjudged an insolvent was presented. This however in my opinion would only operate as a bar in the case of a valid and proper transfer whereas it has been alleged and found that the transaction was a fictitious one. The trial Court considered the document to be a very suspicious one and observed that there was intrinsic evidence in the deed to show that it had been written subsequently. This view has been endorsed by the lower appellate Court and I see no good and sufficient reason to disagree.

The contention of the learned counsel that the Insolvency Court had no jurisdiction to decide the question of title which was conferred more than two years prior to the petition is repelled by the provisions of S. 4 of the Act, which confer full power on the Court to decide all questions of title or of property, etc. It is true that the exercise of such power is subject to the other provisions of the Act but as observed above the limitations imposed by S. 53 will only apply in the case of a valid transfer. The circumstances are entirely different here and I agree with the view taken in this matter by Sulaiman, J., in *Hari Chand Rai* v. *Moti Ram* (1). S. 53 only protects voluntary transfers made before and in consideration of marriage or made in good faith and for valuable consideration and other proper and valid transactions entered into more than two years before the presentation of a petition in bankruptcy. The further contention of the learned counsel as to the application of the receiver being incompetent in view of it having been made after the insolvent had been granted a discharge has no force. An order suspending the discharge of the insolvent for one year was made on 25th June 1931, and when the receiver made his application on 19th December 1931, the husband of the petitioner was still an undischarged bankrupt. I dismiss the petition and make no order as to costs there having been no appearance by or on behalf of the respondent.

K.S. *Petition dismissed.*

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1. A I R 1926 All 470=94 I C 429=48 All 414.

* A. I. R. 1933 Lahore 197 (2)

ADDISON AND AGHA HAIDAR, JJ.

Sardar Khan and *others*—Appellants.

v.

Mt. Aisha Bibi—Respondent.

First Appeal No. 2808 of 1926, Decided on 22nd November 1932.

(a) Custom (Punjab)—Gurdaspur Districts—Succession—Gift of ancestral property to father having only daughters—Daughters are not excluded by collaterals of donor.

In Gurdaspur District in the case of a gift of ancestral property in favour of a father who has only daughters, the property on the death of the donee does not revert to the collaterals of the donor in the presence of the daughters of the donee, but the daughters succeed to it. [P 201 C 1]

(b) Custom (Punjab), Succession—"Aulad" means both male and female children—Words and phrases.

The word "aulad" cannot be construed in a restricted sense, namely, of male issue alone. It has got a wider meaning and includes the descendants and offspring of both sexes. 89 *P. R.* 1892, *held not good law*; 114 *P. R.* 1900; 36 *I. C.* 222; *A.I.R.* 1922 *Lah.* 215; 12 *P. R.* 1892 and *A. I. R.* 1927 *Lah.* 67, *Appr.* [P 200 C 1, 2]

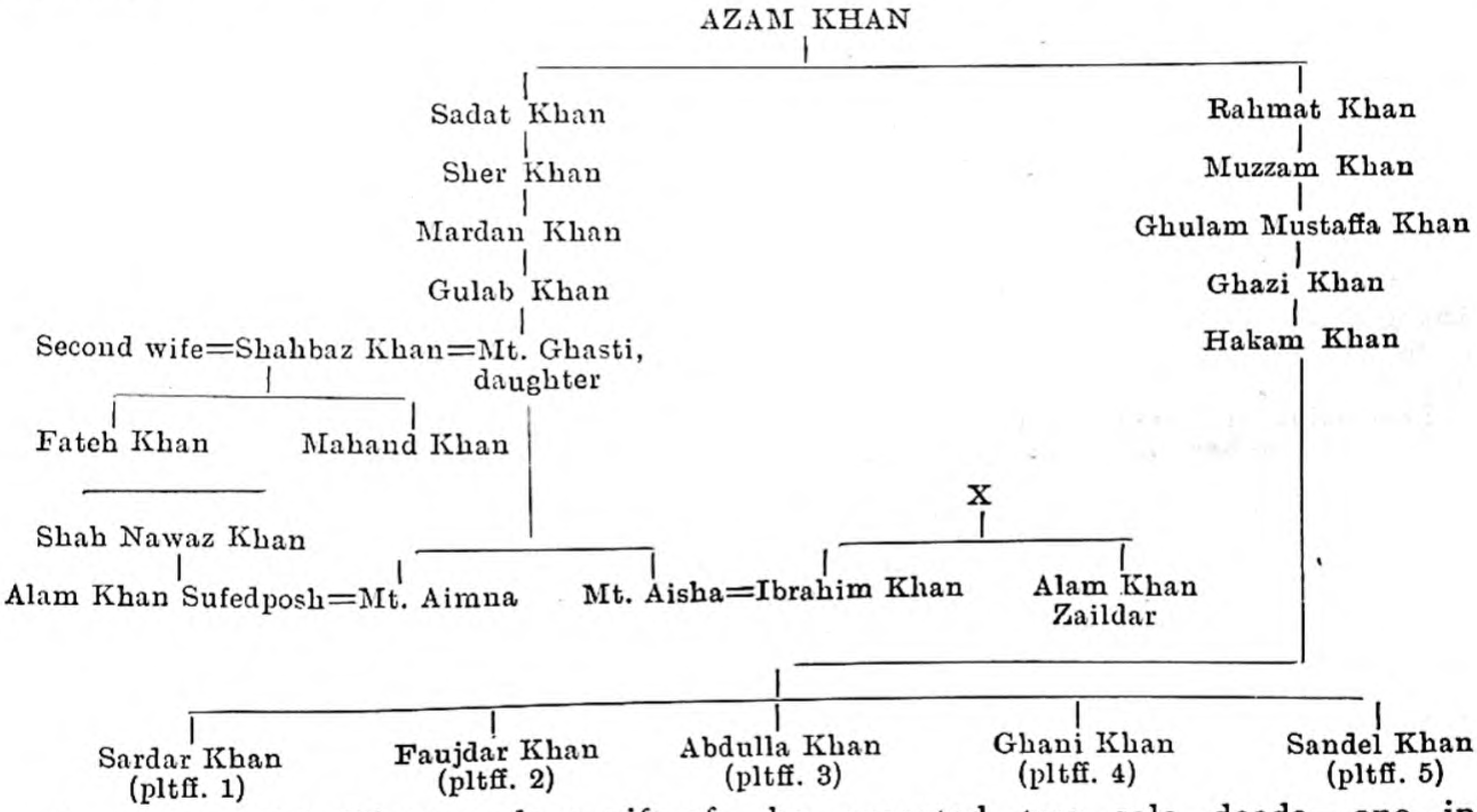
✲ **(c) Practice—Parties citing opponents as witnesses—Court can accept such evidence even if it goes against party citing them—Evidence.**

If parties choose to put their opponents into the witness box and their evidence goes against them, they cannot have any legitimate grievance if the Court accepts the evidence of these witnesses. [P 201 C 1]

Mehr Chand Mahajan and *Malik Mohammad Amin* for *Abul Rashad*—for Appellants.

Badri Das and *Gaulam Mohyuddin*—for Respondents.

Agha Haidar, J.—I am indebted to the learned counsel who appeared in this case for an able and exhaustive argument, and I appreciate the manner in which Mr. Mehr Chand Mahajan, counsel for the appellants, has presented the tangled mass of a protracted litigation in a clear and lucid form. The following pedigree-table may be subjoined here for facility of reference:


AZAM KHAN
Sadat Khan
Sher Khan
Mardan Khan
Gulab Khan
Second wife=Shahbaz Khan=Mt. Ghasti, daughter
Fateh Khan
Mahand Khan
Shah Nawaz Khan
Alam Khan Sufedposh=Mt. Aimna
Mt. Aisha=Ibrahim Khan
X
Alam Khan Zaildar
Rahmat Khan
Muzzam Khan
Ghulam Mustaffa Khan
Ghazi Khan
Hakam Khan
Sardar Khan (pltff. 1)
Faujdar Khan (pltff. 2)
Abdulla Khan (pltff. 3)
Ghani Khan (pltff. 4)
Sandel Khan (pltff. 5)

In 1873 Gulab Khan made a gift of the property in suit, which covered an area of 740 kanals of land, in favour of his son-in-law, Shahbaz Khan, the husband of his only duaghter Mt. Ghasiti. Gulab Khan died in 1877. Litigation started soon afterwards, but with that litigation we are not concerned except only to this extent that it was finally decided, on 19th July 1890, that in the presence of Hakam Khan, the father of the present plaintiffs, the suit was not maintainable at the instance of one Ghulam Hassan Khan, a collateral. On 29th November 1890, Shahbaz Khan made a gift of 197 kanals of land in favour of his two daughters by Mt. Ghasiti, namely, Mt. Aisha and Mt. Aimna. On 22nd March 1892, he executed two sale deeds—one in favour of his son-in-law Ibrahim Khan, the husband of his daughter Mt. Aisha, and Ibrahim Khan's brother Alam Khan zaildar and the other in favour of Shah Nawaz Khan, the father of Alam Khan sufedposh, the husband of his other daughter Mt. Aimna. Each of these two sale-deeds related to an area of 281 kanals, 15 marlas of land. There was some litigation in the year 1893 launched by the sons of Shahbaz Khan by his other wife. We are not however concerned with it and so it need not be considered any further.

On 11th April 1895, Shahbaz Khan executed another sale-deed of 21 kanals of land and a house in favour of Shah Nawaz Khan, the father of Alam Khan, sufedposh. In 1898 the present plaintiffs brought a suit to contest this last alienation. The defendants to this suit were Shahbaz Khan, his wife Mt. Ghasiti and Shah Nawaz Khan. The plaintiffs alleged that, as Mt. Ghasiti had no male issue by Shahbaz Khan, the property, in the absence of such male issue, shall revert to the collaterals on the death of Shahbaz Khan and Mt. Ghasiti. In other words, they denied the rights of the two daughters to succeed to the property. The defence raised was that Shahbaz Khan was the absolute owner of the property under the gift of 1873 and that the said gift was a personal one and was not intended to benefit Mt. Ghansiti and her daughters.

Both the District Judge and the Divisional Judge held that the gift was for the benefit of the daughter Mt. Ghasiti and her aulad (male issue) and, in the absence of such male issue, the plaintiffs were granted a declaration that their reversionary rights would not be affected after the death of Shahbaz Khan and Mt. Ghasiti. It may be observed that in this suit the daughters, although in existence, were not impleaded as parties. Against this decision an appeal was preferred to the Chief Court of the Punjab. While this appeal was pending three separate suits were instituted on 7th August 1900, by the present plaintiffs: (1) Suit No. 55 related to the sale deed executed by Shahbaz Khan in favour of Ibrahim and Alam Khan zaildar; (2) Suit No. 56 was against Shahbaz Khan and Mt. Ghasiti and their daughters and (3) Suit No. 57 related to the sale in favour of Shah Nawaz Khan the father of Alam Khan, sufedposh. In suit No. 56 the plaintiffs prayed that the gift by Shahbaz Khan to his daughter shall not affect their reversionary rights after the death of Shahbaz Khan and Mt. Ghasiti. The defence in the three suits was very much on the same lines as in the suit of 1898. In Suit No. 56 however the daughters filed a separate written statement in which they pleaded that their father was the absolute owner of the property, and that the gift was made to him personally. The trial Court dismissed the three suits holding that the property was in the absolute ownership of Shahbaz Khan. The matter was taken up in appeal to the Divisional Judge who, by his judgment dated 10th October 1901, granted a decree to the two minor plaintiffs, namely, Sandal Khan and Ghani Khan only. As regards the other appellants he held that the suit was barred by limitation. Three appeals arising out of these three suits were filed in the Chief Court and all the four appeals came up for hearing on 26th/27th February 1904. In the three appeals the declaration granted to the two minor plaintiffs by the lower appellate Court was affirmed but as regards the suit of 1898, the declaration was granted to all the plaintiffs. Shahbaz Khan died in 1912 and Mt. Ghasiti in October 1922.

Two suits (Nos. 163/208 of 1922/1925 and 1/209 of 1923/1925), out of which the present two appeals have arisen, were instituted on 20th November 1922, against the two daughters of Shahbaz Khan and Mt. Ghasiti and certain other alienees. We are not concerned with these alienees any longer because they relinquished all the rights that they had in favour of the two daughters of Shahbaz Khan. The result therefore is that, in the present litigation, there is a straight fight between the plaintiffs on the one side and the two ladies Mt. Aisha and Mt. Aimna on the other. The plaintiffs prayed that a decree for possession may be passed in their favour against the defendants. The defence put forward by the daughters is printed at p. 7 of the paper book and is to the effect that they were the legal heirs and in possession of the property. They forestalled the point of res judicata which was urged against them, by pleading that the judgment of the Chief Court did not affect their right so. They concluded by saying that they were the heirs to the donees of the property in suit. The question of res judicata which was raised and contested in the present suits was fought up to the High Court and it was held by a Bench of this Court on 22nd July 1925, that, in the previous litigation the question as to the right of the daughters when succession actually opened, had not been finally decided and that therefore the daughters were not barred in their defence by the rule of res judicata. The trial Court held that the Riwajiam of 1865 was in favour of the plaintiffs, but the general Customary law, as the learned Senior Subordinate Judge has chosen to put it, and the oral evidence on the record had the effect of rebutting the presumption raised by the Riwajiam and on this ground the plaintiffs' two suits were dismissed. Against these two decrees two appeals were filed and both of them are before us for disposal.

The solitary point, which was seriously argued by the learned counsel for the appellants, was that, on the death without any male issue of Shahbaz Khan and Mt. Ghasiti, the original donees, the property reverted to the collaterals of Gulab Khan, and that the daughters of Mt. Ghasiti has no right to succeed. In other words, he urged that in the case of a gift of ancestral property in favour of a father who has only daughters, the property on the death of the donee reverted to the collaterals of the donor in the presence of the daughters of the donee. Several passages were cited in argument from the Riwajiam of Gurdaspur District of the year 1865 by the learned counsel for the appellants, but reliance was mainly placed upon Questions 9 and 13 of the Riwajiam and their answers. Special stress was laid upon Question 13 and its answer. These may be translated as follows:

> "*Question* 13.—In case a daughter or her "aulad" die lawald after becoming the owners of property, does that property revert to the collaterals of her father or to the collaterals of her husband's father?
>
> *Answer*.—If a daughter or her husband or her "aulad" die lawald after becoming owners of property, then the property, which has come as the heritage of the daughter's father, reverts to the heirs of the daughter's father. The heirs of the husband of the daughter have nothing to do with it."

I have purposely left the words "aulad" and "lawald" untranslated, as the meaning of these words is the subject-matter of controversy in the appeal. The argument of Mr. Mehr Chand Mahajan is that the word "aulad" should be construed as meaning the male issue only and, as Mt. Ghasiti had not left any male issue, the property reverted to the collaterals of the original donor, Gulab Khan, namely, the plaintiffs. He relied upon a case reported as *Mt. Rakhi* v. *Mt. Fatima* (1), in which undoubtedly the word "aulad" is interpreted as meaning male issue, but the authority of this case has been considerably shaken by a number of subsequent decisions and, having regard to what has been laid down in *Mt. Dhan Devi* v. *Mt. Malan* (2), *Kallu Mal* v. *Chahindi* (3); and *Saidan* v. *Fazla* (4), it cannot be said to be good law. The last mentioned three cases together with two dictionaries—Durga Parshad's and Fallon's—leave no room for doubt whatsoever that the word "aulad" cannot be construed in a restricted sense, namely, of male issue only, but that, on the other hand, it has got a wider meaning and includes the descendants and offspring of both sexes. There is a passage in the Full Bench decision reported as *Sita Ram* v. *Raja Ram* (5), where at pp. 60 and 61 the following observation occurs:

> "Other tribes go further, and allow gifts to, or adoption of, certain males closely connected with them in the female line such as daughters' sons or husbands' or even sisters' sons. But I entirely concur with the remarks of Sir Meredyth Plowden, which I have already quoted, that where this is done it is done from a tender feeling to benefit the direct descendants of the old stock, and not in order to benefit the family into which a daughter of the tribe happens to have married."

I may observe that this case was followed recently in *Fakir* v. *Ramzan* (6). Speaking generally and without any reference to the authorities, it cannot be doubted for a moment that, while making the gift in favour of Shahbaz Khan, the donor Gulab Khan really intended to benefit his daughter Mt. Ghasiti and the children of that daughter and I do not think that his benefaction was intended to be confined to the male children of his daughter and not to her female children. Whatever etymological meaning the word "aulad" may have, in common parlance, "aulad" connotes both the male and the female children and it is difficult to imagine a case where the use of the word "aulad" would be restricted to the male issue only to the exclusion of the female issue. This being so, I would hold that the word "aulad" in the answer to Question 13 of the Riwaj-i-am means both the male and female children and is not limited only to the males. It may further be observed that the parties produced oral evidence in support of their respective cases. Sher Khan, P. W. 2, in a way supported the defendants. He cites the instance of one Imam Din of village Borewal who gifted the land to his daughters and the suit of the collaterals of the donor was dismissed. Akbar Khan, P. W. 3, is a hostile witness and his evidence cannot be relied upon. Alam Khan zaildar, P. W. 5, who was impleaded as a defendant, has been cited as a witness by the plaintiffs. This witness also quotes the instance from the village Borewal which supports the custom relied upon by the defendants. Ibrahim Khan, P. W. 6, gives his opinion only. Mt. Aisha has also given evidence in the case on behalf of the plaintiffs and has supported her case. If contrary to

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1. (1892) 89 P R 1892.
2. (1900) 14 P R 1900=143 P L R 1900.
3. (1916) 36 I C 222.
4. A I R 1922 Lah 215=69 I C 177.
5. (1892) 12 P R 1892 (F B).
6. A I R 1927 Lah 67=96 I C 171=7 Lah 456.

the repeated observations of their Lordships of the Privy Council, parties choose to put their opponents into the witness box and their evidence goes against them, they cannot have any legitimate grievance if the Court accepts the evidence of these witnesses.

On the defendants' side there are seven witnesses. Six of them give their opinion in support of the custom relied upon by the contesting defendants, namely, the daughters. Such evidence is admissible in proof of the custom and, if believed, a Court of justice can very well act upon it. I do not see any reason why these witnesses should not be believed when they express their opinion in favour of the custom relied upon by the defendants. Ismail Khan, D. W. 4, also cites the instance of the village Borewal. Qasim Khan, D. W. 1, Sher Khan, D. W. 3 and Ismail Khan, D. W. 7, further depose to an instance of this custom in the village Jastrawal, where one Ibrahim got some land by gift and, on his death, his daughter, Mt. Ghulam Fatima succeeded him. The result therefore is that, apart from the riwajiam which, on the interpretation placed by me on the word "aulad" is not against the defendant and is, in fact, comprehensive enough to support their title, a fairly large body of witnesses gives their opinion as to the existence of the custom relied upon by the contesting defendants. This evidence together with the instances from the villages of Borewal and Jastarwal fully establishes the defence and is sufficient to defeat the plaintiffs' claim. In conclusion, I may observe that Mr. Badri Das, counsel for the respondents did not attempt to support the reasoning on which the judgment of the Senior Subordinate Judge was based. He supported his decree on his own line of argument. This he was perfectly entitled to do. I would accordingly affirm the decrees of the Senior Subordinate Judge dated 22nd July 1926, and dismiss with costs throughout both the appeals preferred by the plaintiffs.

Addison, J.—I agree.

K.S. *Appeals dismissed.*

A. I. R. 1933 Lahore 201

TEK CHAND AND MONROE, JJ.

Umrao Singh—Appellant.

v.

Baldev Singh & another—Respondents.

First Appeal No. 531 of 1932, Decided on 22nd November 1932.

Hindu Law—Will—Absolute estate of inheritance created—Subsequent clause restricting such estate even for limited period is invalid—Succession Act (1925), S. 120—T. P. Act (1882), S. 11.

Where in a deed of gift or will an absolute estate of inheritance is created in favour of person, any subsequent clause which purports to restrict that interest is invalid, and the donee or legatee takes an absolute estate as if the deed contained no such restrictive condition. The rule is the same even if the restriction is for a limited period only. [P 202 C 2]

A Hindu testator declared in a will that his three sons were his heirs and were absolute owners, in equal shares, of his moveable and immovable properties. But in a subsequent clause of the will he tried to restrict their power of alienation and partition in respect of immovable properties until the youngest of them had attained majority:

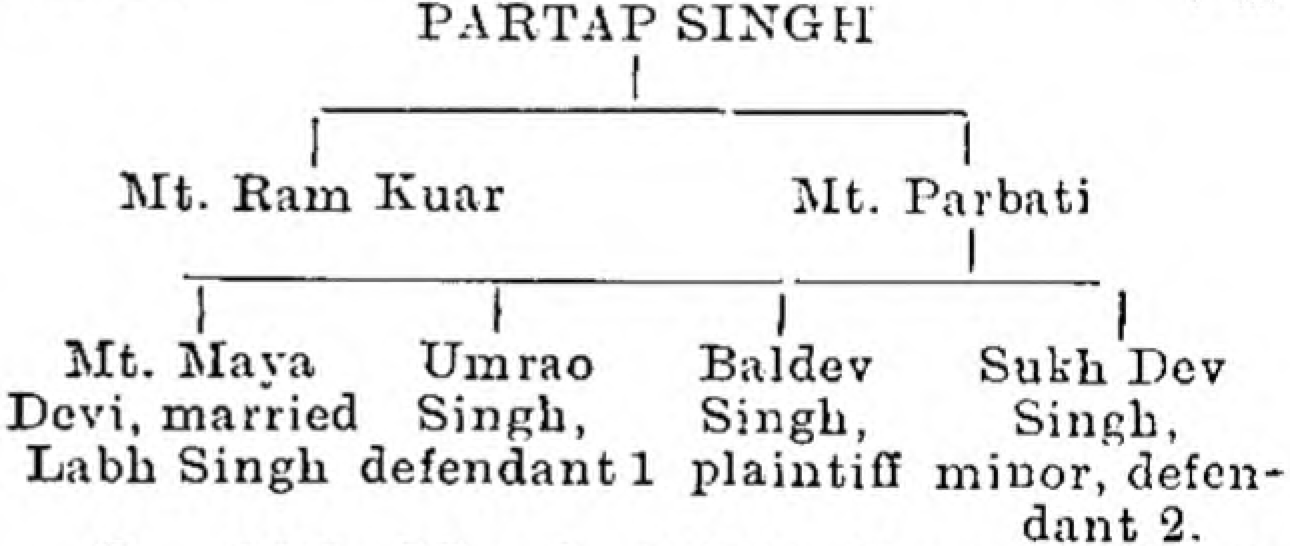
Held: that this restriction is clearly repugnant to the absolute estate created in the earlier part of the will and is therefore invalid.

[P 202 C 2; P 203 C 1]

M. L. Puri and *Kanshi Nath Aggarwal*—for Appellant.

Iqbal Singh, Balwant Rai—for Respds.

Tek Chand, J.—In order to understand the facts of this case it is necessary to refer to the following pedigree table:



On 20th March 1917, Partap Singh executed a will declaring that the heirs to his moveable and immovable properties were his three sons — Umrao Singh, Baldev Singh and Sukhdev Singh minors, that during their minority their mother, Mt. Parbati, would be their guardian and his son-in-law Labh Singh and nephew Lehna Singh would help Mt. Parbati in the management of the estate; that when the eldest son Umrao Singh attained majority he would manage the estate in consultation with his mother and later on, when Baldev Singh became major he also would help in the management. In para. 7 of the will however the testator laid down that "my immovable property shall not be partitioned until all my three sons attain majority, nor shall anybody be competent to effect transfer of any part thereof up to that time."

In para. 13, the testator recited that he had already given 1½ square out of his land in chak No. 101 in District Lyallpur to his eldest son Umrao Singh "by virtue of Sardari," and this land shall remain entered in Umrao Singh's name in the papers as before but he "shall consider the income thereof as joint until his brothers attain majority."

Soon after the execution of the will Partab Singh died on 30th September 1917. The eldest son Umrao Singh attained majority in 1921, and next year Mt. Parbati also died. Baldev Singh, plaintiff completed his 18th year on 29th August 1924. The youngest son Sukhdev Singh is still a minor. The exact date of his birth is not known, but it is common ground that he is over 17 years old now. On 20th January 1926, Baldev Singh, instituted a suit for rendition of accounts against Labh Singh, Umrao Singh and Sukh Dev Singh minor. This claim was resisted by Labh Singh and Umrao Singh and was dismissed on 23rd November 1926, by Rai Bahadur Lala Rangi Lal, District Judge, Gujranwala, on the ground that the parties being members of a joint Hindu family of which Umrao Singh was the manager, a suit for accounts did not lie against him. The learned Judge also held that the provision in para. 7 of the will prohibiting partition of the immovable properties till "all the sons had attained majority" was void under Hindu law, and he expressed the opinion that the only remedy open to the plaintiff, if he was dissatisfied with the management of Umrao Singh, was to seek partition of the family properties. On 22nd January 1931 the plaintiff Baldev Singh brought the present action in the Court of the Senior Subordinate Judge, Gujranwala, seeking possession by partition of one-third of the moveables and house properties mentioned in the appendix attached to the plaint and praying for a declaration that he was entitled to have his one-third share in the joint agricultural lands partitioned by the revenue authorities. He also prayed that Umrao Singh, defendant 1, be required to render accounts of the entire property "from begining to end."

Umrao Singh, defendant 1, for himself and as the guardian ad litem of Sukh Dev Singh minor, defendant 2, raised a number of preliminary objections against the maintainability of the suit, and also filed a lengthy written statement on the merits. The learned Senior Subordinate Judge framed three preliminary issues as follows: 1. Is the plaint properly stamped ? 2. Does the suit lie as framed ? 3. Is the suit not premature ? The first two issues were founded in favour of the plaintiff by order dated 9th October 1931, and the parties were directed to produce such evidence as they desired on the third issue. The learned Judge heard arguments on this point on 10th March 1932, and he forthwith passed an order, holding that the restriction on partition contained in para. 7 of the will was void under Hindu law and that the plaintiff having attained majority before the institution of the suit, was entitled to ask for partition of his share of the joint properties. He accordingly held that the suit was not premature. But, instead of proceeding to frame issues on the pleas on the other points in dispute the learned Judge proceeded at once to pass a preliminary decree under O. 20, R. 18, for partition of one-third of the house properties and moveables in dispute and appointed a local commissioner to effect partition. He also granted the plaintiff a declaration that he had a one-third share in the agricultural lands in dispute, the partition of which could be sought in the revenue Courts. The judgment is silent as to the prayer in the plaint relating to the rendition of accounts by defendant 1, but we are told that, after the aforesaid order was passed, the learned Judge called upon defendant 1, to produce in Court certain account books and that proceedings relating to this matter are going on.

Umrao Singh has preferred a first appeal to this Court, and the first contention raised on his behalf is that the learned Judge was in error in holding that the condition in Cl. 7 of the will restricting partition of immovable properties till the youngest son Sukh Dev Singh attained majority was void. After hearing lengthy arguments, I am of opinion, that the contention is without force and must be overruled. It is clear from the will that the testator declared in unmistakable terms that his three sons were his heirs and were absolute owners, in equal shares, of his moveable and immovable properties. But in a subsequent clause of the will, he tried to restrict their power of alienation and partition in respect of immovable properties until the youngest of them had attained majority. It is settled law that where in a deed of gift or will, an absolute estate of inheritance is created in favour of a person, any subsequent clause which purports to restrict that interest is invalid, and the donee or legatee takes an absolute estate as if the deed contained no such restrictive condition. And the rule is the same even though the restriction is for a limited period only, and purports to cut down the donee's right to enjoy the property as full owner or alienate it until a certain age beyond the date of his majority, except, of course, in cases where in the interval the income of the property has been disposed of in favour of a third party. (See Mulla's Principles of Hindu Law, 7th Edn., paras. 392 to 394, Gour's Hindu Code, 3rd Edn., para. 2099, Mayne's Hindu Law and Usage, 9th Edn., p. 96, and the authorities cited therein). It is admitted that the case before us does not fall within the exception stated above. Here, Umrao Singh attained majority in 1921 and the plaintiff Baldev Singh in 1924, but powers of each of them to have his share partitioned or alienated is postponed till 1933 when the youngest son would attain majority. This restriction is clearly repugnant to the absolute estate created in the earlier part of the will and is therefore invalid.

Mr. Puri relied largely on certain observations of the High Court of Calcutta in *Rai Kishori* v. *Debendronath* (1), but they were not necessary for the decision of the case and do not appear to have been adopted by their Lordships of the Privy Council who affirmed the decision of the High Court on the actual points involved in the case. I hold therefore that the suit is not premature by reason of the fact that the youngest son of the testator had not attained majority at the time of its institution and to this extent the decision of the learned Subordinate Judge is correct. (The remaining portion of the judgment is not necessary for reporting).

K.S. *Case remanded.*

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1. (1888) 15 Cal 409=15 I A 37 (P C).

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* * A. I. R. 1933 Lahore 203

ADDISON, J.

N. W. Ry. Administration—Appellant.

v.

N. W. Ry. Union, Lahore—Respondent.

Misc. First Appeal No. 1586 of 1932, Decided on 14th November 1932.

*** (a) Civil P. C. (1908), O. 39, R. 2—Fact that suit would be infructuous if no temporary injunction is issued is not sufficient for issuing such injunction.**

The issue of a temporary injunction is governed by the same principles as the grant of a permanent injunction at the trial of a case. It is no sufficient reason for the purpose of issuing a temporary injunction that the suit would be infructuous if it did not issue. [P 205 C 1]

(b) Civil P. C. (1908), O. 39, R. 2—Delay is sufficient reason for refusing injunction.

When the suit was delayed till the last day and the temporary injunction was applied for on the very day that the suit was instituted and the men were going to be discharged although it was known long before that they were going to be discharged:

Held: that this in itself was a sufficient reason for refusing to issue the temporary injunction. [P 205 C 2]

*** * (c) Civil P. C. (1908), O. 1, R. 1—Suit by a registered Trade Union—Vice Presidents of such Union are not proper plaintiffs—Trade Unions Act (1926), S. 13.**

Where in the heading the plaintiff purported to be the N. W. Ry. Union, Lahore, through two Vice Presidents who were named and the plaint stated that the plaintiffs were the Vice Presidents of the N. W. Ry. Union, Lahore:

Held: that prima facie the proper plaintiff was not before the Court. [P 206 C 1]

*** * (d) Civil P. C. (1908), O. 1, R. 3—Suit against office of Agent of railway does not lie—Secretary of State for India can be sued as a corporation sole.**

The Agent, N. W. Ry., Lahore, cannot be sued as such; for that amounts to a suit against the office of the agent and not against the person or official himself. The Secretary of State for India in Council can be sued as a corporation sole: *A. I. R.* 1927 *Bom.* 521. *Ref.* [P 206 C 1, 2]

*** (e) Injunction—Injunction can be issued only against named person—Specific Relief Act (1877), S. 53.**

No injunction can issue except against a named person. Equity acts in personam and an injunction must be addressed to the defendant personally. [P 206 C 2]

*** * (f) Government of India Act (1915), S. 32 (4)—Government official is not personally liable.**

No official of Government executing any contract on behalf of the Secretary of State in Council shall be personally liable in respect thereof. [P 207 C 1]

*** (g) Civil P. C. (1908), S. 80—Suit against Agent, N. W. Ry. for temporary injunction—Notice under S. 80 is necessary.**

For a suit even for temporary injunction against the Agent, N. W. Ry., notice under S. 80 is necessary as S. 80 is express, explicit and mandatory and it admits of no implications of exceptions: *A. I. R.* 1931 *Lah.* 703 and *A. I. R.* 1927 *P. C.* 176, *Foll.*; 136 *I. C.* 777, *not Foll.*; *A. I. R.* 1927 *Mad.* 166, *treated as* **overruled.** [P 207 C 2]

*** (h) Injunction — Injunction to prevent breach of contract to employ people cannot be granted—Specific Relief Act (1877), Ss. 21 (b) and 56 (f).**

By Ss. 21 (b) and 56 (f), Specific Relief Act, an injunction cannot be granted to prevent the breach of a contract to employ certain people: *Kirchner & Co.* v. *Gruban* (1909) 1 *Ch.* 413, *Ref.* [P 207 C 2]

*** (i) Specific Relief Act (1877), S. 55 (k)—Applicant having no personal interest—Injunction cannot be granted.**

An injunction cannot be granted where the applicant has no personal interest in the matter. [P 208 C 1]

(j) Civil P. C. (1908), O. 39, R. 2—Court should not pass order frivolously and vexatiously.

It is not open to a Court frivolously and vexatiously to issue a temporary injunction without proper cause and due consideration. [P 208 C 1]

(k) Civil P. C. (1908), O. 43, R. 1 (r)—Refusing discharge.

An order refusing to discharge an injunction issued under O. 39, R. 2 is appealable.

C. H. Carden Noad for *J. C. Highet* and *Ram Lal* for *Secy. of State*—for Appellants.

Jai Gopal Sethi—for Respondents.

Judgment.—This is an appeal by Mr. J. C. Highet, at present Agent of the North Western Railway, from an order, dated 27th October 1932, of the Subordinate Judge, First Class, Lahore, refusing to discharge an injunction issued by him under O. 39, R. 2, Civil P. C., on 10th October. An amended plaint was put in on 10th October 1932, by the North Western Railway Union, Lahore, through Mr. M. A. Khan and Dr. Shuja Ullah, Vice Presidents thereof, against the N. W. Railway Administration, Lahore, and the Agent, North Western Railway, Lahore. It is styled a claim and suit, under Ss. 55 and 57, Specific Relief Act, for an injunction restraining the defendants from committing a breach of agreement and directing them not to discharge certain men on 10th October, 1932, or thereafter until the North Western Railways Union is consulted. In para. (1) of the plaint the plaintiffs are distinctly stated to be two Vice-Presidents. In para (4) it is said that the North Western Railway Union is a body representing the employees on the North Western Railway and is body duly recognised by the Government of India, etc.

The other paragraphs are to the effect that the All India Railwaymen Federation, in which the North Western Railway Union is represented, received information that certain employees were to be discharged; that a deputation of the All India Railwaymen Federation thereafter arrived at an agreement with the Railway Board that any representation made by the Union would be considered before any discharges were made; that on 2nd February 1932, the Railway Board informed the President of the All India Railwaymen Federation that a certain number of men on the North Western Railway were to be discharged but that this would be done only after the North Western Railway Union was consulted; that the Government of India published a communique on 6th June 1932, to this effect; that, though the Agent, North Western Railway, was bound under these instructions to consult the North Western Railway Union, he had not done so; that this constituted a breach of a binding agreement arrived at on behalf of the plaintiffs and defendants; that in particular the Agent had issued notices of discharge to 183 employees fixing a certain date for their discharge and had finally decided to dismiss 159 men as from 10th October 1932, i.e., the date of the plaint, without personally discussing the matter with the Union, and without serving due notices on the 159 men; that the Agent by discharging the said 159 men would be committing a breach of the agreement arrived at between the parties and that if previous notice was not given to the North Western Railway Union and previous consultation with them did not take place, the employees would be out of work and this would result in heavy damages and litigation between the parties. It was therefore prayed that the Court be pleased to order, under Ss. 55 and 57, Specific Relief Act, the defendants not to discharge the 159 men without due consideration and consultation and the notice to North Western Railway Union in terms of the said agreement.

A temporary injunction was applied for on the same day, i.e., 10th October 1932. By order of that date the Subordinate Judge First Class, merely said that, unless a temporary injuction issued, the suit would be infructuous. He therefore directed the issue of a temporary injunction under O. 39, R. 2, Civil P. C., to the defendants restraining the defendants from discharging the 159 persons. No attempt was made to serve this temporary injunction upon defendant 1, i. e. the North Western Railway Administration, Lahore, but a notice directed to the Agent North Western Ry. Lahore, was sent by the Court restraining the defendants from committing a breach of the agreement and preventing them from discharging the men that day or thereafter. This notice apparently was not served. It was taken to one Mr. Muirhead, described as the Chief Personal Officer for the North Western Railway, who did not accept service but wrote on the Parwana directed to the Civil Nazir a memorandum to the effect that the Agent, Mr. J. C. Highet, was at that time residing at Woodbank, Simla, and was not in Lahore. No attempt was made to effect service by affixation or by substitution as contemplated by O. 5, Rr. 17 to 20, Civil P. C. The men were dismissed, in accordance with the notices issued a long time before, that same day, namely, on 10th October 1932. On the 12th October the plaintiffs put in a petition under O. 39, R. 2 (3) to the effect that the temporary injunction had been duly served on Mr. Muirhead, that in spite of service the staff had been discharged, that

Mr. Muirhead and the North Western Railway Administration had deliberately refused to obey the order of the Court and that this amounted to contempt of Court. It is not stated in this petition in so many words that Mr. Highet had also committed contempt of Court, though he was the only person to whom the temporary injunction issued or rather to whose office it was issued.

From the issues framed in these proceedings it would appear however that the question is under consideration as to whether the Agent is in contempt. It is not quite clear how Mr. Muirhead, who is not the Agent and to whom the notice did not issue, can be said to be in contempt. An application was made to the Subordinate Judge, First Class, to set aside the temporary injunction. This gave rise to the order dated 27th October 1932, which is under appeal. I do not understand exactly what the Subordinate Judge meant by the order he passed; nor could the counsel on either side enlighten me as to its exact meaning. He said that as action was being taken under O. 39, R. 2 (3) he did not feel justified in discharging the injunction in the sense in which the words would ordinarily be taken to mean. He could only say that the temporary injunction had ceased to be operative as regards the restraint on the discharge of 159 men referred to in the plaint on account of the action of the defendant Agent or his subordinates. It must be taken he has not discharged the injunction but what else he meant is not clear. An appeal therefore lies under O. 43, R. 1 (r). It is obvious that the Subordinate Judge, First Class, when passing his order with respect to the temporary injunction on 10th October 1932, was not aware of the law as to the conditions necessary before a temporary injunction could issue. He seems to have considered it sufficient for the purpose of issuing a temporary injunction that the suit would be infructuous if it did not issue; but that is no reason in law. I pointed this out to the counsel for the respondents and asked him, when replying to counsel for the appellant, to support the order on any other grounds he could. Apart from certain general observations he was unable to state any real ground justifying the issue of the temporary injunction. This will be seen from the subsequent discussion. It is settled law that the issue of a temporary injunction is governed by the same principles as the grant of a permanent injunction at the trial of a case. It therefore behoved the Subordinate Judge, First Class, to find, in the first instance, that this was prima facie a fit case for the grant of a permanent injunction. For instance, if a suit was brought for specific performance of a contract and for an injunction to restrain breach of the contract and the plaintiff applied for a temporary injunction to prevent a breach, the Court should decline to grant such temporary injunction if the plaint and the affidavits on the record on the face of them to show that the case is not one for a perpetual injunction or for specific performance. Thus no injunction can be granted when damages afford adequate relief and there are other conditions to be satisfied before injunctions can be granted. Instead of going into these points the Court considered that a temporary injunction should automatically issue because the suit would otherwise be infructuous. As the Subordinate Judge has not considered the question at all, it is necessary for me to see whether this was a case where a temporary injunction should or could be issued. I do so in spite of the words in the order of the Subordinate Judge, First Class, that on the merits it had not been proved before him that the ad interim injunction should not have been issued. It is clear from the affidavit filed by Mr. J. C. Highet before the Subordinate Judge in those proceedings that these points were taken and counsel has stated before me that the Judge brushed them aside with the remark that the merits could only be gone into in the regular case. That this was his opinion is clear from his order issuing the temporary injunction; for, as I have already pointed out, he thought that such an injunction should automatically issue without going into the merits.

Coming therefore to the merits I wish to point out in the first instance that the suit was delayed till the last day and that the temporary injunction was applied for on the very day that the suit was instituted and the men were going to be discharged although it was known long before that they were going to be discharged. This in itself was a sufficient reason for refusing to issue the temporary injunction. As given by Woodroffe at p. 106, 5th Edn., on the Law relating to Injunctions, delay may be sufficient to disentitle a suitor to the summary interference of the Court by a temporary injunction. The Court cannot avoid being influenced by the fact of delay; for, amongst other things, it must be calculated to throw considerable doubt upon the reality of the alleged injury. For example, in the present case had there not been this delay it would have been possible for the Court to call upon the opposite side to make answer before issuing the temporary injunction and it might well have been the case that the injunction would not have been issued had such answer been called for. Secondly, there does not appear to be a proper plaintiff before the Court, and the Subordinate Judge should have gone into this question before issuing a temporary injunction; for if there was no proper plaintiff before him obviously no injunction could issue. I have already shown that in the heading the plaintiff purports to be the North Western Railway Union, Lahore, through two Vice-presidents who are named. Para. (1) of the plaint states that the plaintiffs are the Vice Presidents of the North Western Railway Union, Lahore. This Union is a registered Trade Union and it follows from S. 13, Act 16 of 1926, that it is body corporate with perpetual succession and a common seal and with power to acquire and hold both moveable and immovable property and to contract; while it is further laid down that it shall sue and be sued by the said name. It follows that prima facie the proper plaintiff is not before the Court. Thirdly, prima facie there are no proper defendants before the Court.

There is nobody capable of being sued under the name of North Western Railway Administration, Lahore. The term North Western Railway Administration has no existence in law and is merely a convenient nomenclature to describe the management of certain properties in the possession and administration of the Secretary of State for India in Council for the benefit of the revenues of India. Defendant 1 has no legal existence and the name appears to be used merely to avoid introducing that of the Secretary of State who owns the railway and whose Agent Mr. Highet is. Not only that but defendant 2, namely the Agent, North Western Railway, Lahore, cannot be sued as such; for that amounts to a suit against the office of the Agent and not against the person or official himself. This subject has been considered at length in *Sheriff of Bombay* v. *Hakmaji Mulaji* H *Co.* (1), where it was held that the Sheriff of Bombay was not a corporation sole and could not be sued as such. Of course the Secretary of State for India in Council can be sued as a corporation sole. As said by Blackwell, J., in that judgment:

> "It seems to me that there is nothing in any of the sections from 79 to 82, Civil P. C., or in O. 27, which contemplates a suit being brought, if I may say so, against the office as distinguished from the individual for the time being holding the office, and in my judgment, all that Ss. 79 to 82 and O. 27, Civil P. C., contemplates is this: that if an individual holding an office has an action brought against him in respect of an act purporting to be done by him in his official capacity, then he shall have an opportunity of bringing the matter to the notice of Government so as to enable the Government to defend, if the Government chooses to undertake his defence. But neither the sections nor the order give any warrant for the contention that the action can be brought in any other way except against the individual as an individual."

Clearly the Agent is not an individual. The individual is Mr. Highet against whom the suit has not been brought. The absurdity of the position may be shown by the following illustration. Suppose it is held that the Agent is in contempt and a new Agent is appointed tomorrow who shall be asked to purge the contempt? For the reasons given prima facie there are no proper defendants before the Courts and this matter also should have been gone into before the issue of a temporary injunction. Fourthly, it has been laid down that no injunction can issue except against a named person. Equity acts in personam and an injunction must be addressed to the defendant personally. The Secretary of State as a Corporation sole would be an individual and so would be Mr. J. C. Highet, but neither is the North Western Railway Administration, Lahore, an individual nor is the Agent, North Western Railway, Lahore, an individual. I do not know what the North Western Railway Administration, Lahore, is, unless it is a body of officials, but by Agent can only be meant the office of Agent. I have already pointed out that the notice issued only to the Agent and was returned by Mr. Muirhead described as the Chief Personal Officer, because the Agent, who was then Mr. Highet, was in Simla.

Fifthly, another matter, which required the consideration of the Subordinate Judge, First Class, before the issue of the injunction, was, whether any official of Government could be made personally liable upon a contract. According to the concluding words of S. 32, Cl. (4), Government of India Act,

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1. A I R 1927 Bom 521=104 I C 635=51 Bom 749.

no person executing any assurance or contract on behalf of the Secretary of State in Council shall be personally liable in respect thereof, but all such liabilities, and all costs and damages in respect thereof shall be borne by the revenues of India.

Sixthly, another question which should first have been settled or considered by the Subordinate Judge, First Class, was the question apparent on the face of the plaint that no notice under S. 80, Civil P. C., had been given to the Agent, North Western Railway. It was held by their Lordships of the Privy Council in *Bhagchand Dagdusa* v. *Secy. of State* (2), that this section applies to all forms of suit, whatever the relief sought, including a suit for injunction. The case before their Lordships was one in which the Secretary of State and the Collector of Nasik were sued. An attempt was made to argue before their Lordships that the act purported to be done in respect of which the suit was begun was the threatened enforcement of payment. This was held to be a fallacious argument since the illegality, if any, was in the order for recovery of the tax. If that was valid, there was nothing to be restrained:

> "Hence though the act to be restrained was something apprehended in the future, the act alone, in respect of which the suit lay, if at all, was the order already completed and issued."

An attempt was also made to argue before me somewhat on these lines, the argument being based on *Arunachalam Chetti* v. *David* (3), and a decision of a single Judge in the Madras High Court reported in *Krishnaswami Sastry* v. *Sayed Ahmed* (4), which are to the effect that notice ,though necessary, when the Secretary of State is sued, is not necessary when it is sought to restrain an official by an injunction. The first mentioned case was decided before the Privy Council case and need not be further considered. With all respect to the single Judge, who decided the second case, I do not think that it can be said that there was no discussion in the judgment of their Lordships of the Privy Council with regard to the expression "for any act purporting to be done" in S. 80. Civil P. C. I have already given a quotation from their judgment which contains the words mentioned by the Single Judge. The Privy Council has, in my judgment, clearly laid down that in all cases where the suit is against the Secretary of State or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, it cannot be instituted without two months' notice to the Secretary of State or the public officer sued. As stated by their Lordships S. 80 is express, explicit and mandatory and it admitss of no implications or exceptions. In the present case also the real act of the Agent complained of was his order passed a long time before that these men would be discharged on 10th October 1932. The suit cannot be based on the threatened discharge. If there was any illegality, it took place when the order of discharge was made.

> "Hence though the act to be restrained is something apprehended in the future, the act in respect of which the suit lies, if at all, is the order already completed and issued."

This also was not considered by the Subordinate Judge, First Class. Clearly he should have gone into this point before issuing a temporary injunction. I might add that it was held in *Duli Chand* v. *Kalyan Singh* (5), that notice is necessary in the case of a suit against an official for an injunction and this authority is binding on the Courts in this province.

Seventhly, it is enacted, by S. 21 (b), Specific Relief Act, that a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms, cannot be specifically enforced. Some of these contracts are given in the illustration to Cl. (b), e. g., a contract to render personal service, or to employ someone on personal service, cannot be specifically enforced. S. 56 (f), Specific Relief Act, enacts that an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced. It follows that an injunction cannot be granted to prevent the breach of a contract to employ certain people. It was contended however that the injunction sought was in the negative form and was covered by S. 57, Specific Relief Act. It is unnecessary for me to decide this question except to indicate that it seems already to have been decided in *Kirchner & Co.* v. *Gruban* (6), where it was held that the plaintiffs were not entitled to an injunction, restraining the defendants from engaging in any other business than their own, on the ground

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2. A I R 1927 P C 176=104 I C 257=54 I A 338=51 Bom 725 (P C).
3. A I R 1927 Mad 166=99 I C 284=50 Mad 239.
4. (1931) 136 I C 777.
5. A I R 1931 Lah 703=132 I C 4=12 Lah 260.
6. (1909) 1 Ch 413=78 L J Ch 117=99 L T 932.

that the stipulation sought to be enforced, although negative in form, was affirmative in substance and that the Court would not grant an injunction which in effect would compel specific performance of a contract of service.

Eigthly, it seems to me that the applicants have no personal interest in this suit. Counsel for the respondents was specially asked to point out what personal interest they had and he was unable to do so. It is enacted by S. 56 (k), Specific Relief Act, that an injunction cannot be granted where the applicant has no personal interest in the matter. The discharged workmen may have a personal interest, but how the plaintiffs have I fail to see.

Lastly, it seems to me that the Subordinate Judge might have considered and tried to visualize what the alleged contract was that was sought to be enforced. It appears to be alleged not to have been entered into between the parties but between the Railway Board, whatever that may be, and the All India Railwaymen Federation, whatever that may be, while it is contained apparently in various communiques and reports and not in any regular document. There should have been something more than that on the record before an injunction should have issued. It is not open to a Court frivolously and vexatiously to issue such a process without proper cause and due consideration. Sufficient has been said to show that the temporary injunction dated 10th October 1932, should not and could not be issued. I therefore accept the appeal with costs and set aside the order of the Subordinate Judge dated 10th October 1932, issuing the temporary injunction.

K S. *Appeal accepted.*

A. I. R. 1933 Lahore 208

TEK CHAND, J.

Mt. Durga Devi—Petitioner.

v.

Mt. Parbati—Opposite Party.

Civil Revn. Petn. No. 174 of 1932, Decided on 20th October 1932.

(a) Court-fee—Suit decided—Court cannot order payment on deficiency—Jurisdiction.

After the decision of the suit the trial Court is no longer seized of the case and has no jurisdiction to require the plaintiff to make good the deficiency in court-fee: *A. I. R.* 1925 *Lah* 131 and *A. I. R.* 1919 *Cal.* 194, *Foll.* [P 208 C 2]

(b) Court-fees Act (1870), Sch. 2, Art. 17—Partition.

Where in a suit for partition the plaintiff states in the plaint that the property was joint among the parties a court-fee of Rs. 10 is sufficient. [P 208 C 8]

Fakir Chand and *Achhru Ram*—for Petitioners.

Judgment.—The plaintiff filed a suit against her sister in the Court of the Senior Subordinate Judge, Ludhiana, for partition of certain property which was alleged to belong to their father and which had devolved on the parties equally after the death of their mother. In the plaint it was alleged that the property of which partition was sought was joint, and accordingly a court-fee of Rs. 10 only was affixed on the plaint. At the first hearing the case was compromised, the plaintiff agreeing to receive Rs. 3,300 as the value of her share. A decree in accordance with this compromise was passed on 23rd March 1931. It appears that in October 1931 the "stamp auditor" pointed out to the Senior Subordinate Judge that the plaint was insufficiently stamped. Thereupon the learned Judge ordered notice to issue to the plaintiff and passed an order on 6th February 1932, directing her to

> "make up the deficiency in court-fee on Rs. 3,300 before executing the decree or within two months from the date"

of the order. Against this order a petition for revision has been preferred to this Court by the plaintiff and it has been pointed out that after the decision of the suit the Senior Subordinate Judge was no longer seized of the case and had no jurisdiction to require the plaintiff to make good the alleged deficiency in court-fee. In support of this contention reliance is placed on, *A. I. R.* 1925 *Lah.* 131 and *Jatra Mohan Sen* v. *Secy. of State* (1). These rulings are directly in point and following them I hold that the order of the lower Court was passed without jurisdiction.

I may also mention, that it has by no means been established that the plaint was insufficiently stamped. It was stated in the plaint that the property was joint of the parties and on this allegation a court-fee of Rs. 10 was sufficient. The suit was therefore properly valued and as there was nothing to indicate that this allegation was wrong, the plaintiff could not have been called upon to pay ad valorem court-fee on Rs. 3,300. I accept the petition for revision and set aside the order of the lower Court requiring the plaintiff to pay additional court-fee. As no body has appeared on behalf of the respondent or the Collector to oppose the application, there will be no order as to costs.

K.S. *Petition accepted.*

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1. A I R 1919 Cal 194=52 I C 435=46 Cal 520.

A. I. R. 1933 Lahore 209

BHIDE, J.

Joint Hindu Family of Mukhi Lal Chand—Defendants—Appellants.

v.

M. Gul Muhammad—Plaintiff—Respondent.

Second Appeal No. 2017 of 1930, Decided on 8th November 1932, against decree of Dist. Judge, Dera Ghazi Khan, D/- 26th August 1930.

Contract Act (1872), S. 25 (3)—Debt acknowledged barred—No distinct promise to pay—Requirements of S. 25 (3) are not fulfilled—Limitation Act (1908), S. 19.

An acknowledgment of time-barred debts, which does not contain any distinct promise to pay, does not fulfil the requirements of S. 25 (3), Contract Act, because it implies a promise to pay: *A. I. R.* 1930 *All.* 467; *A. I. R.* 1932 *All.* 199; *A. I. R.* 1929 *Cal* 444; *A. I. R.* 1929 *Pat.* 258 and *A. I. R.* 1928 *Bom* 319, *Rel. on*; *A. I. R.* 1928 *Cal* 850, *Expl.* and *Dist.* 33 *Cal.* 1047 (*P. C.*) and *A. I. R.* 1929 *Lah.* 263, 264 and 591, *Dist.* [P 209 C 1, 2]

Kishan Diyal and *Khurshaid Zaman*—for Appellants.

Shuja-ud-Din—for Respondent.

Judgment.—This second appeal arises out of a suit for recovery of Rupees 1,600. The last balance executed in favour of the plaintiff was for Rupees 6,924-8-0. This balance was struck on 31st May 1924. Thereafter certain payments were made and, allowing for them, the plaintiff sued for the balance of Rs. 1,600. The trial Court dismissed the suit as time-barred, but on appeal the learned District Judge has passed a decree in favour of the plaintiff. The sole point which requires decision in this second appeal, is whether the acknowledgment, dated 31st May 1924, in respect of the balance of Rs. 6,924-8-0, fulfils the requirements of S. 25, Cl. (3), Contract Act. It is not disputed that this balance covers time-barred debts. It was however contended before the learned District Judge that inasmuch as an acknowledgment imports a promise to pay, it fulfilled the requirements of S. 25 (3), Contract Act, and therefore the plaintiff was entitled to succeed. This contention was accepted by the learned District Judge who has relied on certain authorities of this Court, namely, *A. I. R.* 1929 *Lah.* 263, 264, 591, but these authorities are not directly in point. The only question, which was decided in these cases was that an unconditional acknowledgment imports promise to pay and could form the basis of a suit. The decision in these cases was based upon *Mani Ram* v. *Rup Chand* (1), a ruling of their Lordships of the Privy Council. The debts under consideration in the latter ruling were however apparently within time. The question whether that ruling can be applied in the case of an acknowledgment of time-barred debts, which does not contain any distinct promise to pay, has been considered by several of the High Courts in India and it has been held that the abovementioned ruling of their Lordships of the Privy Council does not warrant the proposition that such an acknowledgment fulfils the requirements of S. 25 (3), Contract Act, because it implies a promise to pay. It will be sufficient to refer in this connexion to the following authorities: *Raj Narain Rao* v. *Ram Sarup* (2), *Abdul Rafiq* v. *Bhajan* (3), *Sashikanta Acharjya* v. *Sonalla Munshi* (4), *Deoraj Tewari* v. *Indrasan Tewari* (5) and *Magan Lal Hajibhai* v. *Amichand Gulabji* (6). The last ruling was followed in *Davindar Singh* v. *Lachmi Devi* (7).

The learned counsel for the respondent has not been able to cite any authority in point. He referred to *Manikya Bewa* v. *Pushpa Charan Majhi* (8), but in that case the promise to pay was inferred not merely from the acknowledgment but also from an award and a joint petition following the award. The wording of these documents is not given and the applicability of S. 25 (3), Contract Act, to an acknowledgment of the type now in dispute also does not seem to have been considered. In view of the authorities referred to above the present appeal must succeed. I accordingly accept the appeal and, setting aside the decree of the learned District Judge, dismiss the suit. In view of the technical point on which it has succeeded, I leave the parties to pay their costs throughout.

R.K. *Appeal accepted.*

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1. (1903) 33 Cal 1047=2 N L R 130=33 I A 165 (P C).
2. A I R 1930 All 467=123 I C 820=52 All 480.
3. A I R 1932 All 199=137 I C 243=53 All 963.
4. A I R 1929 Cal 444=121 I C 412=57 Cal 394.
5. A I R 1929 Pat 258=120 I C 470=8 Pat 706.
6. A I R 1928 Bom 319=112 I C 24=52 Bom 521.
7. A I R 1930 Lah 985=129 I C 281=12 Lah 239.
8. A I R 1928 Cal 850=115 I C 263.

* A. I. R. 1933 Lahore 210

TAPP, J.

Banarsi Das and *another*—Auction-purchasers—Petitioners.

v.

Ram Chandar and *another*—Decree-holders and Judgment-debtors—Opposite Parties.

Civil Revn. Petn. No. 308 of 1932, Decided on 12th December 1932, against order of Dist. Judge, Ambala, D/- 30th March 1932.

*** (a) Civil P. C. (1908), O. 21, R. 89—Application made under O. 21, R. 89 for permission to deposit amount without express prayer to set aside sale is still application to set aside sale.**

An application by a judgment-debtor made under O. 21, R. 89, for permission to deposit the decretal amount with poundage is an application to set aside the sale even though there is no express prayer in the application to set aside the sale: *A. I. R.* 1928 *Nag.* 111, *Foll.*; *A. I. R.* 1925 *Mad.* 639; *A. I. R.* 1922 *Mad* 44; 9 *I. C.* 33 and *A. I. R.* 1919 *Bom.* 130, *Dist.*

And an order confirming the sale amounts to a refusal to set aside the sale and hence is appealable. [P 210 C 2]

(b) Civil P. C. (1908), S. 115—High Court's power of revision.

Where all the proceedings are before the High Court, it is open to it to revise the order under S. 115 of an execution Court confirming a sale.

(c) Mortgage—Mortgagee rights are immovable property—T. P. Act (1882), S. 3.

Mortgagee rights are indisputably immovable property. Even a mortgage debt is immovable property as it is not an actionable claim. [P 211 C 1]

(d) Practice—Procedure.

Procedure is meant to serve and not to govern. [P 211 C 1]

Jai Gopal Sethi—for Petitioners.

Achhru Ram—for Opposite Parties.

Judgment.—The mortgagee rights of the respondent judgment-debtor, Paras Ram, were put to sale on 7th August 1931, in execution of the decree for Rs. 3,000 obtained against him by the respondent, Ram Chandar. These rights were acquired by the appellants, Banarsi Das, son of Lala Radhe Kishen, and Banarsi Das Garg for Rs. 4,000. On 27th August 1931, the judgment-debtor, Paras Ram, made an application under R. 89, O. 21, for permission to deposit in Court the amount due under the decree and a sum equal to 5 per cent of the purchase money. There was no express prayer in the application to set aside the sale, but the rule and order were cited at the head of the application. The requisite deposit under Cls. (a) and (b) of the rule was made in Court on 30th September 1931, and on the same date one of the two auction-purchasers presented an application contending that his righ defeated by the deposit and uld not be he was entitled to confirmation of the sale. A notice was thereupon issued to second auction-purchaser, who contended that the property sold was a mortgage-debt and therefore moveable property to which R. 89 of the order had no application and the judgment-debtor's application of 27th August 1931, did not contain any prayer to set aside the sale. He also raised two other pleas with which the present application for revision is not concerned. The executing Court did not definitely decide whether the mortgagee rights were moveable or immovable property, but held that there was no application to set aside the sale and consequently the Court had no option but to confirm the sale which it did. Against this order an appeal was preferred to the learned District Judge who found that the sale of the mortgagee rights was a sale of immovable property and that the application of 27th August 1931 contained an implied prayer to set aside the sale. The sale was thereupon set aside and against this order the auction-purchasers have come up in revision.

It was urged on behalf of the petitioners that no appeal lay from the order of the Court confirming the sale, but the validity of this objection depends entirely on the question whether the application made by the judgment-debtor on 27th August 1931, is not an application under R. 89, O. 21. If it is, as held by the learned District Judge, then obviously the order of the execution Court confirming the sale is tantamount to refusing to set aside the sale on the application of the judgment-debtor and against such an order an appeal would lie under O. 43 (1) (j). Mr. Sethi for the petitioners has relied on *A. I. R.* 1925 *Mad.* 639 and *A. I. R.* 1922 *Mad.* 44; *Mathura Prasad* v. *Ram Lal* (1) and *Raoji* v. *Bansilal Narayan* (2). In my opinion all these authorities are distinguishable to some extent and the case reported as *A. I. R.* 1928 *Nag.* 111, is in point and one which I prefer to follow. In the Nagpur case, as in the present case, there was no express prayer to set aside the sale, but the application was made under R. 89, O. 21, for permission to make the required deposit, which was allowed. In my opinion the view taken by the learned District Judge, that the application of 27th August 1931, im-

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1. (1911) 9 I C 33.
2. A I R 1919 Bom 130=53 I C 135=43 Bom 735.

plicitly prayed for the setting aside of the sale, is correct, and to hold otherwise would, I think, be a mere quibble. After all procedure is meant to serve and not to govern, and the simple omission in an application clearly made under R. 89 to ask for the setting aside of the sale should not in any way defeat the real intention of the applicant. On the above view, that the application of 27th August 1931, was one under R. 89, O. 21, and that the confirmation of the sale by the executing Court amounted to a refusal to set aside the sale, an appeal to the District Judge was competent and I hold accordingly. In any case, if this view is wrong now that all the proceedings are before this Court, it is open to me to revise the order of the execution Court confirming the sale under S. 115.

There remains the second question, as to whether the property sold was moveable or immovable. As observed by the learned District Judge the proclamation of sale was very badly drawn up and indicated that the amount due on the mortgage was being put to sale, but at the time of the sale it was clearly announced that what was being sold were the mortgagee rights of the judgment-debtor Paras Ram amounting to Rs. 8,000 principal plus interest in certain land. Mortgagee rights are indisputably immovable property and in the circumstances the view taken by the lower appellate Court is correct. Even if it be considered that it was a mortgage debt that was sold such a debt is not now an actionable claim and must be deemed to be immovable property. For the reasons stated above I hold that the sale was rightly set aside by the learned District Judge and the application is dismissed, parties bearing their own costs.

K.S. *Application dismissed.*

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* A. I. R. 1933 Lahore 211

TAPP, J.

Amin Chand—Mortgagee—Appellant.

v.

Manohar Lal and *others*— Creditors and Insolvent—Respondents.

Misc. First Appeal No. 317 of 1932, Decided on 14th December 1932, from order of Dist. Judge, Mianwali.

*** Provincial Insolvency Act (1920), S. 47—Sale by insolvent annulled—Part of consideration found to have been paid actually for decree-debt — Such debt is just antecedent debt and alienee can prove it.**

Where a sale effected by an insolvent is held to be fraudulant and is annulled, but a part of the sale-consideration is found to have been actually paid by the alienee in satisfaction of a decree against the insolvent the debt is a just antecedent debt and the alienee steps into the shoes of the decree-holder and is entitled to prove his debt: *A. I. R.* 1919 *Lah.* 25, *Rel on*; *A. I. R.* 1923 *All.* 504; *A. I. R.* 1924 *All.* 668 and 41 *P. R.* 1912, *Dist.* [P 211 C 2; P 212 C 1]

M. L. Batra—for Appellant.

Mukand Lal Puri—for Respondents.

Judgment.—The question for determination in this appeal is whether a debt of Rs. 1,203 forming part of the consideration of a sale effected by the insolvent Beli Ram in favour of his deceased son-in-law Ganesh Das (father of the appellant Amir Chand) sould be allowed. The sale was held by this Court to be fraudulent and was annulled but a sum of Rs. 1,203 actually paid to Sahib Singh (creditor) in satisfagtion of his decree for that amount against the insolvent was found to have passed. The learned District Judge relying on certain observations in *Vilayat Husain* v. *Missan* (1), *Daya Ram* v. *Thakuri* (2), and *Kamola Ram* v. *Kaura Khan* (3) has not allowed the appellant to prove this debt. The earlier of the two Allahabad rulings dealt with the application of the maxim in pari delicto to the particular facts in that case while the later ruling and the decision of the Punjab Chief Court in 1912 dealt with contracts which were void ab initio; in one case being a transfer of occupancy rights prohibited by statute and in the other a transaction with a person of unsound mind.

In the present case the appellant was deprived of his security as the sale transaction was held to be a fraudulent one but I see no reason why he should not be allowed to prove the debt of Rs. 1,203 which was held to have been actually paid. By discharging this debt the alienee stepped into the shoes of the decree-holder Sahib Singh, who but for this payment would have been in the position now occupied by the appellant viz., that of an unsecured creditor. In *Husain Bibi* v. *Hakim* (4) which I think is in pari materia it was held that alienees, the transfers in whose favour have been annulled under the Insolvency Act, may prove as unsecured creditors in the insolvency of the alienor to the extent of just antecedent debts. In my opinion the sum of Rs. 1,203 might equitably be regarded as a just antece-

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1. A I R 1923 All 504=72 I C 92=45 All 396.
2. A I R 1924 All 668=83 I C 21=46 All 622.
3. (1912) 41 P R 1912=15 I C 404.
4. A I R 1919 Lah 25=52 I C 587=86 P R 1919.

dent debt even though it was incurred at the time of the transaction held to be fraudulent. If the decree-holder Sahib Singh had been the transferee instead of the appellant's father he would have been allowed to prove his debt of Rs. 1203 as this would have been just antecedent debt according to the authority last cited. As observed above the transferee Ganesh Das stepped into the shoes of Sahib Singh and in the circumstances I am of opinion that the sum of Rs. 1,203 should be regarded as a just antecedent debt. The transfer of the right to realize the debt from Sahib Singh to Ganesh Das should not alter the nature of the liability. For the above reasons I allow the appeal and setting aside the order of the Court below direct that the appellant be allowed to prove this debt. Parties to bear their own costs.

K.S. *Appeal allowed.*

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* A. I. R. 1933 Lahore 212

BHIDE, J.

Jagat Singh Rai—Defendant—Petitioner.

v.

Jagat Singh Kawatra & Sons—Plaintiffs—Opposite Parties.

Civil Revn. Petn. No. 304 of 1932, Decided on 26th October 1932, against decree of Sm. C. C. Judge, Lahore, D/- 29th April 1932.

*** (a) Evidence Act (1872), S. 34—Account books—Sufficiency of, to establish claim.**

Mere reliance on account books without any sworn testimony in support of it or unreliable sworn testimony is not sufficient to establish the claim, but where the plaintiff produces account books and deposes that they are regularly kept and are correct, and he is not cross-examined on the point, his testimony supported by the account book is legally sufficient to establish his claim. [P 212 C 2]

*** (b) Interest Act (1839), S. 1—Notice as to interest not given as required under—Interest to be disallowed—Interest.**

In a suit to recover price of goods sold, if the claim for interest is based on an alleged agreement that is not proved, and no notice as to interest is given as required by Act 32 of 1839, interest should be disallowed. [P 212 C 2]

*** (c) Interest—Claim for interest by way of damages in suit for price of goods sold is not tenable—Such interest, if allowed, can be disallowed in revision—Civil P. C. (1908), S. 115.**

In a suit for price of goods sold a claim for interest on the amount by way of damages for the delay in payment is not tenable; and such interest allowed by a Court can be disallowed in revision: *A. I. R.* 1923 *Lah* 302, *Rel. on*; *Lah C. A.*2323 of 1926, *Dist.*; 20 *Mad.* 481 and 104 *P. R.* 1901, *Ref.* [P 212 C 2]

Narotam Singh—for Petitioner.

Nawal Kishore—for Opposite Parties.

Judgment.—This is a petition for revision of an order of the Small Cause Court, Lahore, granting plaintiff a decree for Rs. 500 on account of price of goods sold together with interest at Re. 1 per cent per mensem and costs. The plaintiff produced an account book relating to the transactions and also went into the witness box to support his claim. The learned counsel for the defendant who has preferred this petition has contended that it is not proved that the account book was kept regularly in the course of business and that the plaintiff has not given the details of the transactions. But the plaintiff has deposed that the account book was kept regularly and that the account is correct. The plaintiff was not cross-examined on the point and his testimony supported by the account book seems to me to be legally sufficient to establish his claim. The rulings which the learned counsel for the petitioner has sought to rely on are easily distinguishable as they refer to cases in which account books alone were relied on without any sworn testimony in support of it or the sworn testimony was considered unreliable. I therefore consider it unnecessary to discuss the rulings. The learned counsel has further contended that interest should have been disallowed as the claim of interest was based on an alleged agreement with the defendant, which was never proved and no notice as to interest was given as required by Act 32 of 1839. This contention seems to be correct. The learned Judge of the Small Cause Court has awarded interest on the basis of commercial usage, but this was not the case set up by the plaintiff. The learned counsel for the respondent has conceded this but urged that as defendant had unduly delayed payment, interest could be easily awarded as damages and, in any case, as substantial justice has been done, this Court should not interfere in revision.

The claim for interest by way of damages does not seem to be tenable according to law, *Kamalammal* v. *Puru Musa* (1), *Bura* v. *Mailia Shah* (2). As to the second contention, it must be remembered that the present claim is on account of price of goods sold, which probably includes substantial profit. Although time was given to the defendant at his own request

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1. (1897) 20 Mad 481=7 M L J 263.
2. (1901) 104 P R 1901=19 P L R 1902.

and payment was delayed, there is no evidence to show that defendant was warned at the time that interest would be claimed. If the defendant had been so warned he might have tried to pay up earlier. In *Des Raj* v. *Feay's Motor Works* (3) a claim for interest was disallowed by this Court in revision in similar circumstances. The learned counsel for the respondent has invited my attention to *C. A.* 2323 *of* 1926 decided by a Division Bench of this Court on 17th February 1932; but in that case it was definitely found that the defendant understood that interest would be charged. I accept the petition for revision and setting aside the decree of the Court below give plaintiff a decree for Rs. 329-6-6 (the principal amount) with proportionate costs throughout.

K.S. *Petition accepted.*

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3. A I R 1923 Lah 302=75 I C 64.

A. I. R. 1933 Lahore 213

TAPP, J.

Chanan Din—Defendant—Appellant.

v.

Chanan Din and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 304 of 1932, Decided on 25th November 1932, from decree of Addl. Dist. Judge, Lahore, D/-5th December 1931.

Punjab Pre-emption Act (1913), S. 15 (c)—"Owner" of estate—Determining factor is whether area is assessed to land revenue.

In deciding whether a person is an owner of an estate within the meaning of 15 (c) thirdly, the determining factor is whether the area in question is or is not assessed to land revenue. Its extent, situation and the purpose for which it is bought or to which it may be devoted are absolutely immaterial: *A. I. R.* 1920 *Lah.* 94 and 109 *P. L. R.* 1908, *Dist.*; 45 *I. C.* 887, *Rel on.* [P 214 C 1]

Madan Lal Sethi—for Appellant.

Barkat Ali—for Respondents.

Judgment.—This second appeal arises out of a suit for pre-emption brought by Chanan Din and Hasan Din against the defendant vendor Karam Bakhsh and defendant vendee Chanan Din in respect of 14 kanals, 18½ marlas of land situate within the areaof Muzang. The sale was effected on 13th August 1928, for an alleged consideration of Rs. 1,500, which the plaintiffs pre-emptors alleged was fictitious, the real price being Rs. 1,310. The defendant vendee Chanan Din inter alia pleaded that he had an equal right of pre-emption being an owner of the estate, and the trial Court finding in his favour on this point dismissed the suit. On appeal by the plaintiffs pre-emptors the learned Additional District Judge held that the vendee was not an owner of the estate and as the sale price was found to be Rs. 1,310, decreed the suit on payment of this sum within a certain fixed period. The claim of the defendant vendee to be an owner of the estate is based on his ownership and possession of two plots of land, one measuring 210 ft. and the other 4 marlas of which the latter is assessed to revenue of 1 anna 6 pies. The plot of 4 marlas is shown in the settlement record of 1924-25 as in the ownership of Chiragh and Chanan half share and Siraj Din and Jalal Din half. Apparently after this the vendee Chanan Din acquired these 4 marlas by purchase. The plot is described as Qabil tamir, i. e., suitable for building, and paying a revenue of 1 anna 6 pies. The plot measuring 210 ft. is not assessed to land revenue. It was urged before the lower appellate Court that the plot of 4 marlas was not really agricultural land but a building site situate within the abadi and consequently its ownership could confer no right of pre-emption even though it was assessed to land revenue. This contention found favour with the learned Additional District Judge who, on the authority of *Jawala Singh* v. *Tara Singh* (1), *Narain Singh* v. *Gopal Singh* (2) and *Muhammad Said* v. *Shah Nawaz* (3), held that the plot of 4 marlas could not be described as agricultural land and the defendant vendee was therefore not an owner of the estate. In *Jawala Singh* v. *Tara Singh* (1), the plaintiff was held not to be one of the owners of the estate because he was a malik qabza and owned only a small plot of land of 8 marlas unassessed to revenue and uncultivated except to a trifling extent and clearly destined to be a building site. The chief difference between that case and the present case is that the area in the latter is smaller and is assessed to revenue. On the other hand none of the plots is cultivated and it has been shown that a portion of it has actually been built upon.

Mr. Madan Lal Sethi for the appellant has cited various authorities for the proposition that the area on the ownership of which the right of pre-emption is claimed, its situation and the amount of land revenue paid thereon, and the purchase for which such area is to be, or may be, used are all immaterial for the purpose of deciding whether the owner of such an area is an

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1. A I R 1920 Lah 94=57 I C 159=1 Lah 503.
2. (1913) 106 P R 1913=20 I C 2.
3. (1921) 60 I C 580.

owner of the estate. In *Salamat Rai* v. *Kanshi Ram* (4), it was held that a person who owns an area assessed to land revenue is an owner of the estate and the fact that the revenue payable on that area is very small or that the area itself is very small or that it is a recent acquisition or that he does not belong to the original village proprietary body, but has acquired that area by gift or purchase would not change his status. Nor would the object for which the acquisition has been made make any difference. The same view appears to have beean taken in *Salamat Rai* v. *Kanshi Ram* (4). The learned counsel for the respondents has relied on *Jawala Singh* v. *Tara Singh* (1) and *Sham Sundar* v. *Sodhi Harbans Singh* (5), but in both these cases the land on which the claim to be an owner of the estate was based was not assessed to revenue. It seems to me after consideration of these various authorities that the determining factor in such cases is whether the area in question is or is not assessed to land revenue. Its extent, situation and the purpose for which it is bought or to which may be devoted are absolutely immaterial. For the above reasons I would hold that the appellant vendee is an owner of the estate within the meaning of S. 15 (c) (thirdly), Pre-emption Act, and in consequence the plaintiff-respondents have no superior right of pre-emption in respect of the land in suit. I accordingly accept the appeal with costs throughout, set aside the decree of the lower appellate Court and restore that of the trial Court.

K.S. *Appeal accepted.*

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4. (1918) 45 I C 887.
5. (1908) 109 P L R 1908=78 P W R 1908.

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* * A. I. R. 1933 Lahore 214

TAPP, J.

Bashambar Nath—Judgment-debtor—Appellant.

v.

Amolak Ram Amin Chand & Co.—Decree-holders—Respondents.

Misc. First Appeal No. 33 of 1932, Decided on 14th December 1932, from order of Sub-Judge, 1st Class, Lahore, D/- 19th December 1931.

*** * Civil P. C. (1908), S. 135 (2)—Income-tax officer is "tribunal" within meaning of section—Words and phrases—Tribunal.**

An Income-tax Officer must be regarded as a "tribunal" within the meaning of S. 135 (2), Civil P. C., and hence a person is exempt from arrest while on his way to appear before the Income-tax Officer: *A. I. R.* 1914 *Bom.* 138, *Rel. on* [P 215 C 1]

Ram Lal and *Khan Chand*—for Appellant.

Daulat Ram—for Respondents.

Judgment.—A warrant for the arrest of the appellant Basheshar Nath Khanna was issued by the Subordinate Judge, First Class, Lahore, on 5th November 1931, and the appellant was arrested on the Mall on 24th. When produced before the Court the appellants presented an application alleging that when arrested he was on his way to appear before the Income-tax Officer in compliance with a notice issued to him by that officer under S. 23 (2), Income-tax Act, and he claimed exemption from arrest under S. 135, Civil P. C. The learned Subordinate Judge rejected the application holding that the Income-tax Officer was not a tribunal within the meaning of Sub-S. (2), of that section and this is the question for determination before me. The matter is not free from difficulty as "tribunal" is nowhere defined in the Code. S. 37, Income-tax Act, on which Mr. Ram Lal principally relies however affords some help. The section in question, while it does not expressly make an Income-tax Officer a Court or a Judge, does confer certain specified powers on such an officer in order to enable him to assess income-tax in as reasonable or equitable a manner as possible. He is therefore given the same powers as vested in a Court under the Code of Civil Procedure as regards enforcing the attendance of any person and examining him on oath or affirmation, compelling the production of a document and issuing commissions for the examination of witnesses. Proceedings before such an officer are also to be deemed to be a "judicial proceeding" within the meaning of Ss. 193 and 228 and for the purposes of S. 196, I. P. C.

The only authority which I have been able to find bearing on the point is a Full Bench decision of the Bombay High Court: *In re Punamchand Maniklal* (1). The question referred to the Full Bench was whether an Income-tax Collector is or is not a Court within the meaning of that word as used in Cls. (b) and (c), S. 195, Criminal P. C. The decision was that an Income-tax Collector is a Revenue Court within the meaning of Cls. (b) and (c), S. 195. The Income-tax Act in force at that time was Act 2 of 1886, and the Income-tax Collector under that Act meant the Chief Officer

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1. A I R 1914 Bom 138=25 I C 333=15 Cr L J 581=38 Bom 642 (F B).

in charge of the Revenue Administration of a district, and, in a presidency town, any officer when the Local Government, by notification in the Official Gazette might, by name or by virtue of his office, appoint to be a Collector for the purposes of the Act. In the present Act the Income-tax Officer means a person appointed to be an Income-tax Officer under S. 5 and such officers are to be appointed by the Central Board of Revenue to perform such functions in respect of such classes of persons or such classes of income and for such area as may be specified. Under Ss. 28 and 37 of the Act of 1886 powers very similar to those conferred on an Income-tax Officer under S. 37 of the present Act were conferred on an Income-tax Collector. Under S. 28 the Income-tax Collector had power to summon and enforce the attendance of witnesses, compel them to give evidence and compel the production of documents as far as possible in the same manner as provided in the case of a civil Court by the Code of Civil Procedure. Further under S. 37 any proceeding under S. 12 (power to require officers of companies to produce documents) or under Ch. 4, which includes S. 28, was to be deemed to be a "judicial proceeding" within the meaning of Ss. 193 and 228, I. P. C.

Thus, in my opinion, the position and status of an Income-tax Officer under the present Income-tax Act is more or less the same as that of an Income-tax Collector under the Act of 1886 and as shown above for the purposes of Cls. (b) and (c), S. 195, Criminal P. C., an Income-tax Collector was held to be a Revenue Court. I would therefore hold on the authority of the Bombay ruling and for the reasons given above that as an Income-tax Officer under the present Act is a Revenue Court for the purposes of Cls. (b) and (c), S. 195, Criminal P. C., he must be regarded as a "tribunal" within the meaning of S. 135 (2), Civil P. C. In the circumstances the appellant, Basheshar Nath was exempt from arrest while on his way to appear before the Income-tax Officer. I accordingly accept the appeal and set aside the order of the lower Court and direct that the appellant be discharged from his arrest, which was ultra vires; parties to bear their own costs.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 215

JAI LAL, J.

Ram Nath—Accused—Petitioner.

v.

Raja Ram—Complainant — Opposite Party.

Criminal Misc. Petn. No. 172 of 1932, Decided on 4th November 1932.

Penal Code (1860), S. 420—Held on facts no offence is committed.

The respondent alleged in his complaint that he approached the petitioner to drop certain criminal proceedings against him (respondent) and also to withdraw the proceedings relating to the execution of the decree against him (respondent) on receipt of a certain amount. The petitioner having agreed to his suggestion, an agreement to that effect was written out by a petition-writer and also a promissory note. The respondent signed the compromise, but the petitioner took it back from the petition-writer without signing it, saying that he had to consult a friend before signing the document. The petitioner never returned the document:

Held: the above facts do not constitute an offence under S. 420, that the matter is of such a doubtful nature both on the facts and in law that no criminal proceedings should be taken on the allegetions made in the complaint and that the dispute, if at all, was one which was eminently suitable to be decided in civil Courts. [P 216 C 1]

Fakir Chand—for Petitioner.

Order. — This is a petition under S. 439, Criminal P. C., and also under S. 526 of the same Code. The prayer under the first named section is that criminal proceedings under S. 420 against the petitioner be quashed and the prayer under the other section is that if the proceedings are not quashed, the case be transferred from the Court of the Magistrate. The facts on which the complaint is based, as stated in the complaint, are as follows: That there was a decree against the complainant who is the respondent here in favour of the petitioner which decree was in the course of execution. There was some other litigation between the parties in the course of which it was alleged by the petitioner that the respondent had assaulted a Court official, and a complaint was filed in the Court of the Magistrate against the respondent under S. 353, I. P. C. The respondent alleged in his complaint that he approached the petitioner to drop the criminal proceedings under S. 353 and also to withdraw the proceedings relating to the execution of the decree on receipt of a certain amount. The petitioner having agreed to his suggestion, an agreement to that effect was written out by a petition writer and also a promissory note. The respondent signed the compromise, but the petitioner took it back from the petition writer without signing it, saying that he had to consult a friend before signing the document. It is alleged that the petitioner never returned the document. It is on these facts that a complaint under S. 420 was made against the petitioner.

In my opinion the above facts do not constitute an offence and in any case the matter is of such a doubtful nature both on the facts and in law that no criminal proceedings should be taken on the allegations made in the complaint. The dispute, if at all, is one which is eminently suitable to be decided in civil Courts. I accordingly accept this petition and quash the criminal proceedings against the petitioner who will be deemed to have been discharged. In view of this order the petition for the transfer of the case becomes infructuous and is dismissed.

K.S. *Petition accepted.*

A. I. R. 1933 Lahore 216

BHIDE, J.

Fateh Chand—Appellant.

v.

Amar Nath and *others* — Respondents.

Misc. First Appeal No. 857 of 1925, Decided on 5th January 1933, from order of Senior Sub-Judge, Lahore, D/- 30th March 1925.

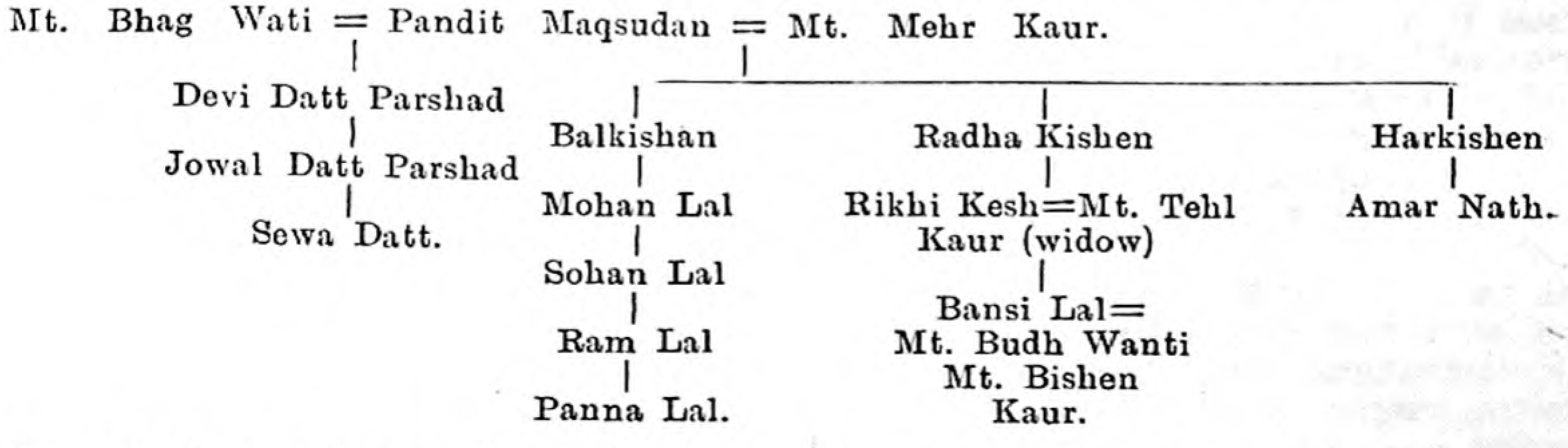
Civil P. C (1908), O. 40, R. 1 (d)—Order giving receiver directions to restore property is not appealable—Civil P. C. (1908), O. 43, R. 1 (e).

An order giving directions to a receiver for the restoration of property does not fall under O. 40, R. 1 (d) and is not appealable. [P 216 C 2]

Badri Das—for Appellant.

Mehr Chand and *D. D. Kapur*—for Respondents.

Judgment.—The pedigree table of the parties concerned is as follows:


Mt. Bhag Wati = Pandit Maqsudan = Mt. Mehr Kaur.
Devi Datt Parshad
Jowal Datt Parshad
Sewa Datt.
Balkishan
Mohan Lal
Sohan Lal
Ram Lal
Panna Lal.
Radha Kishen
Rikhi Kesh=Mt. Tehl Kaur (widow)
Bansi Lal= Mt. Budh Wanti Mt. Bishen Kaur.
Harkishen
Amar Nath.

There has been a good deal of litigation in connexion with the property of Bansi Lal. It appears that three suits were instituted with regard to this property by the various claimants at different times. During the pendency of one of these suits instituted by the widows of Bansi Lal, one Seth Ram Prasad was appointed receiver by this Court and was directed to take possession of the property in dispute. Subsequently the order of his appointment was discharged. It was however continued in connexion with another suit instituted by Mt. Tehl Kaur, the mother of Bansi Lal under S. 92, Civil P. C. After the decision of the latter suit the properties in charge of the receiver were ordered to be restored to the persons from whom they were taken. The receiver asked for instructions in connexion with the properties and the Court below directed the properties Nos. 11, 12 and 17 which were alleged to have been taken from the possession of Rai Sahib Fateh Chand should be restored to Pandit Amar Nath. This instruction was apparently given on the ground that Amar Nath was found in the course of another suit brought by Sewa Datt to be the person entitled to the property and also on account of the fact that the sale of the properties on which Rai Sahib Fateh Chand relied had been made during the pendency of the suit by Sewa Datt. It is from this order that the present appeal has been preferred. A preliminary objection is raised that the order in question is not appealable. The appeal purports to have been filed under O. 43, R. 1 (s), Civil P. C. The learned counsel for the appellants contends that the order under appeal falls under Cl. (d), R. 1, O. 40. That clause however appears to deal with the powers to be conferred on a receiver. In the present instance the Court did not purport to confer any power on the receiver. The appointment of the receiver had in fact come to an end. The receiver merely asked for instructions for his guidance as regards the persons to whom certain properties were to be restored, and the Court gave directions accordingly. It seems to me that the order in question cannot be said to fall properly under Cl. (d), R. 1, O. 40 and consequently no appeal is competent.

The learned counsel next requested that the appeal be treated as a memorandum of revision. It is urged that the Court below could only order the properties to be restored to the persons from whose possession they were taken and that it has exceeded its jurisdiction in ordering the properties to be restored to another person. But it seems to me that it is by no means clear that the properties were taken by the receiver from the possession of Rai Sahib Fateh Chand. If Rai Sahib Fateh Chand were holding the properties in dispute in his own right at the time when possession was taken by the receiver he would have probably at once obejcted to possession being taken inasmuch as under O. 40, Civil P. C., a Court has no power to remove any person from the possession or custody of the property whom any party to the suit has not a present right so to remove. Next, when Rai Sahib Fateh Chand applied to the Court for possession of the properties being restored to him, he did not say definitely that the three properties now in dispute were actually taken from his possession: vide: his application dated 22nd October 1924. All that he said was that one-fourth share of certain shops and baithaks had been sold to him by Panna Lal and were therefore his property. The receiver no doubt subsequently stated that the three properties referred to above had been taken from the possession of Rai Sahib Fateh Chand; but it appears that the receiver had made different statements on the point on different occasions.

The petitioner has another remedy open to him, viz., by a separate suit. It is not disputed that he purchased the property from Panna Lal, during the pendency of Sewa Datt's suit. The decision in the suit by Sewa Datt, to which Panna Lal was a party, is certainly prima facie in favour of the title claimed by the respondent. It is significant that Rai Sahib Fateh Chand did not care to put forward his claim in the suit by Sewa Datt or apply to be made a party thereto. In view of all the above circumstances I am not prepared to interfere in revision. It appears that Panna Lal became an insolvent and a receiver is now in charge of his estate. The receiver also put in an appearance in this Court, but he had not claimed the property in the Court below and I do not think he has any right to put forward the claim for the first time in these proceedings. I dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 217

TAPP, J.

Gajjan Singh—Appellant.

v.

Mahal Singh and *another*—Respdts.

Second Appeal No. 685 of 1932, Decided on 17th November 1932, from decree of Dist. Judge, Ferozepore.

Hindu Law— Alienation—Discharge of antecedent debts — Alienee, acting honestly need not prove nature of such debt

Where an outsider alienee acts honestly and satisfies himself that the debts which he is discharging are actually due and there is nothing to put him on his guard, he is not required to show that the antecedent debts were contracted for a necessary purpose: 65 *P. R.* 1900 (*F.B.*), *Foll.*; and *A. I. R.* 1920 *Lah* 279, *Expl.* [P 218 C 1]

Durga Das—for Appellant.

B. P. Khosla—for Respondents.

Judgment.—The facts necessary for the determination of Appeals Nos. 685 and 686, which will be conveniently disposed of by this judgment, may be shortly stated as follows: Sohna Singh, a Jat agriculturist of Patto Hira Singh in the Moga Tahsil of the Ferozepore District, sold 46 kanals, 9 marlas of land to Gajjan Singh, (appellant in Appeal No. 685) for Rs. 1,700, on 22nd July 1928, and 19 kanals, 14 marlas to Kishan Singh, and his four brothers, (appellants in Appeal No. 686) for Rs. 1,600, on 23rd July 1928. Mahal Singh, a reversioner of Sohna Singh, brought two suits contesting these alienations as usual. The trial Court finding against him on all the points, namely, whether the land was ancestral, whether he was a reversioner and as to there being consideration and necessity for the sales dismissed both the suits. On appeal the plaintiff's right to challenge the alienations was conceded and it was held that the land in the case of the alienation to Gajjan Singh except khasra No. 1175 having an area of 14 kanals, 15 marlas and the whole of the area sold to Kishan Singh and his brothers were ancestral. The learned District Judge also found that consideration and necessity had been proved in respect of both alienations except for a sum of Rs. 120 in Gajjan Singh's alienation and Rupees 152-8-0, in the case of the other, but as the alienees who were outsiders, had failed to show that the antecedent debts discharged by them had been contracted for necessary purposes the alienations were not justified. He accordingly accepted the appeals and decreed both the suits.

Now the view taken by the learned District Judge is quite opposed to the trend of all the decisions of this Court following on the Full Bench decision of the Chief Court in *Deni Ditta* v. *Saudagar Singh* (1). He seems to have been led astray by certain observations in *Jhandu* v. *Niamat Khan* (2). As observed on p. 251 of the Digest of the Customary Law, 11th Edn., the judgments in the latter case were directed towards ascertaining the meaning of what was actually laid down in 65 *P. R.* 1900. It was remarked by one learned Judge that:

> "an alienee discharging an antecedent debt is not required to make an inquiry into the nature thereof; but this holds good only in the case of an honest alienee who acts in perfect good faith. An alienee paying off an antecedent creditor gets no advantage, if he has knowledge of the true nature of the debt or acts in bad faith, or where he and the antecedent creditor are in effect one and the same person."

The other learned Judge observed that:

> "the principle laid down in *Devi Ditta* v. *Saudagar* (1) is that the initial onus lies on the outsider alienee to show that the debts were due, and when he has discharged that onus, the turn of the opposite party (i.e., the reversioners challenging the alienation) then comes to show that the alienee made no proper inquiry or that if he had made one, he must have learnt of the real nature of the debts."

These observations merely show that where an outsider alienee actually discharges an antecedent debt, after satisfying himself as to its existence, he is not fixed with making any enquiry unless the party impeaching the alienation proves that the debt was tainted with immorality or there were suspicious circumstances which should have put the alienee on guard. In short, where an outsider alienee acts honestly and satisfies himself that the debts which he is discharging are actually due and there is nothing to put him on his guard, he is not required to show that the antecedent debts were contracted for a necessary purpose. In the present case it was alleged that the alienor was a bad character, a drunkard and an opium eater, but both Courts have found that these allegations are indefinite and have not been established. The two sums of Rs. 120 and 152-8-0, form such a small proportion of the total consideration in each case that the failure of the alienee to prove necessity in respect of these two items is of no significance. The learned District Judge having found that khasra No. 1175 with an area of 14 kanals, 15 marlas was not ancestral should have excluded this from his decree, but in view of the observations made above, any alteration in this respect is unnecessary. The seventh ground of appeal in Appeal No. 686, as to the finding of the learned Judge regarding the ancestral nature of the land in that case being based upon a misapprehension, has been dropped. For the above reasons I hold that the conclusion arrived at by the lower appellate Court is wrong and accepting both the appeals, I set aside the decrees of the lower appellate Court and restore those of the trial Court with costs throughout.

K.S. *Appeals accepted.*

A. I. R. 1933 Lahore 218

BHIDE, J.

Hassu and *others*—Defendants—Appellants.

v.

Ibrahim and *another*—Plaintiffs—Respondents.

Second Appeal No. 568 of 1932, Decided on 27th October 1932, from decree of Senior Sub-Judge, Gujrat, D/- 6th January 1932.

(a) Civil P. C. (1908), S. 11—Finding neither necessary for decision of case nor party given opportunity to challenge it—It cannot operate as res judicata.

A finding which is not necessary for the decision of a case and against which the party affected had no opportunity to challenge cannot operate as res judicata but it can only be regarded as an obiter dictum. [P 219 C 1, 2]

(b) Adverse Possession—Widow remarrying and holding property as absolute owner—Adverse possession dates from remarriage or from date when she openly asserts her adverse title.

Where a widow claims the property as an absolute owner after the forfeiture of her estate by remarriage she may acquire such title by prescription after the lapse of the requisite period; and the adverse possession would date from the remarriage or from the date when she openly asserts her adverse title: *A. I. R.* 1924 *P. C.* 121, *Dist.*; *A. I. R.* 1930 *Lah.* 504; *A. I. R.* 1924 *All.* 740; *A. I. R.* 1928 *All.* 45 and *A. I. R.* 1928 *Pat.* 220, *Rel. on.* [P 219 C 2]

Vasheshar Nath Sethi—for Appellants.

Jagan Nath Aggarwal— for Respondents.

Judgment.—The following pedigree table will be useful for the purposes of this case:

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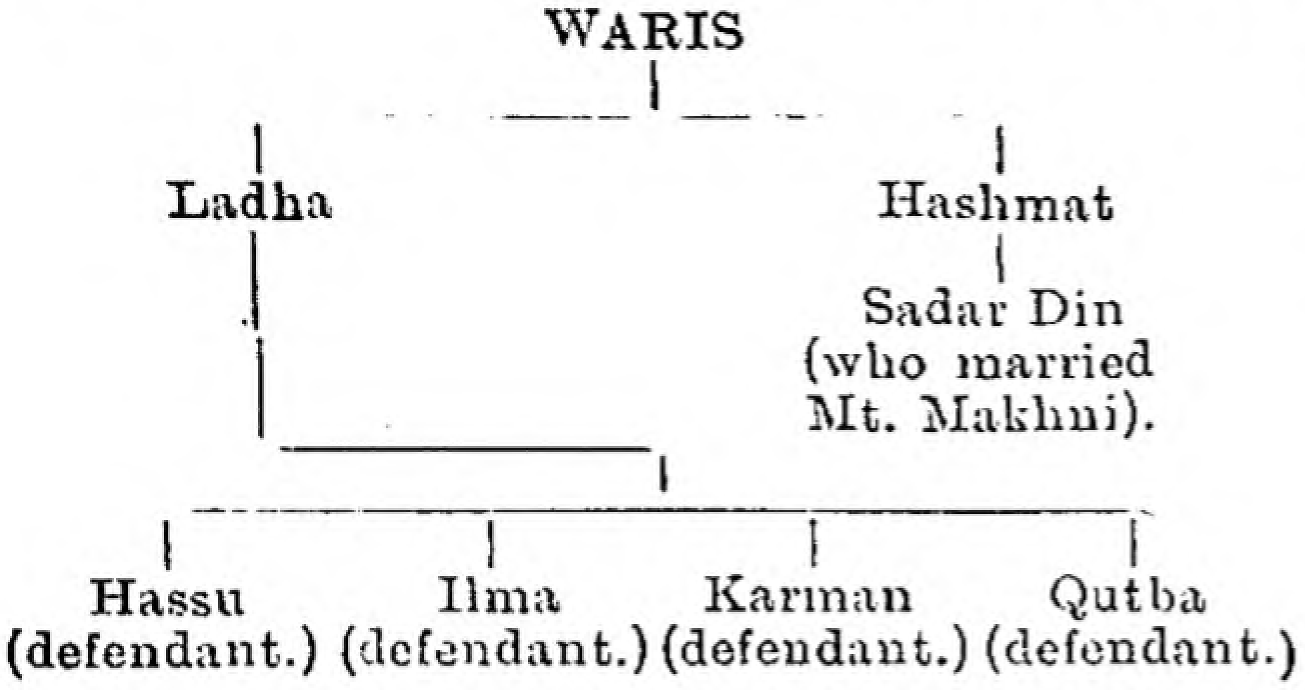
1. (1900) 65 P R 1900=322 P L R 1900 (F B).
2. A I R 1920 Lah 279=54 I C 842=1 Lah 472.



The land in suit which was held by Sadar Din was mutated in the name of his widow Mt. Makhni on his death. Subsequently Mt. Makhni married Karman, defendant, but in spite of the remarriage the land remained with her. On 25th May 1911, Hassu, Ilma and Qutba instituted a suit for possession of three-fourths of the land on the allegation that Mt. Makhni was allowed to remain in possession of the land in pursuance of an agreement that she would give it up when asked for by the heirs of Sadar Din. This suit was dismissed on the finding that the agreement relied upon by the plaintiffs was not proved. It may be noted here that Mt. Makhni had pleaded in that suit that she held the land as an absolute owner. The learned Subordinate Judge did not consider this allegation to be proved but there was no necessity to give any definite finding on the point as the agreement relied upon by the plaintiffs, on which the suit was based, had not been proved. Mt. Makhni died thereafter and the land was mutated in the name of her son Ibrahim who had been born as a result of her marriage with Karman. On appeal this order was reversed. Ibrahim thereupon instituted the present suit for possession of the land, alleging that the defendants had taken forcible possession thereof. His suit was decreed by the trial Court and the decision was affirmed on appeal by the learned Senior Subordinate Judge. The defendants have now preferred a second appeal to this Court. The first point raised by the learned counsel on appeal was that it was found in the suit of 1911 that Mt. Makhni was not holding the land in suit adversely to the reversioners but as a result of an understanding with them that she would continue to hold as a widow for her lifetime. But as already pointed out above, this finding was not necessary for the decision of the case as the Court had disbelieved the plaintiffs' evidence as regards the agreement on which the suit was based. Mt. Makhni had no opportunity to challenge this finding as the suit was dismissed. I therefore agree with the learned Senior Subordinate Judge that the finding cannot operate as res judicata and that it can only be regarded as an obiter dictum.

The next contention of the learned counsel for the appellants was that Mt. Makhni could not acquire absolute ownership by adverse possession as she was holding the land merely as a widow. *Mt. Lajwanti* v. *Safa Chand* (1) was relied upon as an authority in this respect. But in the present instance Mt. Makhni had remarried and she cannot therefore be said to be holding the land merely as a widow of Sadar Din. The plaintiffs were aware of the remarriage and the consequent forfeiture of the widow's estate held by Mt. Makhni in Sadar Din's property but took no action. In the suit of 1911 Mt. Makhni, moreover, asserted that she was holding the land as an absolute owner. This was a clear notice to the reversioners of the adverse claim set up by her. The adverse possession would date from the remarriage, but even if limitation is reckoned from the year 1911, when Mt. Makhni openly asserted her adverse title in Court, her title must be held to have been perfected long before the institution of the present suit in 1931. The facts of the case reported as *Mahajan* v. *Mt. Purbo* (2) were analogous in this respect and the remarks on p. 426 (of 11 *Lah.*) in that judgment show that where a widow claims the property as an absolute owner after the forfeiture of her estate she may acquire such title by prescription after the lapse of the requisite period. The principle laid down by their Lordships of the Privy Council in *Mt. Lajwanti* v. *Safa Chand* (3), cannot apply where a woman who claims title by adverse possession is holding not merely a widow's estate but claims the property in her own right as an absolute owner as in this case. This view receives further support from the following decisions of the Allahabad and Patna High Courts, viz., *Kali Charan* v. *Piari* (4), *Rikhdeo Tewari* v. *Sukhdeo Tewari* (5) and *Suraj Bali Singh* v. *Tilakdhari Singh* (6). In my

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1. A I R 1924 P C 121=80 I C 788=51 I A 171=5 Lah 192 (P C).
2. A I R 1930 Lah 504=123 I C 276=11 Lah 424.
3. A I R 1924 P C 121=80 I C 788=51 I A 171=5 Lah 192 (P C).
4. A I R 1924 All 740=83 I C 754=46 All 769.
5. A I R 1928 All 45=102 I C 175=49 All 713.
6. A I R 1928 Pat 220=107 I C 151=7 Pat 163.

judgment, the decision of the learned Senior Subordinate Judge is correct and this appeal must therefore be dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 220

BHIDE, J.

Narshingh Das and *another*—Appellants.

v.

Hem Raj and *another*—Respondents.

Misc. First Appeal No. 797 of 1932, Decided on 29th November 1932, from order of Senior Sub-Judge, Sialkot, D/- 27th January 1932.

Guardians and Wards Act (1890), Ss. 7 and 10—Application by *A* to be appointed guardian contested by *B*, *C* and *D* claiming to be trustees of minor's property under will—Validity of will questioned—Another guardian suggested by counsel for *B*, *C* and *D* and agreed by counsel for *A*—Such person appointed by Court after notice to parties—Appointment is valid.

An application by *A* to be appointed guardian of a minor was contested by *B*, *C* and *D* who claimed to be trustees or guardians of the properties of the minor under a will in their favour. The validity of the will was questioned by *A*. In the course of the proceedings, counsel for *B*, *C* and *D* under instructions from the muktar of the party made a statement to the effect that *H* may be appointed guardian. This was agreed to by counsel for *A*. Notice was issued to the parties. *B*, *C* and *D* did not appear and object, but their muktar only appeared. Subsequently they contended that the muktar and counsel had no authority to consent to the appointment.

Held: that neither the muktar nor the counsel has exceeded their authority; that *B*, *C* and *D* were estopped from challenging the validity of the appointment; and that even if there was some irregularity in not taking a formal application under S. 10 that irregularity cannot render the appointment illegal: *A. I. R.* 1928 *Lah.* 456, *Dist.* [P 221 C 1, 2]

Gobind Ram Khanna—for Appellants.

Mukand Lal Puri—for Respondents.

Judgment.—This is an appeal from the order of the Senior Subordinate Judge, Sialkot, appointing Pandit Hem Raj as a guardian of the property of a minor named Vidya Sagar. The application for guardianship was originally made by Mt. Parkash Vatti and notices were issued to the relations of the minor. The application was contested by Narain Das, Amar Nath and Charan Das, who claimed to have been appointed trustees or guardians of the property of the minor by a will executed by Pandit Kaka Ram, grandfather of the minor. The validity of this will was disputed by the applicant, Mt. Parkash Vati. The proceedings went on for sometime. Eventually, on 27th June 1932, Diwan Mulk Raj, counsel for the objectors (Narsingh Das, etc.), made a statement to the effect that Pandit Hem Raj, retired District Inspector of Schools, who is a maternal grandfather of the minor, may be appointed guardian of the property. This was consented to by Lala Kirpa Ram, advocate for the petitioner. The Court after taking into consideration the statements of the parties, then proceeded to appoint Pandit Hem Raj as guardian of the property. It is from this order that the present appeal has been preferred by Narsingh Das and Amar Nath. It is contended on behalf of the appellants: (1) that Mela Ram who was acting as their Mukhtar and Diwan Mulk Raj, who was engaged as counsel for them, had no authority to consent to the appointment of Pandit Hem Raj; (2) that the Court had no jurisdiction to appoint Pandit Hem Raj as guardian of the property when the appellants had been appointed trustees by virtue of a will; (3) that the minor Vidya Sagar being a member of a joint Hindu family, no guardian can be appointed of his undivided share in the joint family property, and lastly; (4) that there was no proper petition for appointment of Pandit Hem Raj as a guardian, and hence, the appointment was illegal.

After carefully considering the arguments advanced I do not think there is force in any of these contentions. As regards the first point it appears from the record that after the appointment of Pandit Hem Raj as guardian of the property notices were issued to the appellants to deliver property of the minor to the guardian. These notices were duly served on them. But, on the 1st April, Mela Ram only, the Mukhtar of the appellants, appeared again. If the Mukhtar had exceeded his authority in consenting to the appointment of Pandit Hem Raj as guardian, the appellants might have been expected to appear in person and present at once against the action taken by Mela Ram and their counsel. But they did nothing of the kind. An adjournment was taken to answer another application put in by the guardian. On the 22nd April, Mela Ram and appellant Amer Nath, appeared and filed an account. A legal objection was no doubt raised on that date; the application is dated 1st April but it was put in only on the 22nd April, that no person other than the appellants could be appointed guardian of property but there was no suggestion that Mela Ram had acted contrary to his instructions or authority in agreeing to the appointment of Pandit Hem Raj. On behalf of the respondents an affidavit is filed alleging that the appellants were annoyed on account of the defects or discrepancies in the accounts which were detected by Pandit Hem Raj when accounts were shown to him by the appellants early in April. The appellants have not ventured to deny the truth of this allegation but have merely contented themselves with saying that the allegations were not relevant (vide para. 5 of the appellants' affidavit, dated 16th November 1932). In view of all these facts I have no hesitation in holding that it is not proved that Mela Ram or Diwan Mulk Raj, counsel for the appellants, exceeded their authority or acted contrary to their instructions in consenting to the appointment of Pandit Hem Raj as guardian.

The next point urged was that the appointment of Pandit Hem Raj was in any case illegal, as no guardian of property could be appointed until the trustees or guardians appointed by Pandit Kaka Ram by his will were removed: vide S. 7 (3), Guardians and Wards Act. As regards this contention, it must however be remembered that the will relied upon by the appellants was not admitted by the respondent or the petitioner Mt. Parkash Vati. Then the appellant's counsel stated on 27th January 1932, that the appellants were not willing to be guardians and suggested the appointment of Pandit Hem Raj. It must, I think, be held that they waived their objections based on the will. These objections having been withdrawn and there being no proof of any valid appointment of any other person as a trustee or a guardian, the order of the learned Senior Subordinate Judge cannot be said to contravene the provisions of S. 7, Guardians and Wards Act. The contention that the minor is a member of a joint Hindu family is sufficiently refuted by the very will on which the appellants sought to rely. If the family were joint, Kaka Ram could not dispose of the property by a will in certain specified shares as he is said to have done. This contention seems to be obviously devoid of any force whatsoever.

The last contention, viz., Pandit Hem Raj could not be appointed a guardian as there was no proper application presented by him under S. 10, Guardians and Wards Act, also does not appear to me to be sustainable in the circumstances of the case, as the appointment was suggested by the appellant's own counsel and Pandit Hem Raj agreed to it. The learned counsel for the appellant relied upon, *A. I. R.* 1928 *Lah.* 456, but that case is distinguishable because in that case, the original application had abated and there was no proper application for the appointment of a guardian before the Court at all. In the present instance, the suggestion as to Pandit Hem Raj's appointment was made by the appellant's own counsel and was accepted by Pandit Hem Raj and others present. The appellants, at any rate, are therefore estopped from challenging the validity of the appointment on that ground. Even if there was some irregularity in procedure in not taking a formal application under S. 10 of the Act from Pandit Hem Raj, I do not think the irregularity can render the appointment illegal in the circumstances of the case. I dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 221

SHADI LAL, C. J. AND BROADWAY, J.

Mela Ram—Defendant—Appellant.

v.

Sandhi Khan—Plaintiff—Respondent.

Letters Patent Appeal No. 141 of 1927, Decided on 11th April 1932, from decree of Bhide, J., D/- 4th July 1927, in Civil Appeal No. 613 of 1927.

Landlord and Tenant—Disclaimer of landlord's title occasions forfeiture of tenancy —Transfer of Property Act (1882), S. 111 (g).

A disclaimer of the landlord's title made before the suit for ejectment, occasions a forfeiture of the tenancy, and this rule applies to all tenancies permanent or otherwise. [P 222 C 1]

Fakir Chand—for Appellant.

Badri Das—for Respondent.

Shadi Lal, C. J.—This appeal under Cl. 10, Letters Patent, arises out of a suit brought by a landlord for the ejectment of his tenant. The question for determination is whether the tenant has forfeited his tenancy by the repudiation of his landlord's title. The learned District Judge, concurring with the trial Court, has reached to the conclusion that the tenant denied, in clear and unequivocal terms, the title of his landlord; and that the denial caused a forfeiture of the tenancy.

The learned Judge, from whose judgment this appeal is preferred, considers that the finding of the learned District Judge as to forfeiture proceeded upon the custom prevailing in the locality in which the demised building is situated, and that, in the absence of a certificate under S. 41, Punjab Courts Act, a second appeal could not be entertained. There can however be no doubt that, apart from the question of custom, it is settled rule of law that a disclaimer of the landlord's title made before the suit for ejectment, occasions a forfeiture of the tenancy, and this rule applies to all tenancies permanent or otherwise. I would therefore affirm the judgment of the single Judge, and dismiss the appeal with costs.

Broadway, J.—I concur.

K.S. *Appeal dismissed.*

✲ A. I. R. 1933 Lahore 222

TEK CHAND AND MONROE, JJ.

Ram Lal—Plaintiff—Appellant.

v.

Dhian Singh and *others*—Defendants—Respondents.

First Appeal No. 129 of 1927, Decided on 12th October 1932, from decree of Senior Sub-Judge, Jhang, D/- 8th October 1926.

✲ (a) **Contract—Contract between two parties for depriving third party of rights—Suit by one of them to enforce contract—Other can set up true nature of transaction by way of defence—Maxims**—*Potior est conditio possidentis.*

A defendant can set up the true nature of a transaction reduced to the form of a document, when the plaintiff and defendant have entered into the transaction for the purpose of misleading a third party or depriving him of rights given by law: *Potior est conditio possidentis.* [P 222 C 2]

✲ (b) **Evidence Act (1872), S. 92—Document recording transaction—Evidence can be given to show that transaction had no existence.**

Notwithstanding S. 92, evidence can be given to show that there was really no transaction in existence which has been recorded in the document. [P 222 C 2; P 223 C 1]

J. N. Aggarwal and *Asa Ram Aggarwal*—for Appellant.

Mehr Chand Mahajan, Dev Raj Sawhhey and *Arjan Dev Bagat*—for Respondents.

Monroe, J.—This is an appeal from a decree of the Senior Subordinate Judge at Jhang, dismissing the plaintiff's suit for possession by redemption of property comprised in a mortgage of 5th May 1890. The mortgage referred to came into existence as follows: Aya Singh purchased the shop *A* and half of shop *C* shown on the plan Ex. P-1 on 7th April 1890 for Rs. 1,823, and on the same day he also purchased the remaining half share in shop *C*. On 5th May 1890, Aya Singh sold shops *A* and half *C*, the property now in dispute to Bhawani Das and Devi Ditta for Rs. 1,823 and in lieu of purchase money these purchasers mortgaged the property to Aya Singh, the vendor for a like amount. The present plaintiff and appellant is the successor of Bhawani Das and Devi Ditta and the defendants represent the interest of Aya Singh. Possession remained with Aya Singh, the vendor mortgagee and the defendants' answer to the plaintiff's claim is that the sale and mortgage transactions were sham transactions and there was an intention that they should have no effect on the actual ownership of the property.

It is established by the oral evidence brought on the record that these transactions were carried out for the sole object of defeating the right of pre-emption available to one Gurditta Ram against Aya Singh and that there was no intention on either side that the actual ownership should be affected. It is also proved that after the period of pre-emption had elapsed, Aya Singh and his successors acted and spoke of themselves as owners and in rebuilding incorporated with the property in dispute other property belonging to them; while this was happening the plaintiff and his predecessor stood by making no objection. About these facts there can be no doubt and the sole questions in the case as argued before us are whether this evidence is inadmissible by reason of S. 92, Evidence Act, and whether the defendants can be permitted to set up a case in conflict with the documentary evidence on the principle that a party may not plead his own fraud. No decision has been cited to us which could be taken as authority for the proposition that a defendant cannot set up the true nature of a transaction reduced to the form of a document, when the plaintiff and defendant have entered into the transaction for the purpose of misleading a third party or depriving him of rights given by law. It has been shown that the plaintiff in the present case is seeking to acquire this property from the defendants fraudulently; and in the absence of any authority in his favour I see no reason why the Court should be prepared to assist him by extending the principle relied on by the learned counsel for the plaintiff; the predecessors of both plaintiff and defendants were parties to this transaction with full knowledge of all the circumstances; *potior est conditio possidentis.*

The other question is whether S. 92, Evidence Act, applies. It is stated in the note to S. 92 in Woodroffe and Amir Ali's Law of Evidence that notwithstanding S. 92 evidence may be given to show that there was really never any disposition at all; and this I accept as a correct statement of the law. The sale-deed of 5th May 1890, contains the statement by Aya Singh "I have sold the said shop to Bhanni Ram and Devi Ditta," and the mortgage-deed of the same date contains the statement: "we now mortgage" made by Bhani Ram and Devi Ditta. The statement that a sale had taken place was false; the document records a transaction which had no existence, there was never any disposition at all. Relying on the oral evidence of the witnesses for the defendants, I find that the plaintiff has failed to show that he has any interest in the property in dispute and accordingly, I think that the judgment of the learned Subordinate Judge should be affirmed and this appeal dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 223

TAPP, J.

Maula Bakhsh and *others*—Plaintiffs —Petitioners.

v.

Sajawal Shah and *others*—Defendants —Opposite Parties.

Civil Misc. Petn. No. 606 of 1932, and No. 580 of 1931, Decided on 12th December 1932, on judgment in Civil Appeal No. 1863 of 1930, D/- 18th July 1931.

(a) Custom (Punjab) — Alienation—Sale of share of offerings to shrine to participant is valid.

A sale of a share of offerings to a shrine to a participant in such offerings is not opposed to public policy and is valid: 6 *Bom.* 298, *Foll.*; 35 *Cal.* 226; *A. I. R.* 1926 *Cal.* 490 and *A. I. R.* 1914 *Bom.* 318, *Ref.* [P 224 C 1]

(b) Civil P. C. (1908), O. 47, R. 1—Decision based on wrong authority is not mistake apparent on face of record.

A finding on a wrong authority is not a mistake or even apparent on the face of the record but only an error in law and would afford no ground for review. [P 223 C 2]

Dev Raj Sawhney and *Gobind Ram Khanna*—for Petitioners.

Khalifa Shujauddin — for Opposite Parties.

Order.—This is an application to review my judgment in appeal on the ground of mistake or error apparent on the face of the record. The appeal arose out of a suit for a declaration that a sale of a two-third share in one anna and four pies in the rupee of the offerings made to the shrine of Shah Chan Chiragh in the Rawalpandi District was invalid and ineffective *qua* the reversionary rights of the plaintiffs in that suit. I held inter alia that in the absence of a certificate as to whether the alienation was invalid under any custom pertaining to the shrine, a second appeal was incompetent and in agreement with the lower appellate Court that the alienation was not opposed to public policy, having been effected in favour of one who was a participant in the offerings and not a stranger. For the latter conclusion I relied on the case of *Mancha Ram* v. *Pran Shankar* (1). Now, it is obvious that neither of these findings has arisen from any mistake or error apparent on the face of the record. In order to establish this the learned counsel for the petitioner wished to take me through the pleadings and the evidence a course which could not be permitted. A mistake or error is hardly apparent if, in order to discover it, recourse had to be had to the pleadings and the evidence. In short the application for review is nothing but an attempt to open out the whole appeal and argue it a second time. If I have relied on a wrong authority that has been overruled, this would be an error in law and would afford no ground for review. For the above reasons I hold that the present application has no force and I reject it with costs.

In connexion with the same case there is an application for leave to file a Letters Patent appeal against my judgment referred to above, and in order to avoid the recapitulation of the facts it will be convenient if I dispose of this application in the same order. It has been urged in support of the application for leave to appeal that the rulings of the Bombay High Court relied on by me is not good law having been dissented from in various other decisions, particularly in *Rajeshwar Mullick* v. *Gopeshwar Mullick* (2) and *Nagendra Nath* v. *Rabindra Nath* (3). Reference was also made to *Manjunath Subrayabhat* v. *Shankar Manjaya* (4), in which the earlier Bombay ruling is cited but not dissented from, as the rule laid down in *Mancha Ram* v. *Pran Shankar* (1) was recognized provided that such alienation could be supported by local usage and custom. I have given the whole matter my very careful considera-

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1. (1881) 6 Bom 298.
2. (1908) 35 Cal 226=7 C L J 315=12 C W N 323.
3. A I R 1926 Cal 490=94 I C 212=53 Cal 132.
4. A I R 1914 Bom 318=28 I C 139=39 Bom 26.

tion and adhere to my opinion that the alienation in the present case was not opposed to public policy, having been effected in favour of a participant in the offerings. In the circumstances I see no sufficient reasons for granting leave to appeal and I therefore dismiss the application.

K.S. *Applications dismissed.*

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* A. I. R. 1933 Lahore 224

TEK CHAND, J.

Mt. Khemi and *others* — Plaintiffs—Appellants.

v.

Keshav Ram and *others*—Defendants—Respondents.

Second Appeal No. 664 of 1929, Decided on 5th July 1932, against decree of Dist. Judge, Hoshiarpur, D/- 13th September 1928.

(a) Civil P. C. (1908), O. 41, Rr. 1, 23 and 25—Case held typical instance in which Subordinate Courts bring entire judicial system into contempt by blindly following technicalities of law without having recourse to salutory provisions in Acts to undo injustice caused by application of these technicalities—Limitation Act (1908), S. 5.

In appeal from a decree an objection was taken by the appellants that some of the defendants had died during the pendency of the suit in the trial Court. The factum of the death was not admitted and the District Judge set aside the judgment of the trial Court and passed an order under O. 41, R. 23. The trial Court on inquiry found the question of the death in the affirmative and held that the suit had abated in its entirety and sent a report to the District Judge on 3rd December 1927. On return of the papers by the District Judge saying that his formal order of remand was under O. 41, R. 23, the trial Court by a formal order dated 10th January 1928 dismissed the suit for reasons given in his judgment dated 3rd December 1927. In appeal only the decree sheet and the judgment dated 3rd December 1927 were attached to the Memorandum, but not the formal order dated 10th January 1928. The appeal was dismissed on the ground of the absence of the formal order as well as on the ground that in the memorandum the names of all the appellants and respondents were not mentioned. Before the appeal came on for hearing the complete list was filed and reason for failure to do so was explained as due to the fact that in the certified copies supplied the parties were described as shown in the memorandum:

Held: (1) that the case was a typical instance of cases in which the Subordinate Courts bring the entire judicial system into contempt by blindly following the technicalities of the law without having recourse to the salutory provisions contained in the Acts of the legislature to undo the injustice caused by the application of these technicalities; [P 224 C 2]

(2) that the District Judge should have remanded an issue under O. 41, R. 25, on the question of the factum of the death and should not have acted under O. 41, R. 23 which was not ap cable; [P 224 C

(3) that it was pre-eminently a case in wh the power of dispensation vested in tne Co under O. 41, R. 1, should have been exercised motu by the District Judge even if no prayer that effect had been made by the appellants; [P 225 C

(4) that it was pre-emimently a fit case which the District Judge should have exercis his powers under S. 5, Lim. Act, and extend the time for filing the appeal up to the date wh the complete list was filed. [P 225 C

*** (b) Civil P. C. (1908), O. 22, Rr. 4 and —Appeal—One respondent dying and no a plication to bring on record representativ made within time— Affidavit satisfactori explaining omission—No counter-affidavit There is sufficient cause for justifying se ting aside abatement under O. 22, R. 9.**

In appeal it was contended that one of the re pondents had died and an application to brin his legal representative on record was not mad within time. In affidavit filed in support of th application under O. 22, Rr. 4 and 9 for bringin the legal representatives on the record, it wa stated that the parties lived in different village where occasions for the parties to come into con tact were few and that the omission to file application was not intentional. No counter-affidavit denying these averments had been filed:

Held: that there was sufficient cause justifying the setting aside of the abatement under O. 22, R. 9. [P 225 C 2]

M. C. Mahajan—for Appellants.

Fakir Chand – for Respondents.

Judgment.—This is a typical instance of cases in which subordinate Courts bring the entire judicial system into contempt by blindly following the technicalities of the law without having recourse to the salutory provisions contained in the Acts of the Legislature to undo the injustice casued by the application of these technicalities. The suit was instituted in the Court of the Subordinate Judge of Kulu on 4th June 1925, and a decree in favour of the plaintiffs was passed on 15th December 1925. The defendants preferred an appeal to the Deputy Commissioner, Kangra, who was in those days invested with the powers of the District Judge of the Kulu Sub-Division. When the appeal came up for hearing before him it was pointed out on behalf of the appellants that three of the defendants had died during the pendency of the suit in the trial Court, but as the factum of the death of these persons was not admitted, the learned District Judge, instead of remanding an issue under O. 41, R. 25, Civil P. C., set aside the judgment of the trial Judge and passed an order under O. 41, R. 23, Civil P. C., which obviously had no application. No appeal to this Court was however preferred against this order of remand, which became final. The Subordinate Judge inquired into the question as to whether the three defendants had died during the pendency of the suit, and, finding in the affirmative, held that the suit had abated not only against the deceased persons but in its entirety. However instead of dismissing the suit, which was a necessary consequence of his finding on the question of abatement, he sent up a report to the District Judge on 3rd December 1927.

The District Judge returned the papers to the Subordinate Judge pointing out that his previous order of remand was passed under O. 41, R. 23, Civil P. C., and that the trial Court should have passed a formal decree dismissing the suit. Thereupon the Subordinate Judge passed a formal order on 10th January 1928, stating that, for reasons given by him in his detailed order of 3rd December 1927, the suit was dismissed. In accordance with this order of dismissal, a decree-sheet was prepared on 10th January 1928. The plaintiff preferred an appeal to the District Judge against this decree, and with the memorandum of appeal attached the decree-sheet and also the detailed order of the Subordinate Judge, dated 3rd December 1927, giving reasons for holding that the suit had abated in its entirety. No copy of the formal order passed on 10th January 1928, was however filed with the memorandum of appeal. When the appeal came up for hearing before the District Judge it was objected on behalf of the respondents that the appeal was not properly constituted as no copy of the order of 10th January 1928 had been filed. The learned District Judge upheld the objection and dismissed the appeal. In my opinion this was eminently a case in which the power of dispensation vested in the appellate Court under O. 41, R. 1, Civil P. C., should have been exercised suo motu by the District Judge, even if no prayer to that effect had been made by the appellants.

The learned District Judge however gave another reason for dismissing the appeal and that was that in the memorandum of appeal the names of all the appellants and all the respondents had not been given but the appeal was described as having been filed by "Mt. Khimi and 76 other persons" and the respondents were stated to be "Keshab Ram and 98 other persons." The reason for describing the parties in this manner was that, in the decree-sheet which had been prepared by the trial Court and in the copy of the judgment of the order of 3rd December 1927, which had been supplied to him, the names of all the plaintiffs and all the defendants were not given, but the plaintiffs were described as "Mt. Khimi and 76 other persons" and the respondents as "Keshab Ram and 98 other persons." On 24th February 1928, long before the appeal came up for hearing, the appellants however filed a complete list of all the plaintiffs and defendants, and stated that the failure of their counsel to give the names of all the plaintiffs and all the defendants in the memorandum of appeal was due to the fact that in the certified copies which had been supplied to them such names were not given and the parties were described as above. In these circumstances it was eminently a fit case in which the learned District Judge should have exercised his powers under S. 5, Limitation Act, and extended the time for filing the appeal up to 24th February 1928. The order of the learned District Judge cannot therefore be sustained on either of the grounds on which it proceeds and must be set aside.

Mr. Fakir Chand for the respondents raised a further objection that, during the pendency of the appeal in this Court, one of the respondents Keshab Ram had died and the application to bring his legal representatives on the record was filed more than 90 days after his death. He therefore urged that the appeal has abated. In the affidavit, which was filed by the appellant in support of his application under O. 22, Rr. 4 and 9, Civil P. C., for bringing Keshab Ram's representatives on the record, it was stated that the parties lived in different villages at great distances in the Kulu valley, where means of communication are scarce and "occasions for the parties to come into contact are few," that the appellant Mt. Khimi who had been entrusted with the conduct of the case, was a female and that the omission to file the application under O. 1, R. 8, Civil P. C., was not intentional. No counter affidavit denying the averments in the appellants' affidavit has been filed. In these circumstances, I think' sufficient cause has been shown, justifying the setting aside of the abatement under O. 22, R. 9, Civil P. C. I therefore hold that this second appeal has not abated. For the foregoing reasons I accept the appeal, and setting aside the judgment and decree of the learned District Judge, send the case back to him for disposal in accordance with law. As this litigation has been going for the last seven years and no decision on the merits has yet been given, the District Judge is directed to proceed with the final decision with as little delay as possible.

P.N./R K. *Appeal allowed.*

* A. I. R. 1933 Lahore 226

BHIDE, J.

Mohammad Bakhsh—Judgment-debtor—Petitioner.

v.

Pirthi Chand— Decree-holder—Opposite Party.

Civil Revn. No. 51 of 1932, Decided on 6th July 1932, for revision of order of Sub-Judge, Fourth Class, Batala, D/- 20th June 1931.

*** (a) Civil P. C. (1908), O. 47, R. 1—Notice issued —Successor cannot refuse to interfere merely because order under review was appealable.**

Where the Judge who passed the original order has issued notice on the presentation of the application for review and his successor who hears the application for review is of opinion that the order passed by his predecessor was wrong he cannot refuse to interfere merely because the order was appealable. [P 226 C 2]

(b) Civil P. C. (1908), O. 21, R. 89—Judgment-debtor is to deposit only amount of that decree under which property is sold—Application for rateable distribution is immaterial.

Where land has been sold in execution of one decree only under O. 21, R. 89, the judgment-debtor can be asked only to deposit the amount of that decree with 5 per cent although another decree-holder has applied for rateable distribution. [P 226 C 2]

Bhawani Singh—for Petitioner.

Anant Ram Khosla for *J. L. Kapur*—for Opposite Party.

Order.—This is a petition for revision of an order by the Subordinate Judge, Fourth Class, Batala, rejecting an application for review. It appears that in execution of a decree certain house property belonging to the judgment-debtor was attached and sold. Before the date fixed for confirmation of the sale the judgment-debtor put in an application under O. 21, R. 89, Civil P. C., stating that he was prepared to deposit the decretal amount with 5 per cent for the auction-purchaser. The application was granted and the judgment-debtor deposited Rs. 235-8-0. It appears that there was another decree-holder who had applied for rateable distribution of the assets. The learned Subordinate Judge thought that the judgment-debtor was bound to deposit the amount due to both the decree-holders, and finding that the amount actually deposited by the judgment-debtor was short of the total amount of the two decrees by Rupees 11-4-0 confirmed the sale. An application for review of this order was presented by the judgment-debtor, and it came before the successor of the Subordinate Judge who had passed the original order. It may be noted here that the latter had issued notice on the presentation of the application for review. The learned Subordinate Judge who heard the application for review, was of opinion that the order passed by his predecessor was wrong, but he thought that the judgment-debtor could have appealed from the order and therefore he refused to interfere. The only words used by the learned Subordinate Judge are: "In review I am not going to interfere."

It does not appear from his order on what grounds he considered it fit not to interfere when he found the order under review to be clearly erroneous. The mere fact that an appeal lay from the original order was, in my opinion, no justification for rejecting the application for review. O. 47, R. 1, Civil P. C., clearly provides that an application for review is competent in cases where an appeal is provided for under the law but has not been preferred. It seems clear from the order passed by Lala Sansar Chand, Subordinate Judge, of which review was sought that the learned Subordinate Judge was under the impression that the land had been sold in execution of one of the decrees only and under O. 21, R. 89 the judgment-debtor could be asked only to deposit the amount of that decree with 5 per cent. This amount had been deposited by the judgment-debtor. There was thus an error apparent on the face of the record, and the application for review should, in my opinion, have been granted. I accordingly accept this petition for revision and set aside the order rejecting the application for review as well as the order of Lala Sansar Chand, Subordinate Judge, by which the sale was confirmed on 8th April 1931. The learned Subordinate Judge should resume proceedings from that stage and pass necessary order. In view of all the circumstances I leave the parties to bear their own costs of this application.

R.K. *Order set aside.*

A. I. R. 1933 Lahore 227

CURRIE, J.

Mohammad Shafi—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1329 of 1932, Decided on 13th January 1933, from order of Sess. Judge, Sialkot.

Penal Code (1860), Ss. 100 and 304-II—Attack by notorious bully—Accused stabbing with knife — Held that right of private defence was exceeded.

Deceased who was a notorious bully and older than the accused, along with another assaulted the accused and attacked him with their fists. After the scuffle which lasted for 10 minutes in which accused got some slight injuries, accused drew a knife and stabbed the deceased:

Held: there was no justification for the accused to draw a knife and stab, that he had exceeded the right of private defence which he had and that in the circumstances of the case, sentence may be reduced from five years rigorous imprisonment to three years rigorous imprisonment. [P 228 C 1]

Ferozuddin—for Appellant.

Bhagwan Das—for the Crown.

Judgment.—The appellant has been convicted by the Sessions Judge of Sialkot under S. 304-2, I. P. C., for causing the death of one Ahmad Din alias Chunj. The facts of the case are really not in dispute. The appellant was going home from his work in the evening when he passed a shop where Ahmad Din Chunj, Firoz (P. W. 5) and Mohammad Shafi alias Tai (P. W. 8) were sitting. The prosecution evidence shows that the deceased challenged the appellant by asking him whether he would beat Firoz again. What exactly this remark referred to appears to be somewhat doubtful. In any case, the parties came to blows and Ahmad Din and Firoz attacked the appellant with their fists. After a scuffle, which according to one witness lasted for ten or fifteen minutes, the appellant drew a knife and stabbed the deceased Ahmad Din. The doctor found two stab wounds but all the witnesses agree that only one stab was given by the appellant, whether this is due to a desire to minimize the case against the appellant cannot be said. Ahmad Din died on the way while he was being carried to the hospital on a charpoy. The appellant stated that he was attacked by Ahmad Din who struck his head against his face thereby lacerating his lip and then bit his finger and that Firoz also beat him with fists. Ahmad Din then drew a knife and was about to stab the appellant who gave him a push in consequence of which he fell into the drain while the appellant ran away. A certain amount of evidence was produced in support of this story which however was rightly disbelieved by the learned Sessions Judge. The learned counsel for the appellant has not attempted to support this version, but has argued that the appellant acted in the right of private defence and was justified in doing what he did. In support of this contention he urges that in the concluding portion of his judgment the learned Sessions Judge remarks:

> "I find that in the evening he was compelled to use it (i. e. knife) in a bona fide exercise of the right of private defence."

He contends that on this finding the learned Sessions Judge should have acquitted the appellant as he does not say that the appellant exceeded the right of private defence. These remarks however must be read with the preceding portion of the judgment in which the learned Sessions Judge came to the conclusion that in his opinion

> "the conduct of the accused would be covered by Excep. 2, S. 300. It might even be covered by Excep. 4."

From this it is clear that the conclusion arrived at by the learned Sessions Judge was that the appellant had acted bona fide in the exercise of the right of self defence and that his act came within the second exception to S. 300, which provides that culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence of person or property exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm them is necessary for the purpose of such defence. Mr. Ferozuddin Ahmad for the appellant has argued further that the appellant's action might be considered to come within the scope of S. 100, secondly, Indian Penal Code, as the circumstances were such that he might reasonably have the apprehension that grievous hurt would result to him as a consequence of the assault. This is based on the fact that the deceased was apparently a notorious bully, but there is nothing in the present case to show that the appellant had any grounds for thinking that the consequence of the assault on him by the deceased and Firoz might be grievous hurt. An attempt has been made to argue that the deceased's intention was to break the accused's nose by butting it with his head, but I see no reason for accepting that contention. The appellant, as the medical evidence shows received some slight injuries and these in themselves would not form any justification for drawing a knife and striking the deceased with it. I therefore consider that the appellant has been rightly convinced under S. 304-2, I. P. C.

Looking to the circumstances of the case however I think the sentence is somewhat excessive. The aggressor in the first instance was clearly the deceased and he was joined in the assault by Firoz. The deceased apparently was a notorious bully and an older man than the accused. I therefore reduce the sentence to one of three years' rigorous imprisonment.

K.S. *Sentence reduced.*

✻ A. I. R. 1933 Lahore 228

ABDUL QADIR, J.

Abdul Hamid and *another*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No 1328 of 1932, Decided on 13th January 1933, from order of First Class, Magistrate, Jullundur, D/- 19th October 1932.

✻ Criminal P. C. (1898), S. 239 (g)—Joint trial of three persons charged under Ss. 240, 243 and 240/243/109 respectively is illegal—Penal Code (1860), Ss. 240 and 243.

A was charged under S. 240, I. P. C. for uttering counterfeit coin and *B* under S. 243 for being in possession of counterfeit coins. *A* and *B* were in Jullundur. Another person who was in Delhi was charged under S. 240/243/109. There was no evidence that there was a conspiracy among the three persons or that the coins were passed from one to another:

Held: that in such circumstances, the offences for which the three men were tried did not form one transaction and that the joint trial was illegal. [P 229 C 2]

Abdul Aziz—for Appellants.

M. L. Batra—for the Crown.

Judgment.—Abdul Hamid, Abdul Razaq and Ahmad Ullah have been jointly tried and convicted and have appealed to this Court. The question raised by Mr. Abdul Aziz, who represents Abdul Hamid and Abdul Razaq, is that the joint trial of the three persons was not justified by law and vitiates their convictions and should be set aside. The merits of the case have not been argued before me and the arguments have been confined to this preliminary objection. The fact that led to this trial are briefly as follows: Abdul Razaq, who is a young man and a student in a school, was seen having an altercation with a shopkeeper in Jullundur, who was accusing him of having given him a suspicious looking rupee, which was subsequently found to be a counterfeit coin. This was seen by a constable who had received information against Abdul Razaq and Abdul Hamid that they were putting some counterfeit rupees in circulation. He took hold of Abdul Razaq and took him to the police station with the rupee that he had passed to the shop-keeper, Ramzan. The accused were searced at the police station and some more coins, afterwards found to be counterfeits of King's coins, were found in his possession. Abdul Hamid is the uncle of this young man. His house as well as his person was searched and some more coins including some counterfeit coins were found in his possession. It is said that through one of these accused in Jullundur, a clue was obtained to Ahmad Ullah, who has a shop at Delhi. The police went to Delhi twice. On the first occasion they met Ahmad Ullah and searched his house but nothing incriminating was found. On the second occasion Ahmad Ullah produced a pair of dies Ex. P. 2 and Ex. P. 3, and four blanks, Exs. P. 5 to P. 8, from a place in the Company Garden; and it was found later on by the Mint Master, who examined the articles produced, that a number of coins produced from the possession of the accured were counterfeit coins, which could be produced or had probably been produced by using dies Exs. P. 2 and P. 3. After investigation the three accused named above were sent up together to take their trial at Jullundur, Abdul Razaq being charged under S. 240, I. P. C., for uttering a coin knowing it to be a counterfeit of the King's coin; Abdul Hamid under S. 243, I. P. C., for being in possession of counterfeit coins knowing them to be counterfeits of King's coins and Ahmad Ullah under Ss. 240/243/109, I. P. C. The Court below is of the opinion that there was a conspiracy between Ahmad Ullah on the one hand and Abdul Hamid and Abdul Razaq on the other, in consequence of which Ahmad Ullah used to pass on counterfeit coins manufactured by him to the other two, who used to utter them in the bazar at Jullundur.

Counsel for the appellant contends that so far as he can see there is no evidence as to the existence of a conspiracy between Ahmad Ullah of Delhi and Abdul Hamid and Abdul Razaq of Jullundur, or as to the passing of counterfeit coins by him to any of the other two accused. He urges further that there has been a misjoinder of charges in this case, even so far as the joint trial of Abdul Razaq with Abdul Hamid is concerned, inasmuch as Abdul Razaq was charged under S. 240, I. P. C., and Abdul Hamid under S. 243, I. P. C., and the offences committed by each of them were distinct and separate and should not have been tried together. Mr. M. L. Batra, on behalf of the Crown, meets the first objection by urging that the accused could be tried jointly under Ss. 235 and 239 (d), because the various offences attributed to the three accused practically form one transaction or a series of transactions amounting to one transaction. With regard to the conspiracy or the passing of coins by Hamid Ullah to the two accused who reside in Jullundur, he admits that there is no definite evidence to that effect on the record, but he says that conspiracy is a matter of inference and he says that the inference in this case may be drawn from the fact that one of the accused in Jullundur is said to have mentioned the name of Ahmad Ullah. In answer to the second objection relating to the misjoinder, so far as the joint trial of Abdul Razaq and Abdul Hamid is concerned, Mr. Batra refers to S. 239 (g). In conclusion Mr. Batra admits that the charges as framed are not free from defects but he argues that these defects are covered by S. 537, Criminal P. C.

The reply of Mr. Abdul Aziz to this last point is that the case of his clients has been prejudiced by the three men being tried together and evidence against Ahmad Ullah has influenced the judgment of the learned Magistrate regarding his clients. He points out that the several offences said to have been committed by the three accused are quite distinct and have been committed on different occasions and cannot be treated as one transaction. With regard to Cl. (g), S. 239, Criminal P. C., he says that if Abdul Razaq and Abdul Hamid had been on their trial concerning an offence as to one and the same coin, Cl. (g) would have been applicable, but it cannot apply to a case where the charge against Abdul Razaq is that of uttering a coin, while the charge against Abdul Hamid is of possession of different coins altogether and Ahmad Ullah is supposed to be the manufacturer of counterfeit coins working at Delhi, with whom no direct touch of his clients is shown by the evidence on the record. After giving due consideration to the arguments on both sides, I think that there is force in the contentions advanced on behalf of the appellants and in my opinion the trial has been vitiated by the defects pointed out by the appellants' counsel. I do not think the offences for which the three men have been tried form part of the same transaction and, if they did not, I do not see how the offences could have been tried jointly. I therefore quash the convictions and set aside the sentences awarded against the accused and direct that they may be tried afresh according to law, either separately for the various offences with which they are charged or together on a proper charge of conspiracy if the prosecution is in a position to substantiate it and is advised to adopt this course.

K.S. *Retrial ordered.*

A. I. R. 1933 Lahore 229

SHADI LAL, C. J. AND AGHA HAIDAR, J.

Yara Dost Mohammad—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1055 of 1932, Decided on 20th October 1932, from order of Sess. Judge, Attock, D/- 18th August 1932.

Penal Code (1860), S. 302—Boy of 17 committing murder without premeditation and under sudden impulse — Death sentence should not be passed.

A boy of 17 committed the murder of a person between whom and the boy's family there was ill feeling and bad blood. The murder was committed without premeditation and under sudden impulse.

Held: the boy should be given a locus paenitentiae and that the irrevocable sentence of death should not be passed on him. [P 231 C 1]

Barkat Ali for *B. R. Puri*—for Appellant.

Sundar Das for *Govt. Advocate*—for the Crown.

Agha Haidar, J. — The appellant Yara, a boy of seventeen, resident of the village Gattal, in the district of Campbellpur, has been convicted by the Sessions Judge, Attock, at Campbellpur, of having on the afternoon of 29th March 1932, committed the murder of one Sardar Ali; and has been sentenced, under S. 302, I. P. C., to suffer the extreme penalty of the law. Against his conviction and sentence the prisoner appealed to this Court through Mr. Bhagat Ram Puri, but the appeal was argued by Mr. Barkat Ali somewhat perfunctorily. The record of the case is also before us under S. 374, Criminal P. C. Three persons, namely, Yara, son of Dost Mohammad, Jahana, son of Nur Khan and Tegga, son of Hathi, were placed before the Sessions

Judge to take their trial under S. 302, I. P. C., but the learned Judge has convicted Jahana and Tagga of an offence under S. 323 or S. 352, I. P. C., and has sentenced them to three months' rigorous imprisonment each, and we are not concerned with them in this appeal. Yara and Tagga are first cousins and the boy Jahana is their friend. It appears that there had been bad blood between Yara's family and that of the deceased for some time past. In 1922 certain persons related to Sardar Ali, deceased, gave a beating to Hathi, father of Tagga, accused, because Hathi was carrying on an illicit intimacy with the wife of Allahyar, P. W. 2, brother of Sardar Ali. The assailants were fined Rs. 20 each. Hathi however did not give up the intimacy, with the result that in 1926 the deceased Sardar Ali together with his two paternal uncles, namely, Mehr Khan and Ali Khan, murdered Hathi. Sardar Ali and his two companions were tried for the murder of Hathi, but they were acquitted by the Sessions Judge. Allahyar, P. W. 2, has deposed that his brother Sardar Ali had admitted to him that he was one of the merderers of Hathi. In this connexion it must be noted that the accused Yara, who at the time was a boy of 12 years of age, gave evidence for the prosecution. Some 12 or 14 days before the present occurrence there was quarrel between Sardar Ali and the three accused, but some outsiders separated them. It is thus abundantly clear that the relations between Sardar Ali on the one side and the three accused on the other, were highly strained and in fact had reached breaking point shortly before the murder of Sardar Ali.

On 29th March 1932, Allahyar's son, Amir, P. W. 3, aged about ten years, was returning from his school with his uncle Sardar Ali. Behind Amir and Sardar Ali was Mt. Rano, P. W. 4. The three accused appeared all of a sudden and Jahana threw down Sardar Ali, while Yara struck him with an axe and Jahana and Tagga with the sticks which they had in their hands. These facts are deposed to by Mt. Rano and the boy Amir, P. W. 3. In some matters of mental arithmetic and assessment of distances the boy Amir has not shown proficiency, but, so far as the main incidents of the attack upon Sardar Ali are concerned, his evidence is quite clear and bears that realistic touch which is only found in the narrative given by a person who had actually witnessed an occurence like the one with which we are concerned. I have no hesitation in believing him. (After discussing the evidence the judgment proceeded). In my judgment Yara has been rightly convicted under S. 302, I. P. C. The question of sentence presents some difficulty. Tagga is the son of Hathi who was murdered by Sardar Ali deceased, while Yara is the son of Hathi's own sister, so that Hathi was related to him as his maternal uncle. Yara had given evidence in the murder case against Sardar Ali when he was twelve years old. The Judge, who tried Sardar Ali and his associates, must have had good reasons for acquitting them. But in a case of this nature, the village people and the friends and relations of the victim, must have been morally convinced as regards the identity of the person or persons who were responsible for the murder of Hathi, although it was not possible for them to produce cogent and convincing evidence which would satisfy a Court of justice. When an acquittal in a case of this description takes place, the family of the victim naturaly smart under a sense of wrong because the culprit has triumphantly escaped all punishment. In the present case the feelings of Tagga and Yara must have been bitter and the presence of Sardar Ali must have been an eyesore to them. It was under these circumstances that they came upon Sardar Ali, while he was going towards his dhok on the fateful afternoon on which he met his death. There is no evidence of any previous association between the three accused for the purpose of committing the crime, nor is there anything to show that they had made any preparation to attack Sardar Ali. In fact it appears that Yara was empty handed, while his two companions were carrying ordinary sticks.

There is evidence on the record that the axe, with which Sardar was attacked by Yara, belonged really to Sardar Ali and on this point I am inclined to agree with the Sessions Judge who was also of the same opinion. Thus there was no premeditation and the two boys Yara and Jahana along with Tagga under a sudden impulse attacked their own enemy. Yara is only seventeen years old and there is nothing on the record to show that this is not so. It is true that in olden times boys of tender years used to be executed very often for petty crimes, but we are well on into the twentieth century and live under its humanitarian influences. I am not aware of any case of modern times in this country in which a boy of seventeen has been made to pay the extreme penalty of the law. In my judgment a boy of seventeen, who had committed a murder under circumstances similar to those in the present case, should be given a locus paenitentiae and the irrevocable sentence of death should not be passed upon him. While therefore maintaining the conviction of the accused Yara under S. 302, I. P. C., I would commute the sentence of death which has been passed on by the trial Judge to that of transportation for life. To this extent only I would allow his appeal.

Shadi Lal, C. J.—I concur in the conclusion reached by my learned colleague.

K.S. *Sentence commuted.*

A. I. R. 1933 Lahore 231

JAI LAL, J.

Sukhdev Raj—Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 179 of 1932, Decided on 17th October 1932.

Arms Act (1878), S. 19 and S. 20—Accused charged with offence punishable under S. 120-B, I. P. C. read with Ss. 19 and 20, Arms Act—Accused absconding and found in possession of arms at time of arrest—Separate proceedings under S. 19/20 can be taken.

Accused, who was charged for having joined in a conspiracy with others to possess arms in contravention of the Arms Act, was absconding and when arrested he was found in possession of arms. Separate proceedings were taken against him under S. 19/20, Arms Act. On an assurance and admission by the Goverment Advocate that this evidence will not be used against him and that the conviction in this could be irrelevant in the former proceedings:

Held: that the two cases are wholly independent, that the evidence or the conviction in this cannot be considered in the other and that separate proceedings can be taken. [P 232 C 1]

C. H. Garden Noad and *Jawala Parshad*—for the Crown.

Order.—This is an application under Ss. 439 and 561-A, Criminal P. C., by Sukhdev Raj praying that proceedings under S. 19/20, Arms Act, pending against him in the Court of a Magistrate at Lahore, be quashed, or that, in any case, they be stayed till the termination of another previously instituted criminal case, which is pending against him before a Commission appointed under Act 4 of 1930. The applicant is one of the accused in what is known as the new Lahore Conspiracy Case, which is pending before the Commissioners and which was instituted on the sanction of the Local Government granted on 19th November 1930. One of the charges against the accused is that he joined in a conspiracy with others to possess arms in contravention of the provisions of the Arms Act, which act, as alleged, is punishable under S. 120-B, I. P. C., read with Ss. 19/20, Arms Act. It seems that when the proceedings commenced before the Commissioners the applicant was alleged to be an absconder. He is alleged to have been arrested on 3rd May 1931. It is further alleged that at the time of his arrest he was found in possession of a pistol. Consequently Criminal Proceedings under S. 19/20, Arms Act, have been instituted against him in the Court of a Magistrate at Lahore in respect of the possession of the pistol. The contention of the applicant is that he is being tried in two different Courts on the same facts or at least the alleged possession by him of the pistol at the time of his arrest has been deposed to by the prosecution witnesses before the Commissioners as part of the prosecution case against him and the same fact is going to be brought up as a separate charge before the Magistrate, which is not legally permissible; and in any case, he is likely to be seriously prejudiced by the same evidence being considered by the Magistrate in the second case and, if convicted, he is likely to be prejudicially affected in the proceedings before the Commissioners.

The learned Government Advocate, who has appeared before me on behalf of the Crown, has stated that the Crown does not rely upon the possession of the pistol by the applicant in support of their case against the applicant under S. 120-B read with Ss. 19/20, Arms Act. He says that the fact of the recovery of the pistol from the applicant has been mentioned by the witnesses before the Commissioners incidentally when proving the fact of his arrest. Indeed the Government advocate contends that the possession of the pistol by the applicant on 3rd May 1931 cannot legally be used as evidence against the applicant before the Commissioners and his conviction, if he is convicted, will for that reason be irrelevant in the case pending against the applicant before the Commission. In view of this assurance and admission of the learned Government advocate I am unable to see that any prejudice is likely to happen to the applicant if his trial under the Arms Act before the Magistrate, is allowed to proceed. The two cases are wholly independent of each other and the evidence led in one cannot be treated as evidence in the other. Nor can the conviction in one be considered against the accused in the other. I am therefore unable either to quash the proceedings before the Magistrate or to stay them. I consequently reject this application.

K.S. *Application rejected.*

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* A. I. R. 1933 Lahore 232

AGHA HAIDAR, J.

Banta Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1250 of 1932, Decided on 13th January 1933, from order of Sess. Judge, Lyallpur, D/- 25th August 1932.

*** (a) Criminal Trial—Court must accept or reject confession as whole—Criminal P. C. (1898), S. 164.**

Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible: *A. I. R.* 1931 *All.* 1 (*F. B.*), *Foll.* [P 233 C 1]

(b) Criminal Trial—Evidence disbelieved by trial Judge should not be relied on in appeal.

In a criminal appeal it is not desirable in most cases to rely upon the evidence which has been definitely disbelieved by the trial Judge for good reasons and to try to support the conviction of an accused person on such evidence; but there may, of course, be rare cases when the trial Court has without any reasonable grounds disbelieved certain evidence produced on behalf of the prosecution. [P 233 C 1]

M. L. Puri—for Appellant.

Mohammad Amin for *Govt. Advocate*—for the Crown.

Judgment. — Banta Singh, Puran Singh and Dalip Singh, all brothers, were placed before the Sessions Judge, Lyallpur, to take their trial on a charge under S. 302, I. P. C., for having caused the death of one Mahen Singh. Puran Singh and Dalip Singh have been acquitted, while Banta Singh has been convicted of an offence under S. 304-2, I. P. C., and sentenced to a term of two years' rigorous imprisonment. Banta Singh has preferred an appeal to this Court through his counsel, Mr. Mukand Lal Puri. The facts leading to the incident, which resulted in the loss of Mahen Singh's life are given in the judgment of the Sessions Judge in detail and need not be recapitulated here. According to the prosecution, on 3rd June 1932, there was a quarrel between Banta Singh on the one side and Mahen Singh deceased on the other, each accusing the other of theft. The parties came to blows and Mahen Singh was assaulted by Banta Singh, Puran Singh and Dalip Singh and received a severe injury in consequence of which he died on 12th June 1932. The case for the prosecution depended on the evidence of the three eye-witnesses, namely, Lachhman Singh, P. W. 3, Saudagar, P. W. 4, Sohni, P. W. 5, and also upon the three dying declarations made by Mahen Singh, two on the very day on which he received injuries, namely, 3rd June, 1932, and the third on 5th June 1932. Now, the learned Sessions Judge has definitely disbelieved the eye-witnesses and has also refused to place implicit reliance upon the dying declarations, because in his opinion, Mahen Singh while making these declarations "not only had an eye to the case that might be started against him but as usual in such cases implicated two innocent persons." He has however convicted the appellant because in his opinion, there was a sudden fight between the accused and Mehan Singh and therefore it was immaterial to determine in such a case as to which party was the aggressor. He has further held that the injuries on the person of Mahen Singh and Banta Singh show that they had fought on equal footing and that no undue advantage had been taken by Banta Singh who struck one blow only.

Mr. Mukund Lal Puri contended that after the evidence of the alleged eye-witnesses and the dying declarations had been eliminated, there was nothing left on the record on which to base the conviction of the accused. He has further contended that in the statements made by the accused before the Courts below, while admitting that he had given a beating to Mahen Singh deceased, the accused had, at the same time, pleaded that he had done so in self defence, that under the law this statement must be taken as a whole and that therefore the accused was entitled to an acquittal because he had acted in the exercise of the right of private defence. I questioned the learned counsel appearing on behalf of the Crown to state on what evidence the conviction of the accused was based. He frankly admitted that it was based upon the statement of the accused before the committing Magistrate as well as before the Sessions Judge wherein he had admitted that he had attacked Mahen Singh. It may be mentioned here that, according to the medical evidence, Banta Singh received three incised and one contused wounds and one of these incised wounds measuring $2\frac{1}{4}$ inches by $\frac{1}{4}$ inches, was a terrible gash which cut the left nostril from its middle down to the upper lip, thus causing a permanent disfigurement. It was argued further for the Crown that the plea of self defence finds place in the chapter on General Exceptions in the Indian Penal Code and it was therefore the duty of the accused to prove and make out a case of self-defence before he could rely upon it. This argument would be sound in many cases, but we have to look into the facts and circumstances of each case as it comes before the Court. In the present case the evidence of the eye-witnesses and of the dying declarations, as already pointed out, has been wiped out, so to say, by the learned Sessions Judge. Therefore nothing remains on the record to support the conviction of the accused except the statement which he made before the Court. There is a Full Bench decision of the Allahabad High Court in *Emperor* v. *Balmukund* (1), where the learned Judges have laid down that:

> "where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible."

This authority, in my humble judgment, contains an excellent exposition of the law on the subject and clearly supports the contention of the learned counsel for the appellant. In a criminal appeal it is not desirable in most cases to rely upon the evidence which has been definitely disbelieved by the trial Judge for good reasons and to try to support the conviction of an accused person on such evidence. There may, of course, be rare cases when the trial Court has without any reasonable grounds disbelieved certain evidence produced on behalf of the prosecution, but the present case is not such as to lead me to hold that the trial Judge had no grounds whatsoever for disbelieving the evidence tendered on behalf of the prosecution and to affirm the conviction on the basis of such evidence. The result therefore is that the statement of the accused must be taken as a whole, and in view of the serious nature of his own injuries, it seems to be quite probable that he received them at the hands of the deceased and that in self-defence he inflicted the injury which ultimately proved fatal. I therefore accept the appeal of Banta Singh, and, setting aside his conviction and sentence under S. 304-2, I. P. C., order that he be released forthwith.

K.S. *Appeal accepted.*

* A. I. R. 1933 Lahore 233

JAI LAL, J.

(*Lala*) *Vishnu Datta*—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 588 of 1932, Decided on 15th July 1932, for revising order of First Class Magistrate, Karnal, D/- 1st March 1932.

*** Ordinance (5 of 1932), S. 4—Mere fact that accused is Dictator of District Congress Committee is not sufficient for conviction.**

The mere fact that the accused is the Dictator of the District Congress Committee or that ordinarily picketing takes place under the directions of the dictator is not sufficient to prove his guilt unless it is proved that he was present when the picketing took place or that it took place under his instructions. [P 233 C 2]

Dev Raj Sawhney—for Petitioner.

M. L. Batra—for the Crown.

Judgment.—There is no legal evidence against the petitioner on which he could be convicted of having abetted the offence of picketting. All that is proved and admitted is that he was the Dictator of the District Congress Committee. He was not present when the picketting took place and there is no evidence that it took place under his instructions. The Sub-Insepctor stated that when he arrested the pickettors they stated that they had acted under the orders of the Dictator, the petitioner. This has rightly been held to be inadmissible against the petitioner. The remaining evidence is that ordinarily picketting takes place under hte directions of the Dictator. This alone, in my opinion, is not legally sufficient to prove the guilt of the petitioner. I accept the petition, set aside the conviction of the petitioner, and direct that he be released from jail forthwith. The fine if paid shall be refunded to the petitioner.

K.S. *Petition accepted.*

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1. A I R 1931 All 1=1931 Cr C 1=129 I C 258=32 Cr L J 362=52 All 1011 (F B).

* A. I. R. 1933 Lahore 234

JAI LAL, J.

Hari Ram and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1166 of 1932, Decided on 4th January 1933, for revising order of Dist. Magistrate, Simla, D/- 15th April 1932.

*** Public Gambling Act (1867), Ss. 5 and 6 --Presumption under S. 6 arises only on strict compliance with provisions of S. 5.**

In the absence of strict compliance with the provisions of S. 5 the presumption under S. 6 cannot be raised. [P 235 C 1]

Where a Magistrate who did not authorize any police officer to take action under S. 5, but himself professed to take action, did not enter the room himself to conduct the search but sent the Police Inspector to do it:

Held: the provisions of S. 5 were not complied with and the presumption under S. 6 cannot be raised from the instrument of gaming seized by the Inspector. [P 235 C 1]

Jagan Malhotra—for Petitioners.

Judgment. — The petitioners—Hari Ram, Kanhaya Lal and Mukand Lal—have been convicted under the Public Gambling Act; the first named person under S. 3 for owning or keeping a common gaming house and the other two under S. 4 being found in a common gaming house. It appears that a Sub-Inspector of Police reported to Diwan Kahan Chand, a Magistrate of the First Class at Simla, that a raid was proposed to be made in a house where it was suspected that gambling was going on. The Magistrate therefore accompanied by some police officers and others went to the house in question and divided his party into three groups so as to enter the house by the three possible means of access to or exit from the same. The house was entered into and the petitioners were arrested from inside. A room of the house was then searched by the Sub-Inspector of Police who, it may be assumed, was deputed for the purpose by the Magistrate, who himself remained outside at the time of the search. During the search conducted by the Sub-Inspector of Police instruments of gaming were found in the room, which were produced before the Magistrate, and those arrested were then sent up for trial.

It is admitted by the Magistrate in his evidence at the trial that he did not see any of the accused actually gambling at the time of the raid. The conviction of the petitioners, therefore rests on the presumption which has been raised against them under S. 6, Public Gambling Act. That section provides that when instruments of gaming are found in any house or room, etc., entered or searched under the provisions of S. 5 of the Act, it shall be evidence, until the contrary is made to appear, that such house or room, etc., is used as a common gaming house and the persons found therein were there present for the purpose of gaming, although no playing was actually seen by the Magistrate or police officer, or any of his assistants. This presumption, it would be observed, arises only if the house or the room is entered or searched under the provisions of S. 5. Now, S. 5 provides that if inter alia an officer invested with the full powers of a Magistrate upon credible information, and after such inquiry as he may think necessary, has reason to believe that any house or room, etc., is used as a common gaming house, he may either himself enter, or by his warrant authorize the specified police officers to enter such house or room, etc., and may either himself take into custody or authorize such other officer to take into custody, all persons whom he or such officer finds therein, and also may seize or authorize such officer to seize all instruments of gaming, etc., reasonably suspected to have been used or intended to be used for the purpose of gaming, which are found therein, and further, may search or authorize such officer to search all parts of the house, room, etc., and may seize or authorize such officer to seize and take possession of all instruments of gaming found upon such search.

There is no contention that Diwan Kahan Chand, was invested with the full powers of a Magistrate so as to entitle him either himself to enter the house or the room, or by his warrant to authorize the police officer concerned to do so and generally to do all the acts mentioned in S. 5 of the Act. It is obvious that he did not by his warrant authorize any police officer to take action under S. 5. He therefore professed himself to enter the house, to take into custody the persons whom he found therein, and to seize the instruments of gaming found on search of the room. According to law however it was his duty personally to conduct the search of the room in which the instruments of gaming are subsequently alleged to have been found, but he did not conduct the search personally; on the other hand, he admits that he did not even enter the room but sent the Sub-Inspector of Police to conduct the search thereof. This, in my opinion, was not a compliance with the provisions of S. 5 of the Act, so as to en-entitle the Court to raise a presumption under S. 6. In cases like the present, where on the happening of certain events a legal presumption is to be raised against the accused, it is the duty of the prosecution to prove that such events happened strictly as required by law. In the present case, in the absence of strict compliance with the provisions of S. 5, the presumption under S. 6 cound not be raised against the petitioners, and as the conviction is based only on the legal presumption that the house or the room in question is a common gaming house and that the persons found therein were assembled purpose of gambling, the conviction of the petitioner cannot be sustained. I accordingly accept this petition and, setting aside the convictions of the petitioners, acquit them and direct that the fines, if paid by them, be refunded.

K.S. *Petition accepted.*

A. I. R. 1933 Lahore 235 (1)

ADDISON, J.

Sardar Khan—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. 1383 of 1932, Decided on 13th January 1933.

Penal Code (1860), S. 405—Evidence.

Petitioner who had entered into a supurdnama was convicted under S. 405. It was found that he brought the cattle in question to the tahsil and was willing to produce them:

Held : in such circumstances he could not be held to have dishonestly used the cattle in violation of the terms of the supurdnama. [P 235 C 1]

M. A. Ghani—for Petitioner.

Abdul Rashid—for the Crown.

Judgment.—The only question in this case is whether the petitioner dishonestly used the cattle in violation of the terms of the Supurdnama entered into by him.

The petitioner once brought them to the Tahsil and is still willing to produce them. On the facts it is difficult to hold that he has dishonestly used them in violation of the terms of the Supurdnama and this was the the only clause of S. 405, I. P. C., within which the learned Assistant Legal Remembrancer sought to bring the case. In my judgment therefore he should be acquitted. A similar view was taken in *Harnam Singh* v. *Emperor* (1). I would therefore accept this petition and acquit the petitioner. The fine, if paid, will be refunded.

K.S. *Petition accepted.*

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1. (1918) 19 Cr L J 975=47 I C 875.

A. I. R. 1933 Lahore 235 (2)

SHADI LAL, C. J.

Afzal Beg and *others*—Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 614 of 1932, Decided on 14th October 1932, from judgment of First Addl. Sess. Judge, Lahore.

Penal Code (1860), S. 147—Formation of unlawful assembly is necessary as preliminary to commission of offence of rioting.

A preliminary to the commission of the offence of rioting is the formation of an unlawful assembly. Hence in the absence of proof of formation of an unlawful assembly, an isolated or independent assault by some of the candidates and their supporters for an election, cannot be deemed to be actuated by any common object and all the people cannot be convicted for rioting. [P 236 C 1]

M. Barkat Ali—for Petitioners.

Report.—The three persons, viz: Afzal Beg, Walayat Beg, Sultan Ahmad Beg, along with two others named Ahsan Beg and Risaldar Fateh Muhammad Beg were sent up for trial under Ss. 147 and 307, Penal Code, for rioting and attempting to murder one Mansab Ali Shah on the night of 11/12th August 1931. Two other persons Sajjad Hussain and Nazar Hussain alleged to have been concerned in the affair were said to be absconding at the time. These two persons were however subsequently arrested and tried and each has been convicted under S. 147 for rioting and under S. 325 read with S. 149, Penal Code, for causing grievous hurt to Mansab Ali Shah and sentenced to two years' rigorous imprisonment and a fine of Rs. 100 or in default to six months further like imprisonment. They appealed to this Court and for reasons given in my judgment disposing of that appeal and which would also be apparent further on I set aside their convictions under S. 147, acquitting them of the offence of rioting and altered their conviction under S. 325 read with S. 149, Penal Code, to one under S. 325 read with S. 34, Penal Code. The sentences were affirmed. From 10th to 12th August 1931, the Municipal elections were being held in the town of Patti and the various candidates were actively convassing for voters. In one of the wards Mubashar Hussain was opposing Walayat Beg, accused-petitioner, and in another ward Muhammad Ali Beg was opposing Zia Ullah Beg. Walayat Beg and Zia Ullah Beg were said to be the nominees of the accused petitioners. On the night in question or perhaps it would be more correct to say on the early morning of the 12th August Mubashar Hussain and Muhammad Ali Beg the two candidates opposing Walayat Ali Beg and Zia Ullah Beg accompanied by Mansab Ali Shah and others were proceeding to the houses of some voters when they are alleged to have been attacked by the accused petitioners and Sajjad Hussain and Nazar Hussain near the house of Risaldar Fateh Muhammad Beg. Mansab Ali Shah was very badly beaten and sustained no less than 14 injuries, including a compound fracture of the left orbital cavity and a fracture of the nasal bone. Three other persons who were with Mansab Ali Shah, namely, Mehdi Shah, Dara Shah and Mahanda Shah, also sustained certain injuries, all simple in nature. A careful examination and consideration of the evidence leaves no room for doubt that the two rival parties came into collusion while canvassing for votes. A dispute appears to have ensued and in the course of this Mansab Ali Shah and his three companions were beaten and injured by Nazar Hussain and Sajjad Hussain. The Sub-divisional Magistrate in a long and well considered judgment held that the three petitioners Walayat Beg, Sultan Ahmad and Afzal Beg did not take any part in assailing and injuring Mansab Ali Shah and the others, but they committed the offence of rioting by instigating Nazar Hussain and Sajjad Hussain.

Now, a preliminary to the commission of the offence of rioting is the formation of an unlawful assembly and I do not think that candidates for Municipal honours and their supporters while canvassing for votes can possibly be regarded as constituting an unlawful assembly. It has been found by two Courts that Sajjad Hussain and Nazar Hussain were the actual assailants of Mansab Ali Shah and with this conclusion I have seen no reason to disagree. The assault on Mansab Ali Shah and the other three persons does not in my judgment appear to have been actuated by any common object but on the contrary was an isolated and independent act on the part of Sajjad Hussain and Nazar Hussain. In the above circumstances, I do not think that the conviction of Walayat Beg, Sultan Ahmad Beg and Afzal Beg was justified. I would therefore recommend to the Hon'ble High Court that their convictions and sentences be set aside, the fines imposed on them being remitted and the order as to security being cancelled.

Order.—For the reasons recorded by the Additional Sessions Judge, I set aside the convictions of Walayat Beg, Sultan Ahmad Beg and Afzal Beg and the sentences imposed upon them. The fines, if realized, shall be refunded to them. The order requiring them to furnish security is hereby cancelled.

K.S. *Conviction set aside.*

A. I. R. 1933 Lahore 236

BHIDE, J.

Ramphul Singh and *others*—Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1221 of 1932, Decided on 19th December 1932, against order of Dist. Magistrate, Rohtak, D/- 15th July 1932.

(a) Criminal Trial—Finding of fact—Revision—Criminal P. C. (1898), S. 435.

For the purpose of revision findings of facts arrived at by the Courts below are not usually interfered with. [P 238 C 1]

(b) Criminal P. C. (1898), S. 108—Order passed by lower Court cannot be interfered with in revision ordinarily.

Unless it can be shown that there was no evidence at all against any of the petitioners or at least no evidence which could reasonably be accepted by any Court of law as sufficient to justify an order under S. 108 interference in revision will not be justified. [P 238 C 1]

(c) Criminal P. C. (1898), S. 108—Accused taking part in activities of seditious character disseminating seditious matter and organizing branch for such object—Mere closing of such branch is no ground for invalidating an order under S. 108.

Accused who were engaged in a continuous seditious propaganda and taking part in activities of a seditious character by disseminating seditious matter were the organizers of a branch association for such object. The branch was closed owing to police searches and the accused were ordered to furnish security for good behaviour. It was contended by the accused that as the branch had been closed, there was no reasonable apprehension that they would continue their activities:

Held: that the mere closing of the branch would not show that the accused, if left to themselves, would not continue their seditious activities as they had continuously been doing and that the order was justified: *A. I. R.* 1928 *All.* 344, *Dist.* [P 237 C 2]

(d) Criminal P. C. (1898), S. 108—Two seditious speeches made by accused at time of inauguration of branch association with seditious activities — No other direct connexion of accused with activities of such association—Security of Rs. 5,000 is excessive.

The evidence against an accused was that he made two seditious speeches at the time of the inauguration of a branch association with seditious activities. There was no other evidence of any direct connexion of the accused with the activities of the association:

Held: in the above circumstances a security of Rs. 5,000 was excessive. [P 238 C 2]

Jiwan Lal Kapur—for Petitioners.

R. C. Soni for *Govt. Advocate*—for the Crown.

Judgment.—This is a petition for revision arising out of proceedings under S. 108, Criminal P. C. It appears that about November 1931, a branch of an All India Association known as the Hindustan Sewa Dal, was opened at Rohtak in the Punjab. It was the first of its kind in this Province. Volunteers were enrolled for the purpose. The volunteers were regularly drilled and lectured and instructions were given to them. Parades were held and the volunteers marched occasionally in military formation to different places. The avowed object of the association was to train and organize the people of India for national service and disciplined self sacrifice with a view to attainment of Swaraj by peaceful and legitimate means, but it is alleged by the prosecution that its activities were of a seditious character and the present petitioners are alleged to have taken part in those activities in various ways and disseminated seditious matter for the purpose. The petitioners Permashwaram and Desai, who belong to the Madras and Bombay Presidencies are said to have been instructors, who taught drill and gave lectures to the volunteers. Petitioner Sri Ram, who was secretary of the Rohtak District Congress Committee is said to have helped in securing a site and financial assistance for the organization, to have made seditious speeches in furtherance of its objects and taken part in its activities. Petitioner Ramphul Singh, who is a pleader and was President of the Rohtak City Congress Committee is also alleged to have made seditious speeches in furtherance of its objects. The remaining three petitioners, Salwant Singh, Bharat Singh and Hari Ram were volunteers. They are alleged to have taken part in the activities of the association and at times disseminated seditious matter. The learned Magistrate has held it to be proved that Parmeshwaram and Desai disseminated seditious matter and that the other petitioners abetted the dissemination in various ways. Parmeshwaram, Desai, Ramphul Singh and Sri Ram were ordered to execute a bond for good behaviour in Rs. 5,000, with one surety for one year, while Salwant Singh, Bharat Singh and Hari Ram were ordered to execute a similar bond in Rs. 3,000, for the same period. This order was passed on 6th June 1932. The petitioners appealed to the District Magistrate but the appeal was dismissed. The petitioners Ramphul Singh, Salwant Singh and Hari Ram were able to furnish the required security. The others are in jail.

The learned counsel for the petitioners has urged that this petition for revision should be treated as an appeal as the proceedings must have been initiated with the approval of the District Magistrate who heard the appeal. There is nothing on the record to show that this was so and if it was, the proper course for the petitioners would have been to apply for transfer of the appeal from the Court of the District Magistrate. This was not done. The next contention put forward was that even on the finding of the learned Magistrate, there is nothing to show that the petitioners were likely to continue dissemination of seditious matter and in the absence of such evidence, an order under S. 108, Criminal P. C., which section is of a preventive character was not justified. It was urged that the branch of the Hindustan Dal at Rohtak was closed in December 1931, after the police had searched its premises and taken possession of various articles and there was no reasonable apprehension in the circumstances, that the petitioners would continue their seditious activities. *Emperor* v. *Chiranji Lal* (1), is cited in support of this contention. As regards this point, it must be borne in mind that the petitioners are alleged to have engaged in a continuous seditious propaganda. The mere fact that the branch of the Hindustan Sewa Dal was closed—apparently owing to police searches—would not necessarily show that the petitioners would not have, if left to themselves, resumed their activities. On the other hand, if the allegations of the prosecution about the petitioners having repeatedly or continuously taken part in an organized seditious propaganda are correct, there would, I think, be a very reasonable ground for believing that the petitioners would continue their activities, if left unchecked. The Allahabad High Court ruling on which the learned counsel has sought to rely is easily distinguishable. In that case the accused was alleged to have put up certain notices alleged to contain matter falling within the purview of S. 153-A, Penal Code, on one occasion only. It was held that there was nothing on the record to suggest that the accused would repeat the offence and the proper course

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1. A I R 1928 All 344=114 I C 48=50 All 854.

would have been to prosecute him under S. 153-A, Penal Code.

Coming to the merits of the case, it is urged that the learned District Magistrate has not discussed certain arguments or evidence relied on by the petitioners. It does not however appear whether the points now raised were pressed before the learned District Magistrate. The learned District Magistrate has dealt with the case at some length and the presumption is that he has dealt with such arguments as were put forward before him. For the purpose of revision, findings of facts arrived at by the Courts below are not usually interfered with [cf. *Swami Dayal* v. *Emperor* (2), *A. I. R.* 1925 *Lah.* 42; *Phakir Mandal* v. *Madar Mandal* (3)] and unless it can be shown that there was no evidence at all against any of the petitioners or at least no evidence which could reasonably be accepted by any Court of law as sufficient to justify an order under S. 108, Criminal P. C., I do not think such interference would be justified in this case. Judging from this point of view, it seems to me there was sufficient evidence on the record to justify the order against petitioners Parmeshwaram and Sri Ram. Parmeshwaram was imported from Madras and was apparently the Chief Instructor of the volunteers. He is alleged to have given seditious lectures on subjects like the atrocities committed at Jallianwala Bagh, Martial Law, Bhagat Singh, etc. Some of the volunteers who listened to these lectures have supported the prosecution case in this respect and the notes taken by them have also been produced. Sri Ram admittedly took a prominent part in establishing the branch of the Sewa Dal at Rohtak and there is evidence of several speeches mude by him, which appear to fall within the scope of S. 124-A and justify the order under S. 108, Crimianl P. C. Desai was, like Parmeshwaram, imported, as an Instructor outside and has been alleged to have been giving seditious lectures like Parmeshwaram. The evidence against him is practically the same as that against Parmeshwaram. But the record shows that he is only a youth aged about 15. It was stated on behalf of the Crown in the course of the arguments that he is about 20 by appearance; this may possibly be so, but so far as the record goes, the learned Magistrate appears to have accepted the statement of Desai as regards his age without any comment. The evidence shows that Parmeshwaram complained of the inefficiency of this youth, and in view of his age, he could hardly have played any important part. He was ordered to furnish security of Rs. 5,000 for a period of one year. He was unable to furnish the security and has been in jail. The amount of security demanded from this petitioner (Rs. 5,000) seems to be clearly excessive. In view of all the circumstances, I reduce the period of security to the time already spent by this petitioner in jail.

The evidence against Ramphul Singh was that he made two seditious speeches one at Bohar and another at Rohtak at the time of the inauguration of the Seva Dal branch when he is said to have hoisted the national flag. As regards the first speech, there is only the evidence of Raghbir Singh, (P. W. 2). He did not take down any notes or send any report in writing. A patwary is said to have taken down notes and sent a report but that report has not been produced. As regards the second speech, a brief report has been produced. Ramphul Singh has denied having made the speech, but the Courts below have accepted the prosecution evidence in support of it, as well as the evidence in support of the first speech. Even assuming that these speeches considered in relation to the occasion and attendant circumstances fell within the purview of S. 124-A, Penal Code, the evidence cannot be said to be very strong. There is no other evidence of any direct connexion of this petitioner with the activities of the Seva Dal and in the circumstances, the security demanded seems to be in any case excessive. In view of all the facts, I reduce the period of security in the case of this petitioner also to the period which has already elapsed. As regards the remaining petitioners, viz., Hari Ram, Salwant Singh, Bharat Singh, the facts relied upon by the learned Magistrate do not appear to be sufficient to justify an order under S. 108, Criminal P. C. These men were merely volunteers and are said to have taken part in parades, drills, route-marches, etc. Bharat Singh and Salwant Singh are said to have helped Parmeshwaram by interpreting his words, when he gave lectures or instructions. But the evidence shows that Parmeshwaram did not know Urdu (though not perhaps very well), and it does not appear what words were interpreted by these persons and on what occasions. There is no evidence worth the name about

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2. (1908) 8 P R 1908 Cr=15 P W R 1908=149 P L R 1908=7 Cr L J 353.
3. A I R 1931 Cal 619=1931 Cr C 803=134 I C 915=32 Cr L J 1237=58 Cal 1031.

S. N. DAR, B. A., LL. B., Vakil High Court, SRINAGAR (Kashmir)

any seditious speeches made by them. It may be that the activities of the Seva Dal were of a seditious character and these men may be guilty of criminal conspiracy or some other offence. But the question for consideration for the purpose of this petition is whether there is any evidence of dissemination or attempt to disseminate seditious matter by these men which could be reasonably accepted as sufficient to justify an order under S. 108, Criminal P. C. There seems to be no such evidence on this record. As a result I dismiss the petition of Parmeshwaram and Sri Ram. I reduce the period of security in the case of Dasai and Ramphul Singh to the period which has already elapsed and I set aside the order demanding security from Salwant Singh, Bharat Singh and Hari Ram.

K.S. *Order accordingly.*

* A. I. R. 1933 Lahore 239

TAPP, J.

Hira Lal—Defendant—Appellant.

v.

Sojan Chand and *others*—Plaintiffs—Respondents.

Second Appeal No. 1006 of 1932, Decided on 21st December 1932, from decree of Senior Sub-Judge, Gujrat, D/- 30th March 1932.

*** Limitation Act (1908), S. 4—Mere absence of presiding officer on leave is not tantamount to Court being closed.**

The absence of a presiding officer of a Court is not tantamount to the Court being closed during the period of his leave within the meaning of S. 4 where the office of the Court is open and the establishment of the Court is present. [P 239 C 2]

Gobind Ram Khanna—for Appellant.
Din Dayal Kapur—for Respondents.

Judgment. — The plaintiffs-respondents filed a suit in the Court of the Subordinate Judge, Dinga, in the Gujrat District for recovery of Rs. 780 being principal and interest due on a balance of account, dated 11th June 1928. The period of limitation admittedly expired on 11th June 1931. The presiding officer of the Dinga Court was away on leave from 9th to 12th June and the plaint was presented to the reader on the 12th and to the Subordinate Judge on 13th when he returned from leave and the Court opened. The question whether the suit had been brought within time was decided by the Subordinate Judge in favour of the plaintiffs who were granted a decree for the amount claimed. On appeal the learned Senior Subordinate Judge upheld the view taken by the trial Court and dismissed the appeal in limine holding that as the Court was closed when the period of limitation for presenting the suit had expired within the meaning of S. 4, the suit had been instituted within time on the day the Court reopened that is 13th June 1931.

Now it seems to me that the question whether the Court was closed from 9th to 12th June owing to the absence of the presiding officer on leave is purely a question of fact. In my opinion the mere absence of the presiding officer on leave from 9th to 12th June is not tantamount to the Court being closed seeing that the office of the Court was open and the establishment of the Court was present. This is clear from the fact that the plaint was handed to the reader of the Court on 12th June. A further fact is disclosed by the plaint itself namely that it was only written and stamped on 12th June and obviously the plaintiffs had no plaint ready for presentation on 11th June, the last day of limitation. It has been urged that presentation to the reader was not a proper presentation. But it seems to me that consideration and determination of this question would only arise if the plaint had been presented to the reader of the Court on 11th June, the last day of limitation. If the plaint had been ready on 11th and presented to the reader on that date the plaintiffs could have urged that even if it was not a proper presentation they were not to blame for the absence of the presiding officer and in the circumstances the Court should be regarded as having been closed on that date and not reopening till the 13th when the presiding officer returned from leave. If on the other hand the plaint had been presented to the reader on the 11th and was a proper presentation then no question of limitation would have arisen. It seems to me that the plaintiffs did not realize till 12th June that the period of limitation for their suit had expired and seized upon the absence of the presiding officer to try and gain the benefit of S. 4, Lim. Act. I would therefore hold that owing to the absence of the presiding officer on leave the Court was not closed from the 9th to the 12th within the meaning of S. 4 as while there were no judicial sittings during this period the office of the Court was open and the plaint could have been presented to the office on or before the 11th June. I accordingly accept the appeal and dismiss the suit of the plaintiffs but in the circumstances leave the parties to bear their own costs throughout.

K.S. *Appeal accepted.*

✻ A. I. R. 1933 Lahore 240 (1)

TAPP, J.

Rup Chand and *another*—Plaintiffs—Appellants.

v.

Beli Ram and *another*—Defendants—Respondents.

Second Appeal No. 1677 of 1931, Decided on 5th December 1932, from decree of Dist. Judge, Amritsar D/- 25th May 1931.

✻ Stamp Act (1899), Ss. 35 and 36—Admission by lower Court of document not duly stamped cannot be questioned by appellate Court

Under S. 35, Stamp Act, an instrument not duly stamped cannot be admitted in any evidence for any purpose whatever, but when once it is admitted by a Court, though wrongly, the appellate Court is debarred under S. 36 of the Act from interfering in the matter. [P 240 C 1]

Nawal Kishore and *Mehr Chand Sud*—for Appellants.

J. G. Sethi and *H. J. Rustomji*—for Respondents.

Judgment.—Plaintiffs' suit for recovery of Rs. 2,000 was decreed by the trial Court but on appeal the learned District Judge dismissed the suit on the ground that it was barred by time as the promissory note which was relied on as an acknowledgment under S. 19, Limitation Act, not being duly stamped was inadmissible in evidence for that purpose. The document in question is a demand promissory note for Rs. 2,100 admittedly executed by the defendants on 30th March 1925. It bears an "India Postage and Revenue" stamp of one anna and an "India Postage" stamp of three annas. The trial Court while holding that it was inadmissible in evidence as a promissory note not being duly stamped as such nevertheless admitted it in evidence as a validly stamped acknowledgment under S. 19, Limitation Act, and thereby extending limitation. The learned District Judge rightly held in accordance with the provisions of S. 35, Stamp Act, that an instrument not duly stamped cannot be admitted in evidence for any purpose whatever. The correctness of this view is admitted by the learned counsel for the appellants, but he contends that the document having been once admitted, though wrongly, the appellate Court was debarred under S. 36 of the said Act from interfering in the matter. The learned counsel for the defendants-respondents concedes that S. 36, precluded the lower appellate Court from questioning the admission of the document but urges that the document is a simple and not a compound one and therefore could not be classed and used as an acknowledgment. Counsel further submits that it is open to him to raise this contention and for an appellate Court to consider and determine this question. I am unable to appreciate the argument for it seems to me that a document can only be used when it is admitted and having been admitted, though wrongly, it is the admission which cannot be called in question under S. 36. S. 35, Stamp Act, is not concerned with the use to which a document not duly stamped is put once it is admitted: it only regulates the admission of such a document and declares in no uncertain terms that it cannot be admitted in evidence for any purpose. In the words of Lord Collins quoted just before the preface to the 8th Edn., Donogh's Stamp Act, what the Act

"deals with is not the bargain which arises out of the consent of the parties but the instrument which records that bargain."

I do not think it necessary in the circumstances to discuss the various authorites cited by Mr. Sethi as to the distinction between simple and compound instruments and a collateral purpose and a collateral matter. Suffice it to say that the document while wrongly admitted by the trial Court this admission could not be questioned by the appellate Court. The document operating as an acknowledgment under S. 19, Limitation Act, admittedly extended time and the suit was thereafter not barred. For the aforesaid reasons I accept the appeal and setting aside the decree of the lower appellate Court restore that of the trial Court with costs throughout.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 240 (2)

ADDISON, J.

Imam Din and *others* — Judgment-debtors and Defendants—Appellants.

v.

Barkat Ram—Plaintiff—Decree-holder—Respondent.

Misc. Second Appeal No. 1966 of 1931, Decided on 4th January 1933, from order of Dist. Judge, Lahore, D/- 1st July 1931.

(a) Custom—Burden of proving custom lies on person claiming to be governed by custom.

Where a person claims to be governed by custom, the burden lies on him to show that (1) he is governed by the custom; and (2) what that custom is. [P 241 C 1]

(b) Custom (Punjab)—Telis of village Bhonike Autar, Chunian Tahsil, Lahore District, do not follow custom.

Telis of village Bhonike Autar, Chunian Tahsil, Lahore District, do not follow custom even though in some villages Telis follow custom. [P 241 C 1]

Duni Chand Kapur—for Appellants.

Amar Nath Monga—for Respondent.

Judgment.—The only question involved in this second appeal, for the institution of which the usual certificate has been obtained, is whether the Telis of village Bhonike Autar, Chunian Tahsil, Lahore District, have established that they follow agricultural custom. Both the Courts below have held that they have not done so.

The burden was upon the appellants to establish (1) that they followed custom, and (2) if so, what that custom was. They have not produced the Riwajiam or Customary law of the district to show that, according to it they followed custom. All they did was to examine certain witnesses who baldly stated that they followed agricultural custom, no instances being given. On the other hand, it has been established that these Telis own a very small area in the village, that they do not form a compact agricultural community, that they are not confined to agricultural pursuits, and that they did not come to the village with the founders thereof. Lastly, it has also been proved that a large number of alienations have been made by these Telis without objection by collaterals. In these circumstances there can be doubt that the appellants have failed to prove that they follow custom. The fact that in some villages it has been held that Telis follow custom is of little or no value. The decision of the Courts below being correct, I dismiss this appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 241

ADDISON AND HILTON, JJ.

Sapuran Singh—Defendant — Appellant.

v.

Khawaja Khan and *others*—Plaintiffs —Respondents.

Second Appeal No. 88 of 1931, Decided on 16th November 1931, from decree of Dist. Judge, Hoshiarpur, D/- 18th October 1932.

Custom (Punjab)—Common land—Suit to eject trespasser and for possession by patti khas proprietors alone—Title of other members of proprietary body denied—Suit must be dismissed.

Plaintiffs filed a suit on behalf of the patti khas proprietors alone for ejecting defendants who were trespassers and for possession of certain sites in the village. The suit was dismissed as they failed to issue notice to all members of the village proprietary body. In a subsequent suit for the same relief they adopted the same course of impleading only the patti khas proprietors as parties:

Held: that as the plaintiffs had denied the title of the proprietary body of the village, a decree for possession which would be to the exclusion of the village proprietary body could not be given: 112 *I. C.* 402, *Foll.*; *A. I. R.* 1926 *Lah.* 545, *Dist.* [P 242 C 1]

Shamair Chand—for Appellant.

Gulam Mohyuddin—for Respondents.

Hilton, J.—The plaintiffs sued to eject defendants 5 and 6, from the site of certain houses, in the village of Simli. The trial Judge held the said defendants to be proprietors in the village and the plaintiffs to be proprietors of patti khas in which part of the village the site in suit is situated. He gave the plaintiffs a decree for joint possession of the site along with defendants 5 and 6, with a rider that the latter cannot be ejected except on partition. On appeal by the plaintiffs the District Judge gave them a decree for ejectment of the defendants, holding the latter to be trespassers and not cosharers in the site. This is a second appeal by the defendants.

The District Judge relied upon *Budha Singh* v. *Sant Singh* (1), an authority which would support his view if the facts were the same. In that case however it was remarked that no assertion had been made that the plaintiff in that case deliberately set up a claim in order to deprive the other coproprietors of their interest in the land. In the present case, on the contrary, the plaintiffs had originally sued in 1923 for the same relief as now, praying for permission to sue on behalf of the proprietors of patti khas only. They were directed to have notices of the suit issued to all the members of the proprietary body of the village and their suit was dismissed when they failed to do so. In the present suit they have adopted the same course of impleading only the patti khas proprietors as parties. By this procedure they have clearly challenged the title of the village proprietary body in the disputed site. This question of the attitude of the plaintiffs towards the title of the village proprietary body is vital to the question of what relief they should be given against

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1. A I R 1926 Lah 545=96 I C 1009.

trespassers and distinguishes the case from *Budha Singh* v. *Sant Singh* (1). In *Piara Singh* v. *Jawahara Singh* (2) a suit, in which the facts were similar to the present case, was dismissed, the title of the proprietary body of the village having been denied. I would follow that precedent in the present case. It is obvious that the plaintiffs cannot be given a decree for possession such as would enable them to have possession to the exclusion to the village proprietary body, while a decree for joint possession such as was granted by the trial Judge, besides being useless except in the unlikely event of partition, has become inappropriate in view of the finding by the District Judge that the defendants are not cosharers but trespassers. For the above reasons, I would accept the appeal; and setting aside the decree of the District Judge, would dismiss the suit but would leave the parties to bear their own costs throughout.

Addison, J.—I agree.

K.S. *Appeal accepted.*

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2. (1928) 112 I C 402.

A. I. R. 1933 Lahore 242

JAI LAL, J.

Tara Chand—Appellant.

v.

Balkishen and *others*—Respondents.

Misc. First Appeal No. 1741 of 1931, Decided on 10th October 1932, from order of Addl. Dist. Judge, Lyallpur, D/- 4th July 1931.

(a) Provincial Insolvency Act (1920), Ss. 54 and 75 (3)—Order refusing to annul transfer for any reason is covered by S. 75 (3).

According to Sch. 1 of the Act only an order annulling a transfer under S. 54 is made appealable as of right. An order refusing to annul a transfer, for any reason whatsoever, is covered by S. 75 (3) and can only be appealed from with the leave of the District Judge or the High Court: *A. I. R.* 1929 *All.* 105, *Dist.* [P 243 C 1]

(b) Provincial Insolvency Act (1920), Ss. 4 and 54—Only order annulling transfer under S. 54 is appealable as of right—Any other order is appealable with leave of Court.

An order dismissing an application by the Official Receiver under S. 54 and directing him to file a civil suit cannot be held to be an order passed under S. 4. S. 4 does not include cases which are directly covered by S. 54. Therefore only an order annulling a transfer under S. 54 is subject to appeal to the High Court as of right. Any other order passed under that section is appealable with the leave of the District Judge or of the High Court. [P 243 C 1]

Nanak Chand—for Appellant.

Shamair Chand—for Respondents.

Judgment.—The preliminary objection taken by the respondents' counsel that no appeal lies to this Court except by leave of the District Judge or of this Court has force. After an adjudication order had been made an application under S. 54, Provincial Insolvency Act, was made by the Official Receiver that certain alienations made by the insolvent be annulled as they were fraudulent and therefore void as against him. It transpired before the Insolvency Judge that in the meantime the alienee had transferred the property in dispute to another person. An objection was therefore taken on his behalf that an application under S. 54 did not lie as a third person had since obtained title in the property in dispute. The learned Insolvency Judge without going into the merits of the application expressed the opinion that the transfer by the original alienees had introduced a third party in the affair and therefore he should not decide the question of the fraudulent nature of the alienation and the consequent question of the illegality of the original transfer. He therefore dismissed the application leaving the Official Receiver to have recourse to the ordinary civil Courts by means of a suit. Against this order declining to adjudicate upon the application of the Official Receiver an appeal has been presented to this Court and a preliminary objection has been taken as specified above.

On behalf of the appellant it is contended that the order passed by the Insolvency Judge must be deemed to be one passed under S. 4, Provincial Insolvency Act and therefore it must be held that an appeal lies to this Court as a matter of right under Sch. 1, Provincial Insolvency Act. A reference to that schedule however shows that an order under S. 54 deciding that a transfer of property is a preference in favour of a creditor is specifically mentioned there as appealable. This would show that the contention of the appellant's counsel that all orders passed under S. 54 of the Act must be deemed to be orders under S. 4 is erroneous. ***Anwar Khan*** v. ***Muhammad Khan*** (1) does not, in my opinion, help the learned counsel. In that case it was held that where an application to avoid a transfer is not covered by S. 53 or S. 54, the Insolvency Court is competent to entertain it under S. 4 of the Act. The present application however it is conceded, was one made under S. 54, and was

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1. A I R 1929 All 105=118 I C 819=51 All 550 (F B).

within its scope. According to Sch. 1 of the Act only an order annulling a transfer under S. 54 is made appealable as of right. An order refusing to annul a transfer, for any reason whatsoever would in my opinion, be covered by S. 75 (3) of the Act which provides that the persons specified in that section and aggrieved by any other order than the one specified in Sch. 1 made by a District Judge otherwise than in appeal from an order made by a Subordinate Court may appeal to the High Court by leave of the District Court or of the High Court.

My view therefore is that the order under appeal cannot be held to be an order passed under S. 4, Provincial Insolvency Act and that S. 4 does not include cases which are directly covered by S. 54 and therefore only an order annulling a transfer under S. 54 is subject to appeal to this Court as of right. Any other order passed under that section is appealable with the leave of the District Judge or of this Court. In the present case no such leave has been obtained and at this stage I am unable to grant leave especially because the Insolvency Judge has left it open to the appellant to institute a suit to obtain the relief that he claimed under S. 54. This appeal is therefore dismissed, but the parties will bear their own costs.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 243

BROADWAY AND AGHA HAIDAR, JJ.

Muhammad Ahtramullah Khan — Judgment-debtor—Appellant.

v.

Delhi Motor & Furniture Works, Ltd. —Decree-holder—Respondent.

Misc. Civil Appeal No. 1265 of 1930, Decided on 25th July 1932, from order of Senior Sub-Judge, Delhi, D/- 8th April 1930.

(a) Practice—Party having personal knowledge of certain facts of his case should appear as witness and submit himself for cross-examination.

It is the duty of the party who has certain facts relating to his case within his personal knowledge to appear before the Court at a very early stage of the case as a witness and to give evidence relating to those facts and submit himself to cross-examination by the other side. [P 244 C 2]

(b) Punjab Land Alienation Act (13 of 1900), S. 4—Whether Sayed Alawi is Sayed for purpose of S. 4—(*Quaere*).

Whether a Sayed Alawi belongs to the general category of Sayeds and is therefore entitled to the advantages conferred upon this tribe in the District of Gurgaon under the Punjab Alienation of Land Act? (*Quaere*) [P 244 C 2]

Nazir Ahmad—for Appellant.

V. N. Sethi and *Gullu Ram*—for Respondent.

Agha Haidar, J.—This is a judgment-debtor's appeal arising out of certain proceedings in execution of a decree. Muhammad Ahtram Ullah Khan, the judgment-debtor, had purchased a motor car from the respondent for a sum of Rs. 10,000 and, in lieu of the price, he mortgaged the motor car as well as certain immovable property. On 31st August 1921, the mortgagee obtained a final decree for a sum of Rs. 13,908. A sum of Rupees 8,000 or thereabouts has been realized by the decree-holder and a sum of Rs. 18,624-5-3 remains outstanding. These figures have been given by the appellant's counsel and have not been challenged by the counsel representing the respondent. On 1st March 1927, the decree-holder applied for the attachment and sale of certain agricultural land belonging to the judgment-debtor, situated in the village Doha, in the District of Gurgaon. On 1st April 1927, the Court attached the landed property and ordered its sale. The Collector of Gurgaon however on 4th August 1928, refused to auction the landed property on the ground that the revenue authorities had declared the judgment-debtor to be a Sayed Alawi and therefore he belonged to one of the agricultural tribes (i. e. Sayeds), under the provisions of S. 4, Punjab Alienation of Land Act, (13 of 1900.) The decree-holder however contested the status of the judgment-debtor on the ground that he was not a Sayed Alawi and that therefore he could not claim the benefit of the provisions of S. 16, Punjab Alienation of Land Act. On 8th April 1930, the Senior Subordinate Judge, Delhi, held that the judgment-debtor, though descended from Hazrat Ali, was only a Sheikh Alawi and not a Sayed and consequently the land in dispute was liable to be sold in execution of the decree.

Against this decision the judgment-debtor filed the present appeal in this Court and the matter came up before a single Judge who, by his order dated 22nd January 1932, referred this case to a Division Bench. The appeal was argued at length before us. The case for the judgment-debtor is that he was a Sayed Alawi and therefore occupied the status of a Sayed and, as such, his property was the property of an agriculturist and exempt from sale in execution of the decree. On the other hand, the respondent claimed that the Court below was in error in holding the judgment-debtor to be a descendant of Hazrat Ali and that on this ground and, in fact, on any interpretation of the word "Sayed," he could not be called either a Sayed or Sayed Alawi. A number of authorities in the shape of dictionaries and works on Islamic history were cited in the course of arguments by both the parties but, in my judgment, the first and the most important question for determination is whether the judgment-debtor has been able to prove that he was a Sayed Alawi as he claimed to be. On his satisfying the Court that he was a Sayed Alawi the next question would be whether a Sayed Alawi could be called a "Sayed," as the term is universally understood among the Muslims of India and therefore entitled to the exemption conferred upon this community under the Punjab Alienation of Land Act. The judgment-debtor has produced a few witnesses in support of the contention that he was a Sayed Alawi. (After examining the evidence of these witnesses, the judgment proceeded.) Some oral evidence has been produced on behalf of the decree-holder, but it is not of any value and was one feebly pressed on behalf of the respondent. Then a number of documents have been cited on behalf of the judgment-debtor in which various members of the judgment-debtor's family including the judgment-debtor himself, have described themselves as Sayed Alawi and Sayed pure and simple. On the other hand, the respondent has placed on the record at least five documennts executed by the judgment-debtor himself in which he is described as Sheikh Alawi. His father and brother have also, in some documents, similarly described themselves. I need not refer to documents in detail.

Then there are certain revenue entries going back to the year 1877 in which the members of the judgment-debtor's family have been described as Sheikh *got* Alawi. In one document the judgment-debtor's own brother described himself as a Sheikh pure and simple. The result therefore is that, so far as the oral evidence is concerned, it is not of much value and on a careful persual of it I am not prepared to place reliance upon it. So far as the documentary evidence produced by the parties is concerned, there is a conflict. While in some documents the members of the judgment-debtor's family are described as Sayed Alawi and Sayed, in others, they are described as Sheikh and Sheikh Alawi. The most important of these latter documents are those in which the judgment-debtor himself was the executant. Under these circumstances, it was the duty of the judgment-debtor to go into the witness-box and to reconcile these contradictory descriptions which had been given of him or of the members of his family from time to time. He has not done so and the conclusion therefore is irresistible that he was not able to justify his position, in the face of this conflict of evidence, that he was a Sayed Alawi and that there was some explanation of the fact that he and his forfathers and other relations have been described as Sheikh Alawi. Their Lordships of the Privy Council have, in recent years, been pleased to lay down that it is the duty of a party who has certain facts relating to his case within his personal knowledge, to appear before the Court at a very early stage of the case as a witness and to give evidence relating to those facts and submit himself to cross-examination by the other side. Unfortunately these words, which are based upon mature wisdom and long forensic experience, are neglected in this Province, and pleaders in the District Courts still consider it good advocacy not to put the parties into the witness-box.

The parties, themselves, I regret to say, sometimes leave their cases in the hands of their pleaders and put a certain number of men at their disposal as so much raw material out of which evidence of some kind or other may be manufactured. On a careful persual of the evidence—both oral and documentary—on the record I am satisfied that the judgment-debtor in this case has failed to prove that he was a Sayed Alawi. This being so, the appeal fails and I would dismiss it. It is not necessary for me in the view I have taken to enter into any academic discussion as to whether a Sayed Alawi belongs to the general category of Sayeds and is therefore entitled to the advantages conferred upon this tribe in the District of Gurgaon under the Punjab Alienation of Land Act. Having regard to the history of the transaction and the subsequent course of the proceedings I would make no order as to costs.

Broadway, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 245

TEK CHAND, J.

Moti Ram—Plaintiff—Appellant.

v.

Narain Das and *others*—Defendants—Respondents.

Second Appeal No. 2569 of 1927, Decided on 21st June 1932, from decree of Dist. Judge, Attock, D/- 29th June 1927.

Civil P. C. (1908), O. 6, R. 17—Partnership—Suit for rendition of accounts—Suit dismissed for absence of prayer for dissolution of partnership—Amendment of plaint to include that prayer can be allowed.

The powers of the Court under the Civil Procedure Code to allow amendment are very wide and leave to amend should always be given unless the Court is satisfied that the party applying for leave was acting mala fide, or that, by his blunder he had done some injury to the opponent which could not be compensated for by costs or otherwise.

A suit for rendition of accounts in certain business was dismissed on the ground that no prayer for dissolution was made and that the partnership had not been dissolved formally. In the lower appellate Court which confirmed the trial Court decree, plaintiff's application to amend the plaint so as to include the prayer for dissolution was rejected:

Held: that as all the facts necessary for the decision of the case on the proposed amendment were before the Court and as the amendment would not change the character of the suit or cause irreparable injury to the other party, it must be allowed on the plaintiff's paying costs to the other side. [P 245 C 2]

Shamair Chand—for Appellant.
J. N. Aggarwal—for Respondents.

Judgment.—The plaintiff brought a suit against the defendants for rendition of accounts alleging that the parties were partners in a certain business and that the defendants should be called upon to render account of the same. In the plaint no prayer for dissolution of the partnership was made. The defendants objected that the suit for rendition of accounts did not lie so long as the partnership had not been dissolved. The learned trial Judge finding that the partnership had not been formally dissolved and the plaint did not contain a prayer for dissolution thereof dismissed the suit. On appeal the learned District Judge affirmed the view of the trial Judge and refused the prayer for amendment of the plaint which was made before him by the appellant. The plaintiff has preferred a second appeal to this Court and the only point raised by Mr. Shamair Chand on his behalf is that in the circumstances of the case the learned District Judge should have allowed the plaintiff-appellant to amend the plaint so as to include the prayer for dissolution of the partnership. After hearing both counsel I am of opinion that this contention is well founded and must succeed. All the facts necessary for the decision of the case on the proposed amendment were before the Court and in these circumstances it was eminently just and proper that the whole dispute should have been decided once and for all by allowing the amendment to be made.

Mr. Jagan Nath Aggarwal for the respondents has contended that the appellant persisted in the trial Court and also before the learned District Judge in contending that the plaint had been properly framed and that in view of his persistence the learned District Judge was right in disallowing amendment. It is however conceded that the proposed amendment would not have changed the character of the suit, nor would it have caused any irreparable injury to the respondents. The powers of the Court under the Code of 1908 to allow amendment are very wide and as has been held in numerous cases, e. g., *Jharia Coal Co.* v. *Diwan Chand & Co.* (1), leave to amend should always be given unless the Court is satisfied that the party applying for leave was acting mala fide, or that, by his blunder he had done some injury to the opponent which could not be compensated for by costs or otherwise. In my opinion this is a case in which amendment should have been allowed on payment of costs to the defendants-respondents. I accept the appeal, set aside the judgments and decrees of the Courts below and remand the case to the trial Court directing him to allow the plaintiff-appellant to amend the plaint by adding a prayer for dissolution of partnership. Court-fee paid on this appeal as well as on the appeal before the learned District Judge shall be refunded to the plaintiff-appellant; other costs shall be costs in the cause. The appellant shall be allowed to amend the plaint if he pays Rs. 100 as costs of the respondents.

K.S. *Appeal accepted.*

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1. A I R 1921 Lah 367=67 I C 335.

A. I. R. 1933 Lahore 246

TEK CHAND, J.

Jhanda Singh and *another*—Plaintiffs —Petitioners.

v.

Shop Gulab Mal-Bhagwan Das—Defendants—Opposite Parties.

Civil Revn. Petn. No. 550 of 1931, Decided on 15th March 1932, against order of Addl. Dist. Judge, Lyallpur, D/- 4th May 1931.

Court-fees Act (1870), S. 7 (4) (c)—Suit for declaration that decree is not binding and for injunction restraining defendant from executing it falls under S. 7 (4) (c)—Plaintiff fixing same value both for court-fee and jurisdiction—Court cannot revise it however arbitrary such value may be.

Where a suit is brought for a declaration that a decree for Rs. 2,432 odd, which had been passed against the plaintiff ex parte had been obtained by fraud and was not binding on him and for an injunction restraining the defendant decree-holder from executing it, the suit is a suit to obtain a declaratory decree where consequential relief is prayed and falls under S. 7 (4) (c), and if the plaintiff values the suit for purposes of jurisdiction as well as for court-fees at Rs. 130 the Court has no power to revise the valuation inasmuch as the plaintiff can fix any value he likes howsoever arbitrary, fanciful or inadequate it may be: *Case law discussed.* [P 246 C 2; P 247 C 2]

Gobind Ram Khanna—for Petitioners.

Judgment.—The plaintiff instituted a suit in the Court of the Subordinate Judge, Fourth Class, Gojra, for a declaration that a money decree for Rs. 2,432, odd which had been passed ex parte in favour of the defendant against the plaintiff had been obtained by fraud and was not binding on him, and for an injunction restraining the defendant-decree-holder from executing it. The suit was valued for purposes of jurisdiction as well as court-fee at Rs. 130, on which sum ad valorem court-fee was paid. The defendants raise a preliminary objection that the real value of the suit was the amount of the decree, which the plaintiff sought to be declared null and void against him, and as that amount was Rs. 2,432, the Subordinate Judge, Fourth Class, had no jurisdiction to entertain the suit. This objection found favour with the Subordinate Judge, who held that the value for purposes of jurisdiction as well as court-fee should be Rs. 2,432 and therefore the suit was beyond his pecuniary jurisdiction. He accordingly returned the plaint for presentation in the proper Court. Against this order the plaintiff preferred an appeal to the Additional District Judge, Lyallpur, but he dismissed the appeal. The plaintiff has preferred a petition for revision to this Court and has contended that under the law the plaintiff was entitled to put his own valuation on the plaint and that the Subordinate Judge, Fourth Class, had failed to exercise jurisdiction, vested in him by law, in declining to proceed with the suit and returning the plaint for presentation in a Court of higher jurisdiction. In my opinion, this contention is well-founded and must prevail.

It is settled law that a suit for a declaration that a decree is not binding on the plaintiff and for an injunction restraining the defendant from executing the decree, is a suit to obtain a declaratory decree where consequential relief is prayed, and falls under S. 7 (iv) (c), Court-fees Act, according to which the value of the suit for computation of court-fee is the amount at which the relief sought is valued in the plaint. It is also laid down in that section, that in all such suits the plaintiff shall state the amount at which he values the relief sought. There has been some difference of judicial opinion on the question, whether in cases falling under this clause or Cl. (d) the plaintiff can put an arbitrary valuation, or whether the value as fixed by the plaintiff is subject to revision by the Court. So far as this province is concerned the leading authority is the decision of the Full Bench in *Barru* v. *Lachhman* (1), where it was held that in suits falling under S. 7 (iv) (c), Court-fees Act, the Courts are bound to accept the valuation placed by the plaintiff upon the relief sought by him, even though such valuation is arbitrary and inadequately represents the value of the property. This ruling has been consistently followed by the Punjab Chief Court and the Lahore High Court: see inter alia *Bura Mall* v. *Tulsi Ram* (2), *A. I. R.* 1922 *Lah.* 236 and *A. I. R.* 1931 *Lah.* 307. Similarly in *Arunachelam Chetty* v. *Rangaswami Pillai* (3), a Full Bench of the Madras Court has held that a suit for a declaration that a mortgage-decree is not binding on the plaintiff and for an injunction restraining the defendant from executing the same is a suit for a declaratory decree with consequential relief within the meaning of S. 7 (iv) (c), Court-fees Act, and an ad valorem fee is payable on the valuation fixed in the plaint. The same view was taken by a Full Bench of the Allahabad Court in *Jugal*

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1. (1913) 111 P R 1913=22 I C 503 (F B).
2. A I R 1927 Lah 890=107 I C 609=9 Lah 266.
3. (1915) 38 Mad 922=28 I C 79 (F B).

Kishore v. *Talai Singh* (4) and has been consistently followed in the United Provinces. In Bombay, also, the course of decision has run uniformly in the same direction: see *Vachhani Keshabai* v. *Vachhani Nanbha* (5), *Hiragauri Bai* v. *Gulab Das Jamna Das* (6), *Gobinda Krishna* v. *Hanmaya Lingaya* (7) and in *Sundar Bai* v. *Collector of Belgaum* (8) their Lordships of the Privy Council expressed their approval of the observation of the Judges of the Bombay High Court to the effect that

> "where a plaintiff sues for a declaratory decree and asks for consequential relief, and puts his own valuation upon that consequential relief, then for the purposes of court-fee, and also for the purposes of jurisdiction, it is the value that the plaintiff puts upon the plaint that determines both."

At one time a contrary view prevailed in the Calcutta and Patna Courts, and it was held that in such cases it was open to the Court, if a question was raised as to the true valuation of the suit, to determine such question and fix its own valuation in supersession of the valuation which had been arbitrarily fixed by the plaintiff: *Umatul Batul* v. *Nanji Koer* (9), *Raj Krishna Dey* v. *Bepin Behari Dey* (10) and *Ramsekhar Prasad Singh* v. *Sheonandan Dubey* (11), etc. But in recent years the Calcutta Court, pressed with the observations of their Lordships of the Privy Council in *Sundar Bai* v. *Collector of Belgaum* (8), has modified its opinion and it has been held, on a strict interpretation of the wording of the statute that the plaintiff is entitled to put his own value on such a suit and the Court is bound to accept his valuation: see *Official Trustee of Bengal* v. *Gobardhan Guchait* (12) and *A. I. R.* 1930 *Cal.* 686 (689) Col. (1). It will thus be seen that there is now a consensus of opinion in the other High Courts in favour of the view taken in *Barru* v. *Lachhman* (1), and this view has also received the imprimatur of the Judicial Committee of the Privy Council in the case from Bombay, already cited. In coming to a contrary conclusion the learned District Judge has relied upon a Single Bench decision of Scott-Smith, J., in *A. I. R.* 1925 *Lah.* 346. It appears from a perusal of the judgment in that case, that the attention of the learned Judge was not drawn to the Full Bench decision in *Barru* v. *Lachhman* (1), and he relied largely upon *Harihar Prasad Singh* v. *Sham Lal Singh* (13), the view taken in which has since been dissented from in subsequent decisions of the Calcutta High Court. It may also be mentioned that in an earlier case, reported as *A. I. R.* 1922 *Lah.* 236, Scott-Smith, J., himself had held that in cases falling under S. 7 (iv) (c), the plaintiff was entitled to put his own value on the plaint, howsoever arbitrary or inadequate it might be. It appears that this last mentioned case, also, was not cited before the learned Judge ,when he was dealing with *A. I. R.* 1925 *Lah.* 346.

The trial Judge has referred to *A. I. R.* 1931 *Sind* 15, in which the Additional Judicial Commissioner preferred to follow the Calcutta rulings already referred to above, but which have since been dissented from in that Court itself, and which are consistent with the law laid down in the Full Benches of the Punjab, Allahabad and Madras Courts and approved by the Judicial Committee. It may also be stated that the course of decisions in the Sind Court itself is not uniform: see inter alia, *A. I. R.* 1924 *Sind* 105 (110). The result of the above examination of the authorities is that in cases, like this, the plaintiff is entitled to put his own valuation for purposes of payment of court-fee, howsoever arbitrary, fanciful or inadequate such valuation might be. As regards the jurisdictional value of such suits, the law is laid down in S. 8, Suits Valuation Act, that the value as determinable for payment of court-fee and the value for purposes of jurisdiction must be the same. In the present case the plaintiff has followed this rule, and has fixed the valuation, for jurisdiction and court-fee at Rupees 130. The plaint was therefore properly stamped and had been rightly presented in the Court of the Subordinate Judge, Fourth Class.

Before concluding, it seems necessary to refer to *Hakim Rai* v. *Ishar Das Gorukh Rai* (14), which the learned Additional District Judge, appears to have entirely misunderstood. In that case the plaintiff claimed a declaration with consequential relief, but valued the suit for purposes of jurisdiction at Rs. 29,101, and for payment of

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4. (1882) 4 All 320=(1882) A W N 44 (F B).
5. (1909) 33 Bom 307=1 I C 108.
6. (1913) 22 I C 71.
7. A I R 1921 Bom 65=59 I C 777=45 Bom 567.
8. A I R 1918 P C 135=52 I C 897=46 I A 15=43 Bom 376 (P C).
9. (1907) 6 C L J 427=11 C W N 705.
10. (1913) 40 Cal 245=17 I C 162.
11. A I R 1923 Pat 137=73 I C 48=2 Pat 198.
12. (1928) 118 I C 357.
13. (1913) 40 Cal 615=21 I C 404.
14. A I R 1927 Lah 499=102 I C 46=8 Lah 531.

court-fee at Rs. 130 only, on which sum he paid a court-fee stamp of Rs. 10. The Division Bench held that the suit fell within S. 7 (iv) (c) Court-fees Act, but that under S. 8, Suits Valuation Act, the value for jurisdiction and court-fee must be the same, and as the plaintiff himself had valued the relief at Rs. 29,101, he was held bound to pay ad valorem court-fee on that valuation. The same view was taken in *Srikishen Das* v. *Satnarain* (15) and *A. I. R.* 1929 *Lah.* 463. That a plaintiff cannot have the benefit of a higher valuation for selecting a superior forum for the hearing of his case, and pay a court-fee on a lower valuation is also clear from *Kandhaiya Ojha* v. *Jagrani Kuer* (16) and *Balkrishna Narayan* v. *Jankibai Sitaram* (17) and *A. I. R.* 1931 *Lah.* 307. None of these cases has however any bearing on the present case, as here the plaintiff had fixed the same valuation, both for payment of court-fee and for purposes of jurisdiction. It is no doubt true, that this valuation is much below the amount involved in the suit, but as shown above, the plaintiff can fix any value he likes and the Court have no power to reverse it. I hold therefore that the plaint had been properly presented in the Court of the Subordinate Judge, Fourth Class, and he had jurisdiction to entertain the suit. I accept the petition for revision, set aside the judgments of the Courts below and direct the plaintiff to refile the plaint in the Court of the Subordinate Judge, Fourth Class, Gojra, who will restore the suit to its original number and proceed with it in accordance with law.

P.N./R.K. *Petition allowed.*

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15. A I R 1932 Lah 132=135 I C 499=13 Lah 391.
16. A I R 1924 All 597=79 I C 358=46 All 419.
17. A I R 1920 Bom 105=56 I C 340=44 Bom 331.

A. I. R. 1933 Lahore 248

JAI LAL, J.

Manohar Das—Defendant—Appellant.

v.

Darbara Singh and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 1311 of 1929, Decided on 19th October 1932, from decree of Dist. Judge, Multan, D/- 28th January 1929.

Civil P. C. (1908), O. 17, Rr. 2 and 3—Defendant absent on adjournment date — Ex parte order—Application to set aside ex parte order dismissed without inquiry—On appeal District Judge holding that O. 17, R. 2 and O. 11, R. 21 applied—Held that O. 11, R. 2 did not apply but O. 17, R. 2 did—Civil P. C. (1908), O. 11, R. 21.

In a suit for rendition of accounts the defendant did not appear on the date fixed and the case was adjourned for his appearance. He again made a default and the Court decided to proceed against him under O. 17, R. 3, but the plaintiff had not his evidence ready and as the books were in possession of the defendant he was summoned as a witness on behalf of the plaintiff. In the meantime the defendant made an application for the setting aside of the exparte proceedings against him and alleged supporting his allegation with a medical certificate that he was prevented by illness from appearing in Court. The Judge without making any inquiry dismissed the application and after examining the defendant who was present with his books as a witness on behalf of the plaintiff awarded a decree against him. On appeal the District Judge held that O. 17, R. 2, applied to the circumstances of case and that the defence could be and had been struck off under O. 11, R. 21. He therefore dismissed the defendants appeal:

Held: that the circumstances which enable a Court to strike off a plaint or a defence under O. 11, R. 21 had not come into existence in this case and hence that rule had no application:

Held also: that on the finding of the District Judge the trial Court ought to have proceeded under O. 17, R. 2. [P 249 C 1]

J. N. Aggarwal—for Appellant.

Ram Lal Anand I — for Respondents.

Judgment.—In a suit for rendition of accounts the defendant did not appear on the date fixed and the case was adjourned for his appearance. He was directed to pay Rs. 15 as costs of the adjournment, at a subsequent hearing. He again made a default and the Court decided to proceed against him under O.17, R. 3, but the plaintiff had not his evidence ready; and as the books were in possession of the defendant he was summoned as a witness on behalf of the plaintiff. In the meantime the defendant made an application for the setting aside of the ex parte proceedings against him and alleged that he was prevented by illness from appearing in Court. He presented a medical certificate with his application. The Judge without making any enquiry dismissed the application and after examining the defendant who was present with his books as a witness on behalf of the plaintiff awarded a decree for Rs. 1,800 against him. It was contended before the District Judge on appeal by the defendant that proceedings under O. 17, R. 3 could not be taken against him and that O. 17, R. 2, applied to the facts of the case and therefore the trial Judge was bound to make an inquiry into the allegations made in the application by the defendant to set aside the ex parte proceedings. The District Judge has held that O. 17, R. 2 applied to the circumstances of case but he considers that the defendant was guilty of contumacious conduct and was not therefore entitled to any indulgence. He also held that the defence could be and had been struck off under O. 11, R. 21. He therefore dismissed the defendant's appeal. O. 11, R. 21, however has no application to the facts of this case. The defendant had been directed as a party to the suit to produce his documents at a particular date and he failed to do so. The only effect of his default could be that he might lose the right to produce those documents at a later stage in support of his case. The circumstances which enable a Court to strike off a plaint or a defence under O. 11, R. 21, had not come into existence in this case. No interrogatories had been served upon the defendant and no order for discovery or inspection of documents such as is contemplated by O. 11 had been passed.

On the finding of the District Judge that the case was covered by O. 17, R. 2 the trial Court was bound to adjudicate on the application to set aside the order passed by the trial Court to proceed under O. 17, R. 2. The Court however declined to do so. In view of the fact that there is a medical certificate on record in support of the defendants' allegation it would, in my opinion, delay the case unnecessarily if an inquiry into the defendant's allegation is ordered. I consider that the ends of justice would be met if the decree passed by the trial Court is set aside and also the decree of the District Judge on appeal and the case is remitted to the trial Court for decision of the case on the merits but this will be conditional on the appellant defendant paying Rs. 65 as costs incurred by the plaintiff in this Court and also in the Court of the District Judge, and also Rs. 15 adjournment costs granted against the defendant by the trial Court. On payment of Rs. 65 within a month from today in the trial Court by the defendant that Court will proceed with the case from the stage at which it was left when the defendant made a default in producing the books before it, that is to say, the defendant will produce the books which he produced as a witness and others if he wishes on a date fixed by the Court and then both the parties shall be given an opportunity to produce their respective evidence. The order of payment of Rs. 65 as costs is irrespective of the result of this suit.

V.S. *Order accordingly.*

A. I. R. 1933 Lahore 249

BHIDE, J.

Abdul Maksad and *others*—Plaintiffs—Appellants.

v.

Mohammad Amin—Defendant—Respondent.

Second Appeal No. 630 of 1931, Decided on 10th October 1932, against decree of Dist. Judge, Attock, D/- 12th January 1931.

Custom (Punjab)—Wajibularz—Vesting of right of reversion of "malba" must be independently proved.

Custom is not always logical and a rule of custom cannot be deduced by inference. Therefore the mere fact that the right to locate tenants generally goes with the right of reversion of the malba does not necessarily show that the right to malba vests in the person who, it is found, is not the sole owner of the village. And hence the Court can neither assume nor infer that the right to reversion of the malba vests in that person, that being obviously a question of custom must be decided independently on the evidence of the parties. [P 250 C 1]

J. N. Aggarwal—for Appellants.

Barkat Ali—for Respondent.

Judgment.—This was a suit for a declaration that the entry in para. 12 of the Wajibularz made at the fourth regular settlement in the record of rights of the village Shamasabad was incorrect and that the defendant was not the sole owner of Ferozpura, which is a portion of Shamasabad. The entry in question runs as follows:

> " The abadi of Ferozpura was founded by malak Feroz Khan. Non-proprietors can build their kothas in the above mentioned abadi with the permission of Khan Bahadur Malak Mohammad Amin and in the abadi of Shamasabad with the permission of the whole proprietary body. The right of locating or ejecting (the non-proprietors) is on the same lines. As long as (the non-proprietors) live there they are not interfered with, but if they go to another place they cannot sell or remove the malba which is taken by Khan Bahadur Malak Muhammad Amin in the abadi of Ferozpura and by the whole proprietary body in the abadi of Shamasabad."

The Courts below have dismissed the suit on the ground that the entry was in accordance with the decision of the Chief Court in a previous suit between the parties and the matter was "res judicata." From this decision the plaintiffs have appealed. The sole point for decision is whether the entry in question is really covered by the Punjab Chief Court decision dated 5th January 1910, which has been relied on by the defendant. The learned counsel for the appellants conceded that the first part of the entry so far as it states that the abadi of Ferozpura was founded by Malik Faroz Khan and that non-proprietors can build their kothas in the abadi with the permission of Malak Muhammad Amin and that the right of locating or ejecting them vested in him is correct. He however contended that the further entry to the effect that when the non-proprietors leave the village the malba is to be taken by Khan Bahadur Malak Muhammad Amin is not supported by the Chief Court judgment. He also contended that it was held by the Chief Court that Malak Muhammad Amin was not the sole owner of Ferozpura and the finding of the Courts below to the contrary is clearly untenable.

As regards these contentions, the learned counsel for the respondent conceded that it was held by the Chief Court that Malak Muhammad Amin was not the sole owner of Ferozpura and that the finding of the Courts below in this respect cannot therefore be supported. He however urged that the entry with respect to the reversion of the malba to Malak Muhammad Amin was a necessary corollary from the right to locate tenants which was found by the Chief Court to vest in Malak Muhammad Amin. This argument is not, in my opinion, sustainable. The mere fact that the right to locate tenants generally goes with the right of reversion of the malba would not necessarily show that the right to malba vests in Malak Muhammad Amin in this particular village. Custom, as is well-known, is not always logical and a rule of custom cannot be deduced by inference: cf. *Bhambul Debi* v. *Narain Singh* (1). In the present instance it was found by the Chief Court that although Malak Muhammad Amin was not the sole proprietor of the village, the right to locate tenants in the village vested in him alone. This is contrary to the general custom. We cannot however assume or infer that the right to reversion of the malba would also vest in Malak Muhammad Amin. This is obviously a question of custom which much be decided independently on the evidence of the parties. This appeal must therefore be accepted and the case remanded to the trial Court for the decision of the question as to whether on the non-proprietors leaving Ferozpura the malba vests in Malak Muhammad Amin. The fact that Malak Muhammad Amin is not the sole owner of Ferozpura was decided by the Chief Court as stated above and the point not being disputed by the learned counsel for the respondent need not be gone into. Costs will follow final decision.

V.S. *Appeal allowed.*

A. I. R. 1933 Lahore 250

JAI LAL, J.

Jai Kishan Dass—Appellant.

v.

Chiragh Din and *others*—Respondents.

Misc. Second Appeal No. 1022 of 1932, Decided on 7th January 1933, from order of Dist. Judge, Sialkot, D/- 21st March 1932.

Provincial Insolvency Act (1920), S. 28—Land of member of agricultural tribe sold in insolvency—Insolvent applying for discharge relying on payment of proceeds of sale to creditors—Subsequent belated application to set aside sale cannot be allowed — Punjab Alienation of Land Act (1900), S. 16.

The land of a member of an agricultural tribe was sold in insolvency and the sale proceeds were distributed among the creditors. The insolvent relying on these payments to creditors applied for discharge and was accordingly discharged. He subsequently, long after the expiry of the period of limitation, filed an application to have the sale set aside on the ground that the land cannot be sold under the Alienation of Land Act:

Held: that though the land cannot be sold in insolvency, under the above circumstances he was not entitled to have the sale set aside: *A.I.R.* 1930 *Lah.* 1034, *Ref.* [P 251 C 1]

Hazara Singh—for Appellant.

Abdul Aziz—for Respondents.

Judgment.—Chiragh Din has been adjudicated an insolvent, his land was sold on 31st December 1928, and the amount realized was distributed among the creditors. He then applied for an order of discharge alleging that the amount paid to the creditors out of the sale proceeds of his land was sufficient to entitle him to such an order. The Insolvency Court granted the petition and the discharge. Subsequent to this he made an application that the sale of the land be set aside as it could not be sold under the provisions of the Alienation of Land Act. This application was made considerably after the expiry of the period of limitation provided for such applications and the Insolvency Court declined to entertain it. The District Judge on appeal however came to the contrary conclusion.

The creditors have presented this appeal against the order of the District Judge and the only respondent present before me is the auction-purchaser who supports the appellant's contention. The insolvent has been personally served but has not appeared before me. It seems to me that though in view of the decision of this Court in *A. I. R.* 1930

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1. (1915) 39 P R 1915=29 I C 572.

Lah. 1034, the land of a member of an agricultural tribe could not be sold in insolvency proceedings the contrary view was held by this Court when the sale actually took place and the application objecting to the sale was not only beyond time but was also belated and improper as relying upon the payment of the sale proceeds to the creditors, the insolvent applied for his discharge and obtained such an order. In my opinion, under the circumsances he was not entitled to any special consideration. I therefore accept this appeal and, setting aside the order of discharge, restore that of the trial Court, leaving the parties to bear their own costs.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 251

BHIDE, J.

Bhagu—Plaintiff—Appellant.

v.

Batna Singh and *others*—Defendants—Respondents.

Second Appeal No. 92 of 1931, Decided on 20th December 1932, from decree of Dist. Judge, Jullundur, D/- 16th October 1930.

(a) Custom—Punjab—Ancestral Property—Alienation for satisfaction of decree is valid necessity.

A sale of ancestral property in execution for satisfaction of a decree constitutes a valid necessity unless it is proved that the decree is collusive or that the debts which resulted in it are illegal or immoral: *A. I. R.* 1922 *Lah.* 299, *Foll.* [P 251 C 2; P 252 C 1]

(b) Civil P. C. (1908), S. 60—Exemption can be claimed only by judgment-debtor.

Exemption under S. 60, Civil P. C. can only be claimed by the judgment-debtor. If for some reason or the other, the judgment-debtor chooses to waive that privilege his son cannot complain of his action. [P 252 C 1]

Tirath Ram—for Appellant.

Judgment.—In execution of a decree against one Batna two houses were attached and sold. They were purchased by one Banta Singh. The plaintiff, who is a minor son of Batna, thereafter instituted this suit for a declaration that the houses were ancestral and were not liable to be attached and sold in execution of the decree. The trial Court at first found that the houses were not proved to be ancestral and on that ground dismissed the suit. On appeal, this finding was upset by the Additional District Judge and the case was remanded for decision of the other issues. The other issues framed in the case were: (1) Whether the decretal debt would justify the sale of ancestral property against reversioners. (2) Whether the sale is illegal, and if so, to what relief the plaintiff is entitled. These issues were found in favour of the plaintiff and the suit was decreed by the trial Court. On appeal, the learned District Judge held that there being a decree against the judgment-debtor and the houses having been sold for satisfaction thereof, the sale must be held to have been effected for valid necessity and was therefore binding on the plaintiff. The appeal was accordingly accepted and the plaintiff's suit dismissed with costs throughout. From this decision the plaintiff has preferred a second appeal to this Court. The learned counsel for the appellant has raised two points viz: (1) that it was incumbent on the auction-purchaser to prove the original debts which had resulted in the decree and to show that they were not illegal or immoral; and (2) that one of the houses had been exempted from attachment on the ground that it had been occupied by the judgment-debtor as an agriculturist and in the circumstances that the sale of that house was, at any rate, void.

As regards the first point, it is true that the onus was originally on the alienee, but as soon as the alienee showed that the sale had been effected for satisfaction of a decree against the judgment-debtor, the onus was shifted to the plaintiff. The learned Additional District Judge in remanding the case had not decided, as urged by the learned counsel that the decretal debt would not constitute a valid necessity. He had merely decided that the property was ancestral and remanded the case for trial of the remaining issues. The learned counsel next tried to distinguish the present case on the ground that the houses were sold in execution of a decree and in the circumstances only the "right, title and interest" of the judgment-debtor could be sold. But it is not alleged that the judgment-debtor's title was defective. It is true that the property has been held to be ancestral; but that only gives the plaintiff a right under custom to challenge an alienation, if it is made without valid necessity. *Ran Singh* v. *Rullia* (1) on which the learned District Judge has relied clearly shows that a sale in execution for satisfaction of a decree constitutes a valid necessity. The appellant was not able to show that the decree was collusive, or that the debts which resulted in it were illegal or immoral. In the circumstances the sale

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1. A I R 1922 Lah 299=68 I C 99=3 Lah 139.

must be held to have been effected for valid necessity. The next contention of the learned counsel that one of the houses had been exempted from sale under S. 60, Civil P. C., cannot by itself, help the plaintiff. This was decided by the learned Additional District Judge in remanding the case and the decision was clearly right. Exemption under S. 60, Civil P. C., can only be claimed by the judgment-debtor. If for some reason or other, the judgment-debtor chose to waive that privilege, the plaintiff cannot complain of his action. Plaintiff can only challenge the alienation on the ground of want of valid necessity. But such necessity having been found to exist, plaintiff is out of Court. I dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 252

BROADWAY, C. J. AND ABDUL QADIR, J.

Saram Dass and *others*—Petitioners—Appellants.

v.

Shiromani Gurdwaras Parbandhak Committee, Amritsar — Objectors— Respondents.

First Appeal No. 1648 of 1930, Decided on 1st November 1932, from decree of First Sikh Gurdwaras Tribunal, Lahore, D/- 16th April 1930.

(a) Custom (Punjab)—Religious institution —Guru's property devolving on his chela— Presumption is property ceases to be secular.

Where a property devolves from a guru to his chela, the presumption is that the property has ceased to be secular: *A. I. R.* 1921 *Lah.* 337, *Rel. on.* [P 252 C 2]

(b) Custom (Punjab)—Religious Institution —Land granted to sadhu for maintenance by head of institution belongs to such institution.

Where land is given to a sadhu for his maintenance by the head of an institution, the presumption is that the property belongs to the institution to which the sadhu is attached. [P 252 C 2]

Shaukat Rai—for Appellants.

Bhagat Singh—for Respondents.

Broadway, C. J.—When the institution known as Dara Sangat Sahib or Gurdwara Bhai Pheru at Mianke Maur was declared to be a Sikh institution under the provisions of the Sikh Gurdwaras Act, 1925, a consolidated list of the properties claimed to belong to that institution was duly published, under S. 3 of the Act with the result that many claims were advanced by different persons to the ownership of various properties. Amongst these claimants mere Saran Das and two others who claimed to be the full owners of 111 kanals 5 marlas of land and two houses Nos. 208 and 209 in the said consolidated list of properties published under S. 3. This petition was sent by the Local Government to the Gurdwara Tribunal for disposal and was disposed after due inquiry on 23rd April 1930; the president and the members of the Tribunal were unanimous in holding that the petitioners had failed to prove that they were the absolute owners of the land and the houses claimed by them. Against this decision Saran Das, etc. have preferred this appeal through Mr. Shaukat Rai. The learned counsel stated at the outset that he did not wish to say anything about the land regarding which the petitioners have praccally given up their claim. *Qua* the houses however Mr. Shaukat Rai has taken up considerable time in urging that the evidence on the record shows that they belonged to his clients. Now, as pointed out by the learned President who wrote the judgment in the case, it is clear that both these houses were at one time in the possession of Nihal Das, the Guru of Saran Das. Admittedly on Nihal Das's death this property as well as the land which has now been given up came into the possession of Saran Das who was Nihal Das's chela. Inasmuch as the houses had devolved upon the petitioner from his guru, the learned president, acting on the authority of *Indar Singh* v. *Fateh Singh* (1), raised a presumption that the property has ceased to be secular; a presumption which to my mind is a very reasonable one. It has been urged by the learned counsel that the conclusions arrived at by the Tribunal are influenced by the provisions of para. 89, Rattigan's Digest of Customary Law, where it has been laid down that:

> "all property acquired by individual members of a religious fraternity belongs to the religious institution to which they are attached."

Now, the evidence on the record leaves no room for doubt that Nihal Das (who was admittedly a Sadh) was attached to this institution. He was granted land for his maintenance by the head of the institution and therefore the presumption mentioned in the said para. 89 undoubtedly arises and has not in any shape or form been rebutted by evidence or by any material on the record. In this view of the case in my judgment the conclusion arrived at by the Tribunal is a

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1. A I R 1921 Lah 337=59 I C 734=1 Lah 540.

correct one. I would therefore dismiss this appeal with costs.

Abdul Qadir, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 253

BROADWAY AND COLDSTREAM, JJ.

Hem Raj and *others*—Plaintiffs—Appellants.

v.

Basheshar Das and *others*—Defendants—Respondents.

First Appeal No. 2073 of 1926, Decided on 7th June 1932, against decree of Senior Sub-Judge, Lahore, D/- 26th May 1926.

Hindu Law — Alienation — Father—Mortgage by father—Subsequent partition between father and sons—Suit against mortgagor decreed and in execution property sold—Sons obstructing to taking possession by auction-purchaser — Mortgagee rights are not affected by subsequent partition, and in absence of immorality or illegality of debt it is binding on sons.

The father mortgaged the joint family property and subsequently the property mortgaged was partitioned among the father and his five sons each getting 1/6th share. The mortgagee then brought a suit against the mortgagor alone and obtained a decree and in execution the property was sold. The sons obstructed to taking of possession by auction-purchaser contending that their shares had not passed to the auction-purchaser. No contention was however even raised that the debt was incurred for immoral or illegal purpose.

Held: that when the property was partitioned all that remained to the family was the equity of redemption and it was in the equity of redemption that the father and his five sons were given equal shares and that the property being joint at the time of mortgage, the mortgagee rights were not affected in any way by the subsequent partition: 8 *Bom.* 481, *Foll.* [P 255 C 1]

M. C. Mahajan, Tirath Ram and *Manohar Lal Sachdev*—for Appellants.

Kishen Dayal, Rama Nand and *Bhagwat Dayal*—for Respondents.

Broadway, J.—On 18th June 1907 one Narpat Rai, son of Lala Surjan Mal, a Khatri of Lahore, executed a mortgage in favour of Mul Chand and Company of Lahore by which he mortgaged a certain house in lieu of a sum of Rs. 8,000. In this deed of mortgage Narpat Rai alleged that he was the owner of the property mortgaged. As a matter of fact Narpat Rai had five sons with four of whom he was having considerable difficulty. They (the four sons) were claiming that they were members of a joint Hindu family along with their father Narpat Rai and their brother Daulat Ram and joint owners of all the property including this particular house while Narpat Rai was asserting that the said four sons were not joint with him and that the property of which they were in possession including the house mortgaged, was his sole property and that they were in possession of it as his servants. On 5th August 1907 Narpat Rai instituted a suit against his four sons claiming possession of all the properties, including the house mortgaged, on the ground that he was the sole owner of the same. The four sons contested the suit on the ground that they were members of a joint Hindu family and that the property was joint family property. Ultimately the parties referred their case to arbitration with the result that an award was given on 16th November 1909, partitioning the entire family property, including this house, between the father and his five sons, each one being given a 1/6th share in the entire property. So far as the house mortgaged was concerned, although it was in the possession of the four brothers, the father was declared to be a cosharer with them to the extent of 1/6th, their brother Daulat Ram being also allotted a similar share.

Objection was taken to this award but it was finally decided in 1910 and a decree apparently was passed, giving effect to the award. It appears that Narpat Rai took no further steps to get the joint property divided by metes and bounds to take possession of his divided share. Subsequent to this Mul Chand and Company brought a suit on the basis of their mortgage, obtained the usual decree and in due course brought the mortgaged house to sale. At the auction sale the highest bidder was one Nikka Mal who finally purchased the property on 27th May 1917 for Rs. 6,500. When he sought to obtain possession of the said house however he was obstructed by the four brothers who claimed that they were the sole owners of the said house and that their father had no right, title or interest in it and was not for that reason empowered to create any charge on the house. It was held by the executing Court that Narpat Rai and his five sons were cosharers in this house, each having a 1/6th share. The objections were therefore allowed to the extent of the shares of the four brothers, namely, 2/3rd of the house, but dismissied *qua* the remaining 1/3rd This was on 30th August 1918 and resulted in the institution of two suits, one by Nikka Mal for immediate pos-

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session of the house purchased by him, and the other by four brothers, who claimed that they were the owners of the entire house and that therefore they were entitled to the 1/3rd, possession of which had been allowed to Nikka Mal. These two suits were tried and disposed of on 21st July 1919 and 27th January 1921. When the appeals came up before a Division Bench of this Court, it was found that the procedure adopted by the Court below had been in disregard of certain decisions of this Court and of the Civil Procedure Code and a remand was therefore ordered in both of them for the proper trial of the cases. They were finally disposed of in one judgment by Pundit Devi Dayal Joshi on 26th May 1926, the decision being in favour of the auction-purchaser Nikka Mal, who however had died and was represented by his son Basheshar Das. Separate appeals have been filed by the four brothers in the two cases and this judgment will dispose of both these appeals.

Appeal No. 2073 of 1926 relates to the suit brought by the four brothers *qua* the 1/3rd of the house, and No. 2074 of 1926 arises out of the suit brought by the auction-purchaser relating to the 2/3rds of which he had been deprived. (Here the judgment dismissed Appeal No. 2073 of 1926 holding that the decision of the trial Court was correct and after considering the plea set by the four appellants in Appeal No. 2074 of 1926, that as a matter of fact there had been a separation in status as far back as 1905 concluded.) After a careful examination of such evidence as there is on the record and after giving due weight to the arguments advanced at the Bar, I am of opinion that the disruption of this family took place in 1910 after the award in the suit instituted by Narpat Rai on 5th August 1907. It is immaterial whether the date of the disruption is the date of the decree or is the date of the institution of the suit, for admittedly the mortgage in favour of Mul Chand and Company was effected shortly before 5th August 1907. It was next urged on behalf of the four brothers that inasmuch as admittedly, and as found by the trial Court, they were not bound by the decree in the suit brought by Mul Chand and Company on the mortgage bond, the sale of this particular house in execution of that decree did not in any way affect their 2/3rds share in the said house. It was pointed out that in any event there was no joint family at the date when Mul Chand and Company instituted their suit and that there was no joint family property when the decree in favour of Mool Chand and Company was executed and this particular house brought to sale.

It was urged therefore that all that the auction-purchaser could have bought was the interest or share of the mortgagor Narpat Rai; that is to say 1/6th of the property sold at the auction. On the other hand, it was contended that the partition which intervened between the date of the mortgage, when the charge was created on this property, and the date of the sale, did not affect the situation in any way; and it was urged that the four appellants could only avoid the effect of the sale by proving that the mortgage had been effected by their father for some immoral or illegal purpose. As a matter of fact the appellants have never set up such a case. There is good authority for the proposition that had the house in question been joint at the time of the sale, the four appellants, although not parties to the suit and therefore not bound by the decree, could not have recovered their shares of the mortgaged property unless they could prove that the mortgage had been effected for some immoral or illegal purpose: see Mulla's Hindu Law, S. 294 (2) and S. 296. It was urged however that the authorities in support of that proposition did not meet the present situation; for in those cases, at the time of the sale, the property sold was joint, whereas in the present case admittedly at the time of the sale there was no joint family property in existence. It seems to me however that the question is set at rest by the decision of the Division Bench of the Bombay High Court in *Trimbak Balkrishna* v. *Narayan Damodar* (1). There the facts were practically on all fours with the present case. A father had created a charge on joint family property. Subsequent to the creation of that charge a partition had been effected and the family had been disrupted. The partition although specifying the shares of the various members was not a partition by metes and bounds. Subsequently to this partition a suit was brought on the mortgage and finally decreed. The property mortgaged was brought to sale and when the auction-purchaser sought to get possession of the property bought by him at this sale, he was obstructed by the sons of the mortgagor who

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1. (1884) 8 Bom 481.

claimed that his share had not passed to the auction. The son's claim was rejected.

It seems to me clear that when in this case the property was partitioned, so far as this particular house was concerned, all that remained to the joint family was the equity of redemption and that it was in this equity of redemption that Narpat Rai and his five sons were given equal shares, i. e., 1/6th each. The property being part of the jont property at the date of the mortgage, the mortgage rights were not affected in any way by the partition itself and no doubt the four appellants would have been entitled to claim redemption of their shares from the mortgagee if the terms of the mortgage permitted of a part redemption of the property. Failing such conditions it seems to me clear that the redemption would have had to have been of the whole of the property. In the present case, as already pointed out, the appellants have never alleged that this debt had been raised by their father for any immoral or illegal purpose, nor have they ever offered or expressed a desire to redeem either wholly or in part and in these circumstances I consider that the view taken by the trial Court is correct and that the auction-purchaser was entitled to immediate possession of the property bought by him and I would therefore dismiss this appeal with costs.

Coldstream, J.—I agree.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 255

MONROE, J.

Mr. F. H. Frusher—Petitioner.

v.

Mrs. Jessie Frusher—Respondent.

Leonard Hayes—Co-respondent.

Matrimonial Petn. No. 4 of 1932, Decided on 24th June 1932.

Divorce (Indian and Colonial) Jurisdiction Act (1926), S. 1—Adultery — Collusion or connivance.

Where proceedings for the dissolution of marriage on the ground of adultery are instituted promptly on the discovery and there is no collusion or connivance between the parties a decree for the dissolution of the marriage should be pronounced. [P 256 C 1]

Mohammad Akbar Khan — for Petitioner.

H. J. Rustomji—for Respondent.

Order. — The petitioner, Francis Hector Frusher, of the I. A. O. C. at present stationed at Quetta, sues for a divorce from his wife on the ground of her adultery with the co-respondent Leonard Hayes, also of the I. A. O. C.

The petitioner was born in Cambridgeshire where his parents still live and the respondent belongs to the same county. The petitioner and respondent were married at Felixatows in Suffolk, on 21st February 1918, and there have been born during the marriage four children, Joyce Jenny aged 12 years, Panela Molly aged six years and John William aged five years and Lionel Charles Thomson born in March 1929. After marriage the petitioner and respondent lived for a time in England and later came to India where they were living in 1927; in that year the petitioner was stationed at Allahabad, when the respondent and co-respondent first met. The petitioner was afterwards transferred to Rawalpindi and Karachi, amongst other places. The petitioner states that he first got to know of his wife's adultery, when in February 1932, she confessed to him that she had misconducted herself with the co-respondent, that he asked her whether she could give him proof and in reply she produced a bundle of letters (Ex. P-2), written to her by the co-respondent; the respondent did not appear at the hearing but the co-respondent gave evidence and he admitted that the letters were his; he also fixed the date of the commencement of his illicit intimacy with the respondent as the beginning of 1928. From the letter it appears that the acts of adultery were very numerous and that when the petitioner and co-respondent were at different stations, the respondent and co-respondent kept up a regular correspondence in which they discussed their relations with one another, the imminence of discovery and the wisdom of a confession by one or other of them; it also appears that they believed that the child Llonel Charles Thomson was begotten by the co-respondent and that they regarded his likeness to the co-respondent as a possible means of the discovery of their intimacy.

Adultery is established and, though when the number of occasions on which it must have been committed is considered it is difficult to understand how the petitioner remained so long in ignorance, I am satisfied that he did remain in ignorance until February 1932, the date given by him and that he instituted proceedings promptly on the discovery; it follows that there has not been collusion or connivance between the parties. I also find that, by reason of the financial position of the petitioner, these proceedings have been properly brought in this Court. I accordingly pronounce a decree for the dissolution of the marriage of the petitioner and the respondent. The petitioner asks for custody of the three first named children, now with him at Quetta; the fourth child, Lionel Charles Thomson, is now with the respondent who is on her way to England; the passages of both mother and child have been paid by the co-respondent and as the custody of this child is not sought by the petitioner, I grant custody of him to the respondent. The petitioner asks for a sum of Rupees 1,200 as damages. The co-respondent does not contest this claim and I award to the petitioner Rs. 1,200 to be paid by the co-respondent and I direct the co-respondent to pay to the petitioner the taxed costs of this suit.

R.K. *Order accordingly.*

A. I. R. 1933 Lahore 256

AGHA HAIDAR, J.

Shamasuddin and *others*—Plaintiffs—Petitioners.

v.

Sant Ram and *others*—Defendants—Opposite Parties.

Misc. Civil Petn. No. 315 of 1932, Decided on 16th December 1932.

(a) Civil P. C. (1908), O. 44, R. 1—Admission of application for permission to appeal in forma pauperis is not final disposal of application.

Admission of an application for permision to file an appeal in forma pauperis is not a final disposal of the application and as such, such admission does not preclude the opposite party from contesting the application: 7 *Pat.* 825=114 *I. C.* 210=*A. I. R.* 1929 *Pat.* 27, **held Overruled** *A. I. R.* 1931 *Pat.* 183 and *A. I R.* 1929 *Lah.* 514, *Rel. on.* [P 256 C 2]

(b) Practice— Precedents — Quoting overruled cases.

To quote a case as an authority, which has been definitely overruled is a form of advocacy which should not be encouraged in any way. [P 256 C 2]

Nand Lal—for Petitioners.

Fakir Chand—for Opposite Parties.

Order.—This is an application under O. 44, R. 1, Civil P. C., for permission to file an appeal in forma pauperis in this Court against the judgment and decree of the Senior Subordinate Judge, Ludhiana, dated 18th April 1932. On 2nd June 1932, I issued notice to the respondents so that I may have the advantage of hearing them before disposing of this application finally. Mr. Fakir Chand has appeared before me on their behalf. Dr. Nand Lal, at the very outset, urged that, in view of the fact that I had admitted the application, the opposite party should not be heard on the question of whether the judgment sought to be appealed against was contrary to law or to some usage having the force of law, or was otherwise erroneous or unjust. In support of his contention he relied upon the case reported as *Mt. Bibi Sogra* v. *Radha Kishun* (1). I may observe that, while admitting the application, I had not given any decision as regards the contents of the proviso to O. 44, R. 1, and this question was left open for final disposal after notice had been served upon the respondents. It would be strange if an ex parte order could preclude the other side from contesting the application. This was merely a provisional order like most of such orders admitting applications or appeals and it would be contrary to the principles of universal justice to treat such orders as final when, on their very face, they had been passed behind the back of the other side. I do not see any force in the contention raised by Dr. Nand Lal and I overrule it. Besides, the case reported as *Mt. Bibi Sogra* v. *Radha Kishun* (1), has been distinctly overruled by a Full Bench decision o fthat Court in a case reported as *Tilak Mahto* v. *Akhil Kishore* (2). To quote a case as an authority, which has been definitely overruled is a form of advocacy which should not be encouraged in any way. The view taken in the latter Patna case is also borne out by a decision of this Court in a case reported as *Basant Kaur* v. *Chandu Lal, A. I. R.* 1929 *Lah.* 514.

I have read carefully the judgment of the Senior Subordinate Judge and, in my opinion, it involves only questions of fact. He does not believe the story of the plaintiffs that the gift had been made in their favour by their respective fathers, or that the fathers, defendants 5 and 6, were in possession of the property at the time of the alleged gift and therefore in a position to make the gift. The theory of the gift being thus rejected the plaintiffs had no case left. On the question of adverse possession there are ample materials on the record to show that defendants 5 and 6, were never in possession after the various sales in favour of defendant 1. In my judgment the decree of the trial Judge is not "contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust." Accord-

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1. A I R 1929 Pat 27=114 I C 210=7 Pat 825.
2. A I R 1931 Pat 183=132 I C 364=10 Pat 606 (F B).

ingly I reject the application for permission to appeal in forma pauperis. Dr. Nand Lal asked me to allow three months' time within which period his clients may pay the requisite court-fee on the memorandum of appeal in this Court. I grant his request, subject to all just exceptions. The respondents shall get their costs so far as this application is concerned.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 257

JAI LAL, J.

Sunder Singh—Plaintiff — Appellant.

v.

Nathu Ram and *another*—Defendants —Respondents.

Second Appeal No. 2340 of 1929, Decided on 19th October 1932, against decree of Dist. Judge, Rawalpindi, D/- 9th July 1929.

Pre-emption—Suit for, decreed—Vendor getting decree for greater amount subsequently against vendee—Vendee cannot sue pre-emptor or vendor again—Civil P. C. (1908), S. 11.

K sold some property to *S*. *N* pre-empted that sale by means of a suit in which *S* alleged that the sale was for Rs. 700 paid by him in cash. *K* alleged that the sale was for Rs. 700 paid to him in cash and Rs. 500 in respect of which a balance had been struck in his favour by *S*. *S* alleged that this balance was fictitious and had been executed by him in favour of *K* after the transaction of sale for Rs. 700 as it was represented to him by *K* that a suit for pre-emption was likely to be instituted. The trial Court gave a decree for pre-emption on payment of Rs. 700. Neither party appealed from the decree. Subsequently *K* sued *S* and got a decree for Rs. 500 under the balance struck. *S* brought a suit against *K* and *N* for the amount decreed:

Held: that *S* was entitled to recover the amount neither from *N* nor from *K*. A fresh suit did not lie for the recovery of money from the successful pre-emptor which *S* was made to pay to the vendor subsequent to the decree for pre-emption. [P 257 C 2]

H. C. Kumar—for Appellant.

Judgment.—Karam Chand sold some property to Sundar Singh. Nathu Ram pre-empted that sale by means of a suit, and it was alleged by him that the sale was for Rs. 650, in 1925. The plea of Sundar Singh was that the sale was for Rs. 700, paid by him in cash in 1924. Karam Chand alleged that the sale was for Rs. 700 paid to him in cash and Rs. 500 in respect of which a balance had been struck in his favour by Sundar Singh. Sundar Singh alleged that this balance was fictitious and had been executed by him in favour of Karam Chand a year after the transaction of sale for Rs. 700 as it was represented to him by Karam Chand that a suit for pre-emption was likely to be instituted. The trial Court gave a decree for pre-emption on payment of Rs. 700 and of moneys spent by Sundar Singh on improvements of the property before the suit was instituted. With regard to Rs. 500 he did not give any definite finding, but made a remark that the matter should be left for settlement between the parties in a separate suit and that Sundar Singh could recover the money from the pre-emptor if he was made to pay the same. Sundar Singh did not appeal against this decree. Subsequently on a suit brought by Karam Chand a decree was granted against Sundar Singh for Rs. 500 mentioned in the balance struck, interest and costs. Sundar Singh has now brought the suit out of which this second appeal has arisen for recovery of the amount decreed against him in favour of Karam Chand. He has impleaded both Karam Chand and Nathu Ram pre-emptor as defendants. This suit has been dismissed by the Courts below.

On the second appeal it is urged that the liability of Sundar Singh to pay Rs. 500 to Karam Chand was determined after the decree for pre-emption had been granted in favour of Nathu Ram, therefore Sundar Singh is entitled to recover that amount from Nathu Ram. I am unable to accept this contention. The appellant is entitled to recover the amount neither from Nathu Ram nor from Karam Chand; from Karam Chand by virtue of the decree granted in his favour against Sundar Singh after the pre-emption suit had been decided; from Nathu Ram, because the whole liability of Nathu Ram should have been determined in the pre-emption suit, and if Sundar Singh considered that the market value of the property or the price paid by him had been under-estimated by the Court which decided the pre-emption suit, he should have appealed from that decree. I am aware of no authority which sanctions the procedure adopted by Sundar Singh in this case by filing a fresh suit for the recovery of money from the successful pre-emptor which, he alleges, he was made to pay to the vendor subsequent to the decree for pre-emption. Moreover in the suit for pre-emption he was not given more than Rs. 700, because he raised a plea that the item of Rs. 500 was fictitious. It is not now open to him to claim against the pre-emptor that that item was a genuine item. In my opinion, this suit is not maintainable and had been rightly dismissed. I dismiss this appeal and as the respondents are not present before me I make no order as to costs.

M.N. *Appeal dismissed.*

A. I. R. 1933 Lahore 258

BHIDE, J.

Nand Lal and *others*—Defendants—Appellants.

v.

Mt. Karam Bibi and *another*—Plaintiffs—Respondents.

Second Appeal No. 2615 of 1929, Decided on 23rd November 1932, from decree of Dist. Judge, Gujranwala, D/- 10th August 1929.

(a) Transfer of Property Act (1882), S. 41—Good faith and consent are necessary requirements.

Not only is it necessary that the transferee should have acted in good faith but also that the transfer should have been made by the ostensible owner with the consent express or implied of the person interested. If these requirements are not satisfied the principle of the section cannot be applied: 26 *All.* 496; *A. I. R.* 1924 *All.* 384 and *A. I. R.* 1926 *Cal* 916, *Dist.* [P 259 C 1]

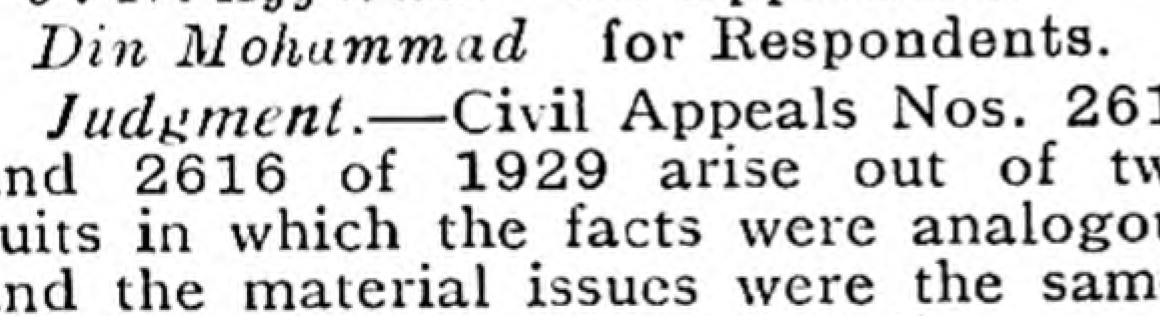
(b) Cosharers—Adverse possession.

Among cosharers in the absence of any overt act amounting to ouster or express denial of the title of the other cosharers the plea of adverse possession cannot succeed: *A. I. R.* 1929 *Lah.* 195, *Ref.* [P 259 C 2]

J. N. Aggarwal—for Appellants.

Din Mohammad for Respondents.

Judgment.—Civil Appeals Nos. 2615 and 2616 of 1929 arise out of two suits in which the facts were analogous and the material issues were the same. It will be convenient to dispose of them together. The following pedigree-table of the parties concerned will be useful:


Umar Bakhsh=Karam Bibi (pltff. 1)
Ghulam Hussain (defendant 1).
Ahmad Din
Mt. Nur Fatima (pltff. 2).
Muhammad Din (defendant 2).

The plaintiffs Mt. Karam Bibi and Mt. Nur Fatima sued for a declaration of their ownership of certain houses which are attached in execution of decrees against Ghulam Hussain and Muhammad Din (defendants 1 and 2,) which were based on mortgages executed by them. The plaintiffs have been declared owners of certain shares in these houses according to Mahomedan law by the Courts below and from this decision the defendants decree-holders have preferred second appeals. Only two points have been raised before me, viz, that (1) the appellants had acted in good faith in accepting mortgages of the property from Ghulam Hussain and Muhammad Din and plaintiffs should be held to be estopped from challenging the mortgages in the circumstances of the cases according to the principle laid down in S. 41, T. P. Act; (2) the suits were barred by time. As regards the first point the learned counsel for the appellant has laid stress on three documents viz: (a) an award given by one Alla Ditta on 5th December 1918 in respect of a dispute between Ghulam Hussain and Muhammad Din with regard to the property of Umar Bakhsh. The award was presented to Court and made a rule of the Court. According to this award the property of Umar Bakhsh was divided between the two brothers; (b) a deed of gift of 8th March 1925, in favour of Mt. Nur Fatima with respect to a small house, on the occasion of her marriage; (c) an agreement between Ghulam Hussain and Muhammad Din entered into after the award referred in (a), by which the income of a shop was ear-marked for the maintenance of Mt. Karam Bibi.

It was urged that the above documents are inconsistent with the rights set up by the plaintiffs and as these transactions were openly entered into and the award referred to in (a) was made a rule of the Court, the plaintiffs should now be held to be estopped from asserting their title. After considering the circumstances of the case and the findings of fact arrived at by the learned District Judge, I do not think the above contention can be upheld. The plaintiffs in this case are ladies. They were admittedly living with Ghulam Hussain and Muhammad Din. Mt. Nur Fatima was born on 2nd March 1907 and had not even attained majority when the documents in question were executed. The ladies were not parties to the transactions relied upon and the learned District Judge has found that there is no evidence to prove that they had accepted these transactions or in fact had any knowledge of them. This is a finding of fact and must be accepted as final. Moreover, even if Mt. Nur Fatima had been shown to have accepted the gift of a small house at the time of her marriage, this fact alone could not have been held to be sufficient to show that she had given up her rights in the property now in suit. As regards the award, the arbitrator has himself deposed that it was a sham transaction intended to defeat the claims of the ladies. The mere fact that the award was filed in Court would not necessarily show that these ladies were aware of it or consented to it.

In the Courts below the appellants had merely pleaded estoppel and had not specifically relied upon the principle of S. 41, T. P. Act. Consequently, the only issue framed on the point was whether the plaintiffs were estopped by their conduct from asserting their rights. No act or representation of the plaintiffs, which could result in estoppel has been proved. Even if the principle laid down in S. 41, T. P. Act, is taken to be a kind of estoppel it seems to me that the requirements of that section also are not fulfilled in the present cases. According to that section not only is it necessary that the transferee should have acted in good faith but also that the transfer should have been made by the ostensible owner with the consent express or implied of the person interested. In the present instance, there is no evidence to show any such consent on the part of plaintiffs. The learned counsel for the appellants has relied upon *Khwaja Mahomed Khan* v. *Mahomed Ibrahim* (1), *Mubarak Unnissa Bibi* v. *Mahomed Rajakhan* (2) and *A. I. R.* 1926 *Cal.* 916, but the facts of these cases are distinguishable as the ostensible owners had entries in the revenue records or title deeds in their favour. In the present cases, there is no evidence of any conduct of the plaintiffs from which even implied consent to the mortgages in question could be inferred. On the other hand it seems to me that the very transactions to which the learned counsel has referred should have apprised the transferees of the presence of these ladies in the family and should have put them on enquiry. But they do not appear to have made any such enquiries or secured their consent to the transactions in dispute. There are perhaps reasons to suspect that the ladies have been induced by the judgment-debtors to set up their title to defeat the claim of the decree-holders; but be that as it may, it seems clear that the requirements of S. 41, T. P. Act, are not satisfied and consequently the principle laid down therein cannot help the appellants.

As regards limitation, Art. 123, Limitation Act, was relied upon before the learned District Judge, but the learned counsel for the appellants conceded that that Article does not apply. He relied upon Art. 144, but that Article also cannot be of any assistance to the appellants, as there is no evidence to show that defendants 1 and 2 had set up any adverse title to the knowledge of the plaintiffs over 12 years before these suits. Plaintiffs were cosharers with defendants 1 and 2 an it is well established that in such cir circumstances in the absence of an overt act on the part of defendant 1 and 2 amounting to ouster or expres denial of the title of other cosharer the plea of adverse possession cannot succeed: cf. *Ahmad Bibi* v. *Shamasdin* (3). No such overt act or denial more than 12 years before the suits has been proved and consequently this contention also has no force. I accordingly dismiss both the appeals with costs.

K.S. *Appeals dismissed.*

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1. (1904) 26 All 490.
2. A I R 1924 All 884=79 I C 174=46 All 877.
3. A I R 1929 Lah 195=122 I C 81=10 Lah 842.

A. I. R. 1933 Lahore 259

TEK CHAND, J.

Firm Ganesh Dass Shankar Lal—Defendants—Petitioners.

v.

Firm Asa Nand-Radhe Sham—Plaintiffs—Opposite Parties.

Civil Revn. Petn. No. 115 of 1932, Decided on 20th October 1932, against order of Sub-Judge, First Class, Delhi, D/- 13th February 1932.

Government of India Act (1915), S. 107—Powers of superintendence under S. 107 are not merely administrative but are judicial also—Powers can be exercised to prevent injustice.

The High Court has jurisdiction to interfere under S. 107, Government of India Act, to prevent grave and irreparable injustice and its powers of superintendence under that section are not merely administrative but are also judicial: *A. I. R.* 1921 *Cal* 30 (*F. B*); *A. I. R.* 1928 *Pat.* 111 and *A. I. R.* 1930 *Lah.* 889, *Ref.*

[P 260 C 2]

J. G. Sethi—for Petitioners.

Bishan Narain—for Opposite Parties.

Judgment.—In a civil suit between the parties pending in the Court of the Subordinate Judge, First Class at Delhi, a preliminary issue was framed on 5th December 1931, as to whether that Court had jurisdiction to try the suit. The parties were directed to file the list of witnesses and deposit the diet money on 8th December 1931. On that date the defendant presented an application giving the names of his witnesses and stated that as they were residents of Lahore, an open commission should issue for their examination. The Court directed notice of this application to issue to the plaintiff and after hearing him ordered on 21st December 1931 that the prayer for the issue of an open commission could not be allowed but that the witnesses should be examined on interrogatories. The defendant was accordingly directed to file the interrogatories, which he did on 13th January 1932. On that date the interrogatories were sent to the pleader for the plaintiff with the direction that he should refile them on 18th January with the questions for the cross-examination of the witnesses. On 18th January the papers were returned to the Court with the remark that the plaintiff's pleader had gone to Calcutta and therefore the order of the Court could not be complied with. The interrogatories were re-sent to the plaintiff's pleader for return after compliance on 23rd January 1932, but on that date also it was found that the plaintiff's pleader had not returned to Delhi. The Court accordingly granted the plaintiff further time upto 28th January to submit his cross-interrogatories. On 28th the plaintiff's pleader appeared in Court and asked for extension of time. The Court granted time till 29th January, but on that date also the plaintiff's pleader was not ready with his cross-interrogatories. Further time was therefore given to him upto 1st February 1932 on which date the plaintiff filed the cross-interrogatories, and the defendant was directed to file the written questions for re-examination on 4th February 1932. The defendant accordingly filed the re-examination questions on 4th February 1932, and on that day the Court directed him to deposit Rs. 100 as the fee of a local commissioner and the diet money. The defendant deposited this amount on 12th February 1932.

When the case came up for hearing on 13th February 1932, the Court. instead of adjourning the case in order to have the interrogatories sent to Lahore and the witnesses examined by the commissioner appointed by it, proceeded to hear the evidence of the parties on the preliminary issue. The plaintiff gave evidence as his own witness and closed his case. The defendant's counsel naturally asked for an adjournment asking the Court to wait for the return of the interrogatories. The Court however refused to do so and decided the preliminary issue in favour of the plaintiff on the evidence which had been given by him as his own witness. From the narrative of the facts as given above it is quite clear that the delay in the issue of the interrogatories was due principally, if not entirely to the failure of the plaintiff or his counsel to file the cross-interrogatories within the time fixed. No less than five adjournments were granted to him for this purpose and it was not until 4th February 1932 that the interrogatories were ready for being sent to Lahore for the examination of the witnesses. In these circumstances there can be no doubt whatsoever that the order of the lower Court shutting out the evidence of the defendant was manifestly improper and is tantamount to a denial of justice to the defendant.

Mr. Bishan Narain for the respondent objects that this Court has no jurisdiction to interfere under S. 107, Government of India Act, as its powers of superintendence under that section are merely administrative and not judicial. There is ample authority that this view is not sound: see inter alia *Pigot* v. *Ali Mahomed Mangal* (1), *A. I. R.* 1928 *Pat.* 111, and *A. I. R.* 1930 *Lah.* 889 (891). It is of course in very rare and exceptional cases where grave and irreparable injustice has been done that this Court will act under this section. I think, the present is a case of this description and the circumstances are such that I should exercise my extraordinary powers of superintendence to direct the lower Court to do its duty. I therefore accept the petition, set aside the order of the Court below and remit the case to it with the direction that the interrogatories be issued to the defendant's witnesses and the case disposed of in accordance with law. Having regard to all the circumstances I leave the parties to bear their own costs in this Court.

M.N. *Petition accepted.*

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1. A I R 1921 Cal 30=60 I C 325=22 Cr L J 213=48 Cal 522 (S B).

A. I. R 1933 Lahore 260

BHIDE, J.

Dhara Singh—Defendant—Petitioner.

v.

Abdullah—Plaintiff — Opposite Party.

Civil Revn. Petn. No. 610 of 1931, Decided on 22nd November 1932, from order of Senior Sub-Judge, Lahore, D/- 24th April 1931.

Limitation Act (1908), S. 5—Extension of time under given circumstances ought to be granted—Failing to consider plea of extension of time is material irregularity — Civil P. C. (1908), S. 115.

Where in a revision it appeared that the copies of the judgment and decree were to be despatched by post, that the petitioner was never informed that any advance had first to be deposited by him and that as a matter of fact an order was passed in his presence that the necessary copies be supplied:

Held: that in the circumstances extension of time under S. 5 ought to have been granted.

Held also: that as the lower Court did not appear to have considered the question of extension of time at all, it acted with material irregularity in rejecting the appeal without such consideration. [P 261 C 1]

H. C. Kumar—for Petitioner.

Judgment.—This petition for revision was heard ex parte as the respondent failed to appear in spite of service. The plaintiff's suit for recovery of a sum of Rs. 35 having been decreed by the trial Court, the defendant preferred an appeal to the Senior Subordinate Judge, Lahore, but the appeal was dismissed as time-barred. The defendant claimed exclusion of time in respect of the copies of the judgment and decree. The copies were to be despatched by post, and it was contended that the period intervening between the completion of the copies and the despatch by post should have been excluded. The learned Senior Subordinate Judge, however, did not accept this contention inasmuch as it appeared that the defendant had failed to pay the necessary evidence to the copying agency. The defendant has now filed a petition for revision of the order of the learned Senior Subordinate Judge.

It is contended on behalf of the petitioner that the petitioner was never informed that any advance had first to be deposited by him and that as a matter of fact an order was passed in his presence that the necessary copies be supplied. There is no order on the application about payment of any advance. In the circumstances it is urged that the learned Senior Subordinate Judge should, at any rate, have granted extension of time under S. 5, Limitation Act. This contention appears to me to be justified. The learned Senior Subordinate Judge does not appear to have considered the question of extension of time at all, though it was raised. The circumstances of the case were such that an extension of time was, in my opinion, justifiable. I hold that the learned Senior Subordinate Judge acted with material irregularity in rejecting the appeal without considering the question of extension of time under S. 5, Limitation Act. I therefore accept the petition and setting aside the order of the learned Senior Subordinate Judge remit the case to him for re-decision. Costs will follow final decision.

V.S. *Petition allowed.*

A. I. R. 1933 Lahore 261

BHIDE, J.

S. V. Smith—Judgment-debtor—Petitioner.

v.

Duni Chand Kapur—Decree-holder—Opposite Party.

Civil Revn. Petn. No. 65 of 1932, Decided on 11th October 1932, against order of Addl. Sm. C. C. Judge, Lahore, D/- 10th July 1931.

Provincial Insolvency Act (1920), S. 31—Debt after adjudication—Protection order can be obtained.

The wording of S. 31 is very wide and protection order can be obtained by the debtor even when a debt is incurred after the adjudication. [P 261 C 2]

Mohammad Monier—for Petitioner.

M. L. Sethi—for Opposite Party.

Order. — This is a petition for revision of the order of the Small Cause Court, Lahore, dismissing an application under O. 21, R. 40, Civil P. C., for exemption from arrest in execution of the decree.

It appears that the debt which was the subject-matter of the decree had been incurred after the petitioner had been adjudicated an insolvent. The learned Judge of the Court below has dismissed the application on the ground that O. 21, R. 40 was not strictly applicable inasmuch as the petitioner had not appeared before him, in obedience to a notice nor had he been arrested in execution of a warrant. Secondly, he thought that it was open to the petitioner to secure a protection order from the insolvency Court. As regards the latter point the learned counsel for the petitioner urges that no protection order could be obtained from the insolvency Court as the debt in question had been incurred after adjudication. The wording of S. 31, Provincial Insolvency Act, however seems to be very wide and as at present advised I am not prepared to hold that no protection order could be obtained by the petitioner. Apart from this however it seems to me that it is open to the petitioner to appear before the Court below even now in obedience to the notice issued to him and plead for exemption from arrest on the ground of poverty or any other ground which he may have put forward. As the learned Judge of the Small Cause Court has remarked the petitioner's application was rejected because the requirements of O. 21, R. 40 had not been fulfilled. If those requirements are now fulfilled the petitioner will be able to present his case in the Court below and obtain an order on his application on merits. In these circumstances I am unable to find any adequate ground for interfering in revision with the order passed by the Court below. I dismiss the petition but taking into consideration all the circumstances I leave the parties to bear their costs.

R.K. *Petition dismissed.*

A. I. R. 1933 Lahore 262

BHIDE, J.

Udho Das and *others*—Plaintiffs—Appellants.

v.

Mehr Bakhsh and *others*—Defendants—Respondents.

Second Appeal No. 1817 of 1931, Decided on 4th November 1932, from decree of Dist. Judge, Dera Ghazi Khan, D/- 15th July 1931.

(a) Practice—Appellate Court should not make out new case for party.

The Judge of an appellate Court is not justified in making out a new case for a party which he has not taken in the lower Court. [P 262 C 2]

(b) Vendor and Purchaser — Sale being complete, subsequent discovery of defect in vendor's title, cannot avoid sale.

When a sale is complete and a conveyance is executed, vendee cannot avoid the sale on subsequent discovery of defect in vendor's title unless there has been fraud. His remedy lies merely to sue for damages: 52 *Cal.* 914, *Rel. on.* [P 263 C 1]

(c) Transfer of Property Act (1882), S. 54 —Oral sale is valid in Punjab.

Transfer of Property Act not being in force in the Punjab an oral sale is valid. [P 263 C 1]

(d) Transfer of Property Act (1882), S. 41— Some of cosharers shown as owners in revenue records—Transfer by such cosharers—Sale cannot be challenged by other cosharers.

Where some of the cosharers are shown in the Revenue Records for a number of years as owners and they were mortgaging the land, a sale by such cosharers cannot be challenged by the other cosharers and the vendee stands in the position of the vendors and any defence available to them is open to him as regards the title to the property: 46 *All.* 377 and 31 *C. W. N.* 205, *Ref* [P 263 C 1]

(e) Vendor and Purchaser — Vendee purchasing and mortgaging same property to vendor—Suit by vendor on mortgage—Vendee cannot set up title in third person.

Where a purchaser of certain property mortgages the same after the sale to the vendor, in a suit by the vendor on the mortgage, the vendee cannot set up title in a third person: *A. I. R.* 1923 *Pat.* 203 and *A. I. R.* 1923 *Oudh* 57, *Ref.* [P 263 C 2]

Chandar Gupta and *Faqir Chand*—for Appellants.

Ghulam Mohiuddin—for Respondents.

Judgment.—The plaintiffs in this case purchased two houses from Ilahi Bux and Alla Diwaya on 14th April 1924, by a registered sale-deed and sold the same orally to Mehr Bux, defendant 1, a few months later. Out of the sale price Rs. 75 were paid in cash and in lieu of the balance of Rs. 600 Mehr Bux mortgaged the same property in favour of the vendors by a deed dated 7th October 1924. Ghulam Hussain (defendant 2) stood surety for payment of the mortgage-money. The plaintiffs instituted the present suit on 9th April 1929 for recovery of Rs. 1,023-7-0 on the basis of this deed. Defendants pleaded that the plaintiffs had no title to the houses and the mortgage had been obtained by fraud. The trial Court held that no fraud was proved and decreed the claim. On appeal the learned District Judge held that although fraud had not been established, the contract was vitiated by "misrepresentation" and the defendants were entitled to avoid it. The appeal was accordingly accepted and the plaintiffs' suit was dismissed with costs. Plaintiffs have now preferred a second appeal.

It has been urged on behalf of the appellants that the learned District Judge was wrong in setting up a new case as regards "misrepresentation" for the defendants, that the defendants as mortgagors were not entitled to plead in this case that their title was defective, and that the plaintiffs had acted in good faith and their sale was valid in view of the principle laid down in S. 41, T. P. Act. It was further contended that even if there was any defect in the title, the sale having been completed and no fraud having been established, plaintiffs could only sue for damages.

These contentions appear to me to be well-founded. The defendants had alleged fraud and given particulars thereof. These have been fully discussed in the judgment of the trial Court, which held that no fraud was proved. In the circumstances, the learned District Judge was, in my opinion, not justified in making out a new case of "misrepresentation." Moreover, the sale in this case was complete. The sale was an oral one. Part of the consideration had been paid, and the defendants having accepted the sale, had further mortgaged the same property in favour of the vendors. It has been held that when defect in vendor's title is discovered after the execution of a conveyance and there has been no "fraud," the vendee cannot avoid the sale, but his remedy lies merely in a suit for damages: cf. *Eastern Mortgage and Agency Co., Ltd.* v. *Mahomed Fuzlul Karim* (1) and Gour's Law of Transfer of Property, p. 771, para. 1199, 5th Edn. It was urged on behalf of the respondents that there was no "conveyance" in the present instance, but the Transfer of Property Act not being in force in this Province, an oral sale is valid. It would thus appear that the defendants' remedy lay in a suit for damages, even if their allegation that the plaintiffs' title was defective is accepted as correct. It may however be pointed out that defendants did not institute any suit for possession of the property and there was no finding given against them that they cannot get the whole or any portion of the property sold to them. The plaintiffs had purchased the property from Alla Diwaya and Ilahi Bux as stated above. It was alleged by the defendants in the Courts below that one Maula Dad was the real owner of the property, but this position was given up before me in view of the evidence on the record. It was however urged that it was proved by the evidence on the record that there were other cosharers in the property and Ilahi Bux and Alla Diwaya could not sell more than their share. As regards this contention, the learned counsel for the appellant pointed out that Ilahi Bux and Alla Diwaya had been shown in the revenue records for a number of years as the owners of the property and had previously mortgaged it. He contended that according to the principle laid down in S. 41,, T. P. Act, the other cosharers would not be in a position to challenge the validity of the sale, in the circumstances of the case: cf. *Mubarakunnissa Bibi* v. *Mahomed Raza Khan* (2). This contention also seems to be prima facie sound. The defendant Mehr Bux stands in the shoes of the plaintiffs so far as the title to the property is concerned and any defence available to the plaintiffs would be available to him also: cf. *Ghulam Sidhique Khan* v. *Jogendra Nath* (3).

The defendant Mehr Bux did not however institute any suit for possession of the property as stated above. The question whether they will be deprived of any portion of the property as a result of the claim of the other cosharers has yet to be decided. As stated above, in view of the principle laid down in S. 41, T. P. Act, it is quite likely that the claim of the other cosharer may fail. The present claim is against the defendants as mortgagors and it is not open to them to set up the title of a third person in the present suit: cf *A. I. R.* 1923 *Pat.* 203, *Brij Mohan Lal* v. *Chandrika Singh* (4). For reasons given above, I hold that the decision of the trial Court was correct. I accept the appeal and restore the decree of the trial Court with costs throughout.

K.S. *Appeal accepted.*

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1. A I R 1926 Cal 385=90 I C 851=52 Cal 914.
2. A I R 1924 All 384=79 I C 174=46 All 377.
3. A I R 1926 Cal 916=96 I C 199.
4. A I R 1923 Oudh 57=70 I C 930=25 O C 251.

A. I. R. 1933 Lahore 263

BHIDE, J.

Habibullah—Defendant—Appellant.

v.

Atma Singh—Plaintiff—Respondent.

Second Appeal No. 225 of 1932, Decided on 6th July 1932, against decree of Senior Sub-Judge, Amritsar, D/- 12th November 1931.

Civil P. C. (1908), O. 39, R. 1—Injunction —Whether obtained without reasonable and probable cause—Finding of fact.

In India, the question whether an injunction was obtained without a reasonable and probable cause is purely one of fact: 25 *Bom.* 332 (*P. C.*), *Foll*; *A. I. R.* 1930 *Cal.* 392, *not Foll.* [P 264 C 1]

Nawal Kishore—for Appellant.

Hargopal—for Respondent.

Judgment.—This second appeal arises out of a suit for damages based on the allegation that the defendant had maliciously obtained a temporary injunction and kept the plaintiff out of possession of certain house property. Both the Courts below have found that the injunction was obtained without reasonable and probable cause. An objection was raised on behalf of the respondent that the finding of the Court below in this respect being one of fact, no second appeal lies. The learned counsel for the appellant contended that the question whether the injunction was obtained without reasonable and probable cause is a mixed question of fact and law and cited *Nagendra Nath Roy* v. *Basanta Das* (1), in support of the contention. The learned counsel for the respondent, on the other hand, relied on a ruling of their Lordships of the Privy Council:

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1. A I R 1930 Cal 392=125 I C 667=57 Cal 25.

viz. *Pestonji Muncherji Modi* v. *Queen Insurance Co.* (2). The latter ruling clearly shows that in India, at any rate, the question whether there was reasonable and probable cause in such a case is purely one of fact. Under the circumstances the contention of the learned counsel for the respondent must prevail. I dismiss the appeal but, in view of all the circumstances, I leave the parties to bear their costs.

R.M./R.K. *Appeal dismissed.*

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2. (1901) 25 Bom 332=2 Bom L R 938=4 C W N 781 (P C).

A. I. R. 1933 Lahore 264

JAI LAL, J.

Bhagwan Das— Plaintiff —Appellant.

v.

Tikaya Ram and *others*—Defendants—Respondents.

Second Appeal No. 385 of 1932, Decided on 20th October 1932, from decree of Dist. Judge, Mianwali, D/- 7th November 1931.

(a) Civil P. C. (1908), S. 19—Option to file suit at two places—Institution of suit at one of such places does not deprive plaintiff of his good faith—Limitation Act (1908), S. 14.

There can be no manner of doubt that if two Courts have jurisdiction to try a suit it is initially the privilege of the plaintiff to decide in which Court he would file the suit and the exercise of this option by filing it in a particular Court does not affect the question of jurisdiction or his bona fides. The mere fact therefore that the plaintiff instituted the suit in the civil Court at *X* instead of at *Y*, because it was convenient for him to do so, does not indicate that he did not institute the suit in good faith. [P 264 C 2]

(b) Limitation Act (1908), S. 14—In order to get benefit of S. 14 plaintiff must show that he acted in good faith.

In order to get the benefit of S. 14 the plaintiff must show that he acted in good faith, in other words, the test is whether the plaintiff believed and bona fide believed that his suit could be instituted at *X* and not at *Y*. [P 265 C 1]

(c) Limitation Act (1908), S. 5—Honest belief of appellant regarding adequacy of court-fee while presenting memorandum—Delay in giving adequate court-fee may be condoned.

Where the appellant honestly believed that he paid the proper court-fee when he originally presented the memorandum of appeal which was admittedly within time:

Held: that under the circumstances the delay in paying the adequate court-fee should be condoned. [P 265 C 1]

M. L. Puri—for Appellant.

Ganesh Dutta—for Respondents.

Order.—This second appeal arises out of a suit for damages for malicious prosecution. The suit was originally instituted in the Lyallpur District when admittedly it was within time. On an objection by the defendant however to the jurisdiction of the civil Courts in Lyallpur to entertain the suit the plaint was returned to the plaintiff to be presented in the Court having jurisdiction and it was consequently presented in the Court of the Senior Subordinate Judge at Mianwali. It is conceded that on the date when the plaint was presented in the Court of the Senior Subordinate Judge of Mianwali the suit would have been normally barred by time, but the plaintiff claimed the benefit of the provisions of S. 14, Limitation Act, and contended that if the time taken by him in prosecuting the case in the civil Court at Lyallpur be deducted his suit would be within time. The trial Court accepted this contention of the plaintiff and held that the suit was within time. On appeal however the District Judge came to the contrary conclusion. He held that the Lyallpur Court had no jurisdiction and the suit was instituted there for the convenience of the plaintiff, the underlying idea being that the defendant had to come from a distance to defend the suit and would consequently be inconvenienced. He therefore held that on the facts stated above it could not be held that the suit had been instituted in the civil Courts at Lyallpur in good faith.

There can be no manner of doubt that if two Courts have jurisdiction to try a suit it is initially the privilege of the plaintiff to decide in which Court he would file the suit and the exercise of this option by filing it in a particular Court does not affect the question of jurisdiction or his bona fides. The mere fact therefore that the plaintiff instituted the suit in the civil Court at Lyallpur, because it was convenient for him to do so, does not indicate that he did not institute the suit in good faith. The Senior Subordinate Judge seems to find that the question of jurisdiction was arguable, and therefore it could not be asserted with any justification that the plaintiff had no reasonable cause for believing that the civil Courts at Lyallpur had jurisdiction to entertain the suit. The District Judge on appeal has not given any finding on this part of the case. The appellant's counsel at one time attempted to argue that the suit could be properly and legally instituted at Lyallpur. This argument however is not open to him, because it has already been held that the civil Court at Lyallpur had no jurisdiction to entertain the suit and no appeal was filed against the order returning the plaint. The question still remains whether in instituting the suit in the Court at Lyallpur the plaintiff acted in good faith, in other words, whether the plaintiff really believed, and bona fide believed, that the suit could be instituted at Lyallpur. If this be found in plaintiff's favour then he would be entitled to the benefit of S. 14, Limitation Act. There may of course, be other circumstances, which may deprive him of this benefit but they must be found and stated. As I have already stated the District Judge has given no finding on this point.

A preliminary objection was raised on behalf of the respondent that this appeal is barred by time. It was contended that deficiency in court-fee stamp was made good after the limitation had expired. The question whether the court-fee stamp originally paid was insufficient is a debateable one, and in any case, it appears that the appellant honestly believed that he paid the proper court-fee when he originally presented the memorandum of appeal which was admittedly within time. I consider that under the circumstances the delay, if any, should be condoned and I order accordingly. On the merits of the case the District Judge has found in favour of the appellant. In order however to determine the question of the applicability of S. 14, Limitation Act, it is necessary to obtain a finding from the District Judge, whether the plaintiff believed in good faith when he filed his suit at Lyallpur that the civil Courts at Lyallpur had jurisdiction to entertain it and the District Judge will submit a finding on this matter either on the present record or after allowing the parties to produce further evidence if he considers such a course necessary and desirable. The case is remanded to him under O. 41, R. 25. Return within three months. The parties will have ten days for objections.

V.S. *Case remanded.*

A. I. R. 1933 Lahore 265

BHIDE, J.

Lachhman Das and *others*—Appellants.

v.

Ram Chander—Respondent.

Misc. First Appeal No. 600 of 1932, Decided on 14th October 1932, against order of Dist. Judge, Karnal, Camp Rohtak, D/- 18th January 1932.

Succession Act (1925), Ss. 232 and 276—Will in favour of religious institution—On death of Mahant in charge his successor is entitled to Letters of Administration.

Where a will is in favour of a religious institution and the property is to be managed by the Mahant in charge and on the death of such Mahant his successor is entitled to claim letters of administration with respect to the will. [P 265 C 2]

Shamair Chand—for Appellants.
R. C. Soni—for Respondent.

Judgment.—This is an appeal from the order of the District Judge, Karnal, granting letters of administration to the respondent Ram Chandar in respect of a will executed by one Bhagwana by which certain property was dedicated to a religious institution known as Tirath Pindara. Two points have been raised in appeal: (1) that the execution of the will has not been proved; and (2) that the original application was made by one Lajja Ram, but Lajja Ram having died the respondent Ram Chandar had no locus standi to continue the application.

As regards the first point the learned District Judge has discussed the evidence fully. The execution of the will is proved by the evidence of Sri Kanth, one of the attesting witnesses. The other attesting witness was dead and hence could not be produced. There is also the evidence of certain other witnesses to whom the deceased had mentioned his intention of executing a will or the fact of his having executed it. The learned counsel admitted that there is nothing in the record to show that these witnesses were interested or unworthy of credit. The witnesses have stated that Bhagwana was hale and hearty and it appears that he himself took the will to Sri Kanth for securing his signature as an attesting witness. In the circumstances the finding of the learned District Judge that the execution of the will by the deceased was satisfactorily proved is clearly correct.

As regards the second point the will was in favour of Tirath Pindara, as stated above, and the property was to be managed by Lajja Ram Brahmchari who was apparently the Mahant in charge. On the death of Lajja Ram, Ram Chandar became the manager and under S. 232, Succession Act, he was entitled to claim letters of administration with respect to the will. The learned counsel for the appellant has to concede this point also. There seems to be no force in this appeal and it is therefore dismissed with costs.

R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 266

TAPP, J.

Sant Ram and *others*—Defendants—**Petitiones.**

v.

Mutual Bank of India Ltd. and *another*—Plaintiffs and Defendants—Opposite Parties.

Civil Revn. Petn. No. 95 of 1931, Decided on 11th May 1931, from order of Senior Sub-Judge, Jhelum, D/- 23rd December 1930.

(a) Civil P. C. (1908), S. 20 (b) — Leave granted under S. 20 (b) without notice to opposite party—Order is not open to revision nor can S. 107 be invoked—Government of India Act (1918), S. 107.

Merely that a leave under S. 20 (b) is granted without first issuing notice to opposite party does not amount to acting in the exercise of jurisdiction illegally or with material irregularity so as to justify an interference in revision under S. 115; nor can such an order contemplate any grave or irreparable injustice so as to invoke the provisions of S. 107, Government of India Act. [P 266 C 2]

(b) Civil P. C. (1908), S. 151 and S. 20 (b) —Leave granted without notice under S. 20 (b)—Court can hear objections under S. 151.

Since there is no remedy under the provisions of the Code, where leave under S. 20 (b) is granted without first issuing notice to opposite party, the Court can in exercise of the inherent powers under S. 151 hear any objection against such leave and pass order necessary in the ends of justice. [P 266 C 2; P 267 C 1]

Gobind Ram Khanna—for Petitioners.

Ram Lal Anand—for Opposite Parties.

Judgment.—The Mutual Bank of India Limited, Jhelum, through their Manager and General Agent, brought an action in the Court of the Senior Subordinate Judge, Jhelum, for recovery of Rs. 10,472-14-0, against three persons as proprietors of the firm Ralia Ram-Jai Ram carrying on business at Gujranwala alleging themselves to be assignees of the amount claimed from one Nanak Chand, defendant 1 in the case. The alleged assignment was made on 22nd December 1930, and on the 23rd, that is, the following day, the plaintiff Bank applied to the Court under Cl. (b), S. 20, Civil P. C., for leave to bring their suit at Jhelum as the transferor defendant actually and voluntarily resided or carried on business or personally worked for gain within the local limits of the jurisdiction of the Jhelum Court. Leave was granted by the Court and notice of the transfer was given to defendants 2 to 5 on the 24th December and the suit was filed on 2nd January 1931. Against this order an application for revision has been filed on behalf of defendants 2 to 5, on the ground that the Court below before granting leave should have issued notice to the petitioners and heard and considered their objections. The learned Judge who admitted the petition was doubtful whether the order could be interfered with at that stage but thought the matter needed consideration. Notice, in his opinion, might not be a strict requirement under S. 20, but on general principles one perhaps might be advisable. A notice was also issued to the parties to show cause why the case pending in the Court of the Senior Subordinate Judge, Jhelum, should not be transferred to Gujranwala.

Now, it seems to me that the present petition for revision does not lie. There is no doubt that the Court had jurisdiction to grant leave and I find it difficult to hold that in granting leave in the exercise of its jurisdiction it acted illegally or with material irregularity in not first issuing a notice to the petitioners. I am also of opinion that the provisions of S. 107, Government of India Act, cannot be invoked for the purpose of the present case as it cannot be said with any reason that grave and otherwise irreparable injustice has been caused to the petitioners by the failure to issue a notice and hear and consider their objections, if any. The learned counsel for the plaintiff Bank contended that part of his cause of action arose in the Jhelum district by virtue of the assignment having taken place there and, consequently, under Cl. (c), S. 20, Civil P. C., he was entitled to bring his suit in the Jhelum District. This very argument helps to endorse the view that while notice was not required to issue under the law the circumstances were such as to render the issue of such a notice advisable. If the plaintiff Bank had relied solely on part of their cause of action arising in the Jhelum District and thus entitling them to bring their suit in that district the petitioners could have challenged this claim but any such challenge would be futile in view of the Court having given leave under Cl. (b), S. 20.

It seems to me therefore that the necessities of the present case justify exercise of the inherent powers contained in S. 151, Civil P. C. As shown above, the petitioners have no remedy open to them under any provision of the Code and I am of opinion, that the ends of justice require that they should be allowed an opportunity of raising any objections they may have to prefer against the application of the plaintiff Bank for leave to bring their suit in the Jhelum District. For the above reasons I would accept the application and, setting aside the order of the Senior Subordinate Judge of 23rd December 1930, granting leave under Cl. (b), S. 20, direct that notice do issue to the defendants petitioners in respect of the application made by the plaintiff Bank so that any objections the petitioners may have to make be heard and considered by the Court which should then pass such order as it thinks right and fit in the matter. I leave parties to bear their own costs.

V.B./R.K. *Order set aside.*

A. I. R. 1933 Lahore 267

TAPP, J.

Imam Din—Plaintiff—Appellant.

v.

Nizam Dian and *others*—Defendants—Respondents.

Second Appeal No. 532 of 1931, Decided on 13th July 1931, against decree of Dist. Judge, Sialkot, D/- 24th January 1931.

Civil P. C. (1908), O. 7, R. 7—Relief granted, which was not specifically claimed, should not be inconsistent with relief claimed or with case raised by pleadings.

The power of Court to grant general or other relief not specifically claimed while undoubted is always subject to the condition that the relief so granted is not inconsistent with that specifically claimed and with the case raised by the pleadings. [P 268 C 1]

A right of ownership and a right of easement are two totally distinct things. One is the right to hold, use and enjoy land or things to the exclusion of every one else, while a right of easement is a right in, to or over the property of another. One is a personal right while the other is annexed to the adjoining land or property (the dominant tenement) and runs with it. A relief arising out of a claim founded on the one is utterly inconsistent with relief on a claim based on the other. [P 268 C 2]

Nawal Kishore—for Appellant.

Nand Lal—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff alleging: (1) that he was a cosharer in an open site lying between his house and the house of the defendants and this site was jointly used by the parties; (2) that in the south-west corner of this site plaintiff had a door through which he used to pass to his house and that he also owned the wall on the south of this site; (3) that during the absence of plaintiff defendants 1 and 3 had taken exclusive possession of the site in question, had built a stair-case in a portion thereof, opened a window in the southern wall and, having removed the frame of the plaintiff's door, had put in their own frame and had also built a khura or bathing platform; and (4) that defendants 1 and 3 had deepened and covered a portion of a common drain passing through the court-yard which had obstructed the flow of water in front of plaintiff's house and caused a bad smell to arise.

Plaintiff claimed the following reliefs: (1) a declaratory decree in respect of the joint ownership of the site and that defendants 1 and 3 had no right to erect the stair-case, window and khura, substitute their own door frame for that of the plaintiff and deepen and cover the drain; (2) an injunction requiring them to remove the above; and (3) a decree for joint possession with defendants of a half share in the open site.

Defendants 1 to 3 contested all the claims set up by plaintiff and the trial Court finding against him on all the points raised dismissed the suit with costs. On appeal the learned District Judge rightly observing that the main question in the case was whether plaintiff was a cosharer in the open site, held on a careful review of the oral and documentary evidence that this had not been established. Plaintiff consequently had no right to challenge the building of the stair-case, and the khura and as he had failed to prove his ownership of the southern wall he was not entitled to restrain defendants 1 to 3 from opening a window in that wall. In regard to the door frame and the deepening and covering of the drain the lower appellate Court found that in the former case there was no proof that the frame alleged to have been removed belonged to plaintiff and that in the latter case no ground for relief had been made out. It was urged before the learned District Judge that he should decide whether plaintiff had a right of way through the door and over the site to his house, but though evidence had been led on both sides, each way he declined to do so. The appeal was accordingly dismissed.

The finding of the learned District Judge as to plaintiff having failed to establish that he was a cosharer in the site has been challenged on the ground that this is based on a misinterpretation of documents and incorrect legal presumptions. This contention is very easily disposed of by a reference to the documentary evidence in question which shows that it has absolutely no foundation. There has been no misconstruction of documents nor have any wrong legal presumptions been drawn therefrom. No question of law arises therefore and the finding of fact arrived at by the lower appellate Court in this particular cannot be questioned in second appeal. The only other point urged was that as the matter of a right of way had been raised and developed in the case and evidence having been led thereon the learned District Judge should have framed an issue and remanded the case for decision of this question. Mr. Nawal Kishore founded his argument on the rule of law that it is open to a Court to grant a relief not specifically claimed and that it is the imperative duty of the Court to make such amendments in issues or frame such additional ones as may be necessary for determining the matters in controversy between the parties.

These propositions find expression in R. 7, O. 7 and R. 5, O. 14, Civil P. C. He also cited *Govind Rao* v. *Sita Ram Kesho* (1) and *Shambhu Pattar* v. *Abdul Kadir* (2) and also relied on *Pulamada* v. *Ravthu* (3), that where a higher relief is claimed but not proved a lesser relief may be given. The two decisions of their Lordships of the Privy Council referred to merely emphasize in the earlier case the principle contained in R. 7, O. 7, that in certain circumstances relief not founded on the pleadings may be granted and in the later case they drew attention to the provisions of R. 5, O. 14, then S. 149 of the old Code. Now the power of Courts to grant general or other relief not specifically claimed while undoubted is always subject to the condition that the relief so granted is not inconsistent with that specifically claimed and with the case raised by the pleadings. For instance, as in 25 *I. A.* 195, where the plaintiff and the defendant each claims to be exclusively entitled to certain lands, the Court may, where certain conditions exist, declare each to be entitled to a moiety. In such cases there is no inconsistency between the relief claimed and that granted. In the present case we find plaintiff claiming to be a cosharer in a certain open site and over which he passed to get to his house. This right of access arose out of his co-ownership and was not dependent on any easement acquired by grant, prescription or necessity.

So far as I can see, the evidence as to plaintiff passing over his site in order to get to his house was led in order to establish his part ownership and not for the purpose of determining the right of passage itself. A right of ownership and a right of easement are two totally distinct things in my opinion. One is the right to hold, use and enjoy land or things to the exclusion of every one else while a right of easement is a right in, to or over the property of another. One is a personal right while the other is annexed to the adjoining land or property (the dominant tenement) and runs with it. In my judgment a relief arising out of a claim founded on the one is utterly inconsistent with relief on a claim based on the other. Finally, the learned counsel for the appellant drew my attention to an application of 31st October 1928, filed by plaintiff in which he alleged that defendants 1 to 3 had closed the door in dispute and thus completely barred all access to his house. I do not however see how this alters the position in any way. For the aforesaid reasons I find that the decision arrived at by the learned District Judge was correct and the appeal is accordingly dismissed with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 268

BHIDE, J.

Harnam Das—Plaintiff—Petitioner.

v.

Mangal Singh and *another* — Defendants—Opposite Parties.

Civil Revn. Petn. No. 234 of 1932, Decided on 13th October 1932, against order of Dist. Judge, Gujranwala, D/- 13th November 1931.

Sikh Gurdwaras Act (1925), Ss. 7 (3), 10 and 31 (2)—Suit for possession—Notification under S. 7 (3)—Suit should be stayed—Plaintiff should proceed under S. 10.

Where during the pendency of a suit for possession of property claimed as a Dera of Udasis a notification is published under S. 7 (3), it is necessary for the plaintiff to present a petition under S. 10 of that Act if he wants to claim possession thereof. The proceedings in the suit should be stayed in view of the provisions of sub-S. (2), S. 31. [P 269 C 1]

M. L. Puri—for Petitioner.

Order.—This petition for revision arises out of a suit by one Bawa Harnam Das for possession of certain property which was described as a dera of Udasis. The suit was resisted by the defendants who claimed it on behalf of

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1. (1899) 21 All 53=25 I A 195 (P C).
2. (1912) 35 Mad 607=39 I A 218=16 I C 250 (P C).
3. (1888) 11 Mad 94.

a Singh Sabha. During the pendency of the suit a notification was issued by the Local Government under S. 7 (3), Sikh Gurdwaras Act, 1925, with respect to this property. The learned Subordinate Judge however ignored this notification and proceeded to pass a decree for possession in favour of the plaintiff. An appeal was presented to the District Judge from this decision and it was brought to the notice of the Court that the proceedings were liable to be stayed under S. 31 (2), Sikh Gurdwaras Act, owing to the publication of the notification under S. 7 (3) of the Act referred to above. The learned District Judge in view of the mandatory provisions of the Sikh Gurdwaras Act set aside the decree passed by the trial Court and remanded the case for the proceedings being stayed and the record forwarded to the Sikh Gurdwara Tribunal in due course if and when the necessity arose.

The plaintiff has now come up to this Court on the revision side and it is urged on his behalf that the learned District Judge has erred in the exercise of his jurisdiction in passing the abovementioned order. It seems to me however that the order passed by the learned District Judge is correct. The suit, as stated above, was for possession of property, which was claimed as a Dera of Udasis. When a notification was published under S. 7 (3), Sikh Gurdwaras Act, it was necessary for the plaintiff to present a petition under S. 10 of that Act if he wanted to claim possession thereof. Consequently, the proceedings in the present suit had to be stayed in view of the provisions of Sub-S. (2), S. 31, Sikh Gurdwaras Act. In my opinion there has been no error in the exercise of the jurisdiction by the learned District Judge. I therefore dismiss this petition.

R.K. *Petition dismissed.*

A. I. R. 1933 Lahore 269

BHIDE, J.

Mt. As Kaur and *others*—Defendants—Petitioners.

v.

Jagat Singh and *another* — Plaintiff and Defendant—Opposite Parties.

Civil Revn. Petn. No. 705 of 1931, Decided on 23rd May 1932, against order of Dist. Judge, Amritsar, D/- 12th November 1931.

Punjab Courts Act (1884), S. 41 (3)—District Judge in deciding question of custom relying on Division Bench ruling—Refus to grant certificate cannot be revised.

Where a District Judge decides a question of custom relying upon a Division Bench ruling of the High Court, which was exactly in point and was uncontradicted by authority, his refusal to grant a certificate cannot be interfered with in revision: *A. I. R.* 1925 *Lah* 556, *Ref.* [P 269 C 2]

Jawahar Singh—for Petitioners.

Hem Raj Mahajan for *Din Dayal*—for Opposite Parties.

Judgment.—This is a petition for revision of an order of the District Judge, Amritsar, refusing to grant a certificate under S. 41 (3), Punjab Courts Act, on a question of custom. The learned Judge was of opinion that it could not be said in the circumstances of the case that the evidence was conflicting or uncertain. The learned counsel for the petitioner urges that the principal evidence in the case is the riwajiam, and as the answers to questions No. 60 and 61 in the riwajiam were conflicting, a certificate should have been granted.

It appears however that the learned District Judge has relied on a Division Bench ruling of this Court in which the answers to these questions were considered, namely, *A. I. R.* 1925 *Lah.* 556. The ruling relates to Sandhu Jats of the Amritsar District and the parties to the present case are also Sandhu Jats of that district. The ruling is admittedly in point and the learned counsel also concedes that there is no other ruling which could be considered to be on all fours with the present case. The learned District Judge having based his decision on a Division Bench ruling of this Court which is exactly in point and which is not contradicted by any other authority that the learned counsel can cite, I do not think it can be held that the learned District Judge has erred materially in the exercise of his jurisdiction in refusing a certificate in this case. The counsel for the petitioners referred to another point, namely, that assuming that the question of custom was rightly decided so far as the succession of daughters to non-ancestral property is concerned his client would still be entitled to maintain that the gift in dispute was valid inasmuch as it was assented to by the nearest reversioner. In support of this contention he has cited *Roshan* v. *Wadhawa* (1). This point however does not appear to have been raised in the application presented to the learned District Judge. Moreover, it hardly raises any point of custom on which a cer-

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1. A I R 1931 Lah 495=134 I C 197=13 Lah 180.

tificate would be necessary. I dismiss this petition with costs.

S.N./R.K. *Petition dismissed.*

A. I. R. 1933 Lahore 270

BHIDE, J.

Mohammad Umar— Defendant —Appellant.

v.

Mohammad Ibrahim and *others*—Plaintiffs—Respondents.

Second Appeal No. 727 of 1930, Decided on 21st October 1932, against decree of Addl. Dist. Judge, Ferozepore, D/- 1st February 1930.

(a) Limitation Act (1908), Art. 120—Starting point depends on facts and relief sought in each case.

The interpretation to be placed upon the expression "when the right to sue accrues" in Art. 120, to a large extent depends on the particular facts of the case to which the article is to be applied and the relief sought: *A. I. R.* 1931 *Lah.* 238 and *A. I. R.* 1932 *Mad.* 589, *Ref.* [P 270 C 2]

(b) Limitation Act (1908), Art. 120—Suit to declare that mortgage decree against wakf properties not binding—Plaintiff knowing of mortgage when it was sought to be enforced under decree—Limitation starts from that date and not from date of mortgage.

A mortgage without possession had been effected with regard to wakf property and a suit brought on its basis had resulted in a decree. The plaintiffs sued for a declaration that the decree was not binding on the property.

Held: that limitation under Art. 120 commenced to run from the date the plaintiff came to know of the mortgage, i. e., the date on which the mortgage was sought to be enforced and not the date on which the mortgage was executed: *A. I. R.* 1932 *Mad.* 589, *Rel. on.*; 33 *Mad.* 31 and *A. I. R.* 1932 *Bom.* 15, *Dist* [P 271 C 1]

Govind Das—for Appellant.

Ghulam Mohiuddin—for Respondents.

Judgment.—This was a suit for a declaration to the effect that the property in dispute is "wakf" property, that Pir Bakhsh, defendant 1, is not its owner and had no right to mortgage it and that the decree obtained by Mohammad Umar, defendant 2, against defendant 1 on the basis of the mortgage was null and void and the property could not be sold in execution of the said decree. The trial Court dismissed the suit, holding inter alia that it was time-barred. The learned Additional Judge however took a contrary view on the question and decreed the suit. From this decision the mortgagee Mohammad Umar has preferred a second appeal. The main point argued was that of limitation. The learned counsel for the parties were agreed that the article applicable for purposes of limitation was Art. 120, Sch. 1, Limitation Act, according to which the period of limitation is six years from the time when the right to sue accrues. The learned counsel for the appellant has urged that the starting point for limitation was the date of the mortgage in favour of the appellant, viz., 1st April 1920, and the suit having been filed more than six years from that date was clearly time-barred as held by the trial Court. The learned Additional Judge has on the other hand held that the right to sue accrued to the plaintiffs only when their rights were threatened by means of a sale of the property in execution proceedings in 1923. The question for decision is whether this view is correct.

The expression "when the right to sue accrues," which defines the starting point of limitation for the purposes of Art. 120 is somewhat indefinite. That article is residuary one covering a variety of cases and the general expression has been probably used purposely by the legislature. It has been frequently pointed out that the interpretation to be placed upon the expression "when the right to sue accrues" in Art. 120 would to a large extent depend on the particular facts of the case to which the article is to be applied and the relief sought, cf. *A. I. R.* 1931 *Lah.* 238; *Kandasami Pillai* v. *Munisami Mudaliar* (1). In the present instance the substantial relief claimed is a declaration that the property is not liable to be sold in execution of the decree. It is true that the mortgage itself which resulted in the decree, was effected by Pir Bux in 1920, and the plaintiffs in their own plaint stated that the cause of action arose on the date of the mortgage. But as the learned Additional Judge has pointed out, the plaintiffs cannot be tied down to that statement and the date of the accrual of the cause of action must be determined from the facts alleged and proved.

In the plaint it is clearly stated that the mortgage had been effected by Pir Bux in collusion with the mortgagee and that the plaintiffs only came to know of it at the time of the auction sale. It was urged that the mortgage was with possession, but the appellant himself denied in the Courts below that he was in possession, vide last portion of application of defendant dated 22nd March 1927. In the circumstances there is nothing to show that the

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1. A I R 1932 Mad 589=137 I C 707.

plaintiffs who were mere worshippers of the mosque had any notice of the mortgage till the mortgagee sought to enforce his rights by sale of the property in 1923. It was urged on behalf of the appellant that the cause of action arose when the mortgage was effected and not when the plaintiffs came to know of it. Reliance was placed in this respect on *Ottapurrakal* v. *Cherichil Pallikhal* (2), and *A. I. R.* 1932 *Bom.* 15. But as pointed out above, the starting point for limitation in cases of this type depends upon the nature of the suit and relief sought. In *Ottapurrakal* v. *Cherichil Pallikhal* (2) and *A. I. R.* 1932 *Bom.* 15 the plaintiffs sought to set aside certain alienations. In the present case the plaintiffs are not asking for such a relief, but are merely asking for a declaration that the property is not liable to be sold in execution of the decree obtained by the present appellant. The facts of the present case seem to be on a par with those in *Kandaswami Pillai* v. *Muniswami Mudaliar* (1) on which the learned counsel for the respondents has relied. In that case also a mortgage had been effected with regard to trust property and a suit brought on its basis had resulted in a decree. The plaintiffs sued for a declaration that the decree was not binding on the trust. It was held by a Division Bench of the Madras High Court that limitation under Art. 120 commenced to run from the date on which the mortgage was sought to be enforced. Their Lordships remarked as follows:

> "The question is when did the plaintiff's right to sue accrue? To determine this it is necessary to see what is the nature of his suit and of the relief sought. The suit was for a declaration that the mortgage-decree in the former suit was not binding on the trust property, nor for a decree setting aside the mortgage. The position was, that defendant 1 had borrowed money from appellant and given him a simple mortgage in the trust property. That mortgage, not having been given for any purpose binding on the trust, could confer no rights over the trust property upon the mortgagee. He had a mortgage which was unenforceable against the trust property. Until he did something to enforce that mortgage against the trust property what right to sue had the plaintiff? "There can be no right to sue," said their Lordships of the Judicial Committee in *Bolo* v. *Koklan* (3), 'until there is an accrual of the right asserted in the suit and its infringement of at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted'."

The learned counsel for the appellant sought to distinguish this ruling on the ground that the mortgage in that case was a simple one. But in the present case also although the mortgage was described as "baqubza." possession had not been taken. There was therefore no actual infringement of plaintiff's rights until the decree was sought to be enforced in 1923; and reckoning limitation from that date the suit was admittedly within time. The fact that the property in suit is wakf was decided in a previous suit by this Court and the point was not pressed. It was however urged that a mere suit for declaration did not lie and that the plaintiffs would have sued for the dispossession of the appellant. It appears however that the plaintiffs did seek at one stage to add such a prayer, but as pointed out above the appellant himself stated that he was not in possession. In the circumstances this contention has no force. It was then urged that Pir Bux at any rate was in possession and even his possession was adverse. But the learned counsel for the respondents has pointed out that Pir Bux was the step-son of Mt. Bholo who created the trust and he had already executed a document stating that he had no right in the property in suit. The appeal fails and is dismissed with costs.

M.N. *Appeal dismissed.*

A. I. R. 1933 Lahore 271

BHIDE, J.

Jagan Nath—Plaintiff—Appellant.

v.

Mt. Chauli—Defendant—Respondent.

Second Appeal No. 2443 of 1929, Decided on 24th October 1932, against decree of Dist. Judge, Ambala, D/- 3rd August 1929.

(a) Stamp Act (1899), S. 36—Documeut put on record but not admitted as result of judicial determination—Endorsement under O. 13, R. 4 not made—Stamp insufficient—Court can reject document under Civil P. C. (1908), O. 13, R. 3.

An insufficiently stamped document was filed and some evidence was taken on it and it was marked as an exhibit for reference, but the endorsement required by O. 13, R 4 was not made. The next day the opposite party objected to the admissibility of the document and the objection was upheld.

Held: that there was no judicial determination of the question of the admissibility of the document till the objection was raised and the words "admitted in evidence" in S. 36, Stamp Act, must be taken to mean letting in as a part of the evidence as a result of judicial determination of the question whether it can be admitted

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2. (1910) 33 Mad 31=5 I C 698.
3. A I R 1930 P C 270=127 I C 737=57 I A 325=11 Lah 657 (P C).

in evidence or not for want of stamp. Hence the Court could reject the document under O. 13, R. 3: 6 *I. C.* 903, *Expl.*; 16 *I. C.* 834; *A. I. R.* 1919 *Nag.* 141 and *A. I. R.* 1929 *Mad.* 522, *Rel on.* [P 273 C 1]

(b) Stamp Act (1899), Sch. 1, Art. 1—Acknowledgment and bond are distinct—Promise to pay cannot be deemed to be included in acknowledgment — Stamp Act (1899), S. 2 (5).

There is a clear distinction between an "acknowledgment" and a "bond" as defined in the Stamp Act, and if a "promise to pay" is imported into an "acknowledgment" the distinction between the two will practically disappear, when the acknowledgment is attested. A promise to pay cannot be deemed to be included in an acknowledgment for the purpose of the Stamp Act; *A. I. R.* 1919 *Nag.* 141 and 22 *Cal.* 757, *Ref.* [P 273 C 2]

Shamair Chand—for Appellant.

Asa Ram—for Respondent.

Judgment.—This is a suit for recovery of Rs. 1,388-0-9 on the basis of a bahi account. The trial Court granted a decree for Rs. 34-10-3 only, ruling out as inadmissible in evidence, the entry relating to the final balance on which the plaintiff had relied. This decree has been upheld by the learned District Judge in appeal and a second appeal has now been preferred to this Court by the plaintiff. The only two points requiring decision in appeal are: (1) Whether the entry relating to the final balance was rightly excluded by the Courts below as inadmissible in evidence. (2) Should the entry have been admitted in evidence on payment of penalty? The entry in question reads as follows:

> "*Lekha paya Ballu ka beta Chhajju ka zat Rajput basanda Jalauli. Rupaya baqi raha 744-4-6. Angutha Ballu ka. Ek anna ticket. Ugahi Atma Ram beta Sadi Ram Baniya Kotwala ke zabani Ballu Rajput ki.*"

The original bahi entry was produced in the Court on 10th May 1929, and the evidence of an attesting witness was recorded with reference to it without any objection being raised on the opposite side. On the next day some more evidence was recorded and then an objection was raised by the counsel for the defendant that the above entry was inadmissible in evidence as the stamp thereon had not been cancelled. The entry had already been marked as Ex. P. 1 but had not yet been initialed or signed by the Judge as required by O. 13, R. 4, Civil P. C. The learned Judge upheld the objection raised by the defendant's counsel and ruled out the entry as inadmissible in evidence. It is urged on behalf of the plaintiff that the entry having been brought on the record without objection on 10th May, the objection as to stamp could not be raised afterwards. It was further urged that the entry was tantamount to a bond and should have been admitted on payment of penalty, and that the decision of the Court below that it was only an acknowledgment and as such was not admissible in evidence even on payment of any penalty is erroneous. As regards the first point the Courts below have relied upon *Sundar Das* v. *Peoples Bank of India Ltd.* (1), which undoubtedly supports the view taken by them. The learned counsel for the appellant has urged that that ruling does not lay down sound law and has relied on the following observations in *Chuni Lal Tulsi Ram* v. *Mula Bai* (2):

> "'Admitted in evidence' means the act of letting the document in as part of the evidence; but it must be letting in as a result of judicial determination of the question whether it can be admitted in evidence or not for want of stamp. In other words, the Court admitting it must have applied its mind consciously to the question whether the document is admissible or not. It may, of course, happen in some cases that a document, which is not admissible for want of stamp, is allowed by the Court to go in, the question of stamp escaping its notice as well as the attention of the parties. In such cases the admission is a judicial determination of the question, because the Court let in the document on its view that there was nothing against its admission."

The learned counsel has laid stress on the latter part of the above observations and has urged that as the document was let in evidence without objection on 10th May, it should be taken to have been admitted on that date. I doubt however if this is a proper interpretation of those observations. The observations seem to refer to those cases, where the question of stamp escaped the notice of the parties as well as the Court during the course of the trial. It may also be pointed out that an objection as regards stamp was actually taken at the very outset in the case reported as *Chunni Lal Tulsi Ram Mula Bai* (2), and the observations on which the learned counsel has laid stress cannot therefore be treated as anything more than "obiter dicta." The learned counsel for the appellant has drawn my attention to the provisions of O. 13, R. 4 Civil P. C., and urged that "admission of a document" must precede the making of the endorsement prescribed by the rule. But even so, it does not follow that a document must be treated as

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1. (1912) 16 I C 834.
2. (1910) 6 I C 903.

admitted as soon as it is tendered and some evidence is led with regard to it without any objection. It is to be noted in this connexion that, according to O. 13, R. 3, Civil P. C.:

> "the Court may, at any stage of the suit, reject any document, which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection."

This rule must, no doubt be read subject to the provisions of S. 36, Stamp Act. But those provisions are of a stringent character and must be strictly construed. As pointed out in *Chunni Lal Tulsi Ram* v. *Mula Bai* (2) on which the learned counsel has relied the words "admitted in evidence" must be taken to mean letting in as a part of the evidence as a result of judicial determination of the question whether it can be admitted in evidence or not for want of stamp. In the present instance, it cannot certainly be said that there was any such determination of the question till an objection was raised on 11th May. The document has been marked as an exhibit for purposes of reference but the endorsement prescribed by O. 13, R. 4, Civil P. C., had not been made on it. If the endorsement had been made, it might perhaps have been urged with some show of reason that the endorsement was evidence of the document having been "admitted in evidence" by the Court. But as the endorsement had not been made, it is unnecessary to go into that question for the purposes of this appeal. I may however note that in *A. I. R.* 1929 *Mad.* 522 it was held that if an endorsement is made only in the course of routine and it is clear that the Judge had not applied his mind to the question of the admissibility of the document, it will have no value in this respect. The decision in *Sundar Das* v. *Peoples Bank of India Ltd.* receives support from the view taken in *Sita Ram* v. *Thakur Das* (3), and *A. I. R.* 1929 *Mad.* 522 and is, in my opinion, if I may say so respectfully, perfectly sound. As regards the next point it would appear from the definitation of a "bond" that the person executing it must thereby oblige himself to pay money to other. On the other hand, the description of an acknowledgment as given in Art. 1, Sch. 1, shows that it must

> "not contain any promise to pay the debt or any stipulation to pay interest, or to deliver any goods or other property."

In the present instance the entry in question does not admittedly contain any promise to pay. The learned counsel however urges that a promise to pay must be inferred from the acknowledgment of the balance. In support of this argument he has relied in this respect on *Mani Ram* v. *Rup Chand* (4), *Kahenchand Duta Ram* v. *Derya Ram Amritlal* (5) and *Fateh Chand* v. *Ganga Singh* (6). But this argument does not appear to be sound. There is a clear distinction between an "acknowledgment" and a "bond," as defined in the Stamp Act, and if a "promise to pay" is imported into an "acknowledgment," the distinction between the two will practically disappear, when the acknowledgment is attested in this case. As pointed out in *Sita Ram* v. *Thakur Das* (3) a promise to pay cannot be deemed to be included in an acknowledgment for the purposes of the Stamp Act. A similar view has been taken in *Hira Lal Sircar* v. *Queen-Empress* (7). In my opinion the decision of the Courts below is correct and the appeal must therefore be dismissed. In view of the technical nature of the points involved, however, I leave the parties to bear their costs in this Court.

M.N. *Appeal dismissed.*

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3. A I R 1919 Nag 141=50 I C 781.
4. (1906) 33 Cal 1047=2 N L R 130=33 I A 165 (P C).
5. A I R 1929 Lah 263=115 I C 764=10 Lah 745.
6. A I R 1929 Lah 264=115 I C 853=10 Lah 748.
7. (1895) 22 Cal 757.

A. I. R. 1933 Lahore 273

ADDISON AND AGHA HAIDAR, JJ.

Hasan Mohammad and *others*—Plaintiffs—Appellants.

v.

Mt. Bahishtan and *others*—Defendants—Respondents.

First Appeal No. 860 of 1927, Decided on 23rd November 1932, from decree of Senior Sub-Judge, Gujrat, D/- 20th December 1926.

(a) Hindu Law—Succession—Non-ancestral property—Daughter is preferred to collateral in fifth degree—Custom (Punjab).

Where property is non-ancestral *qua* the collaterals in the fifth degree of the propositus the daughter of the propositus is a preferential heir. [P 274 C 1]

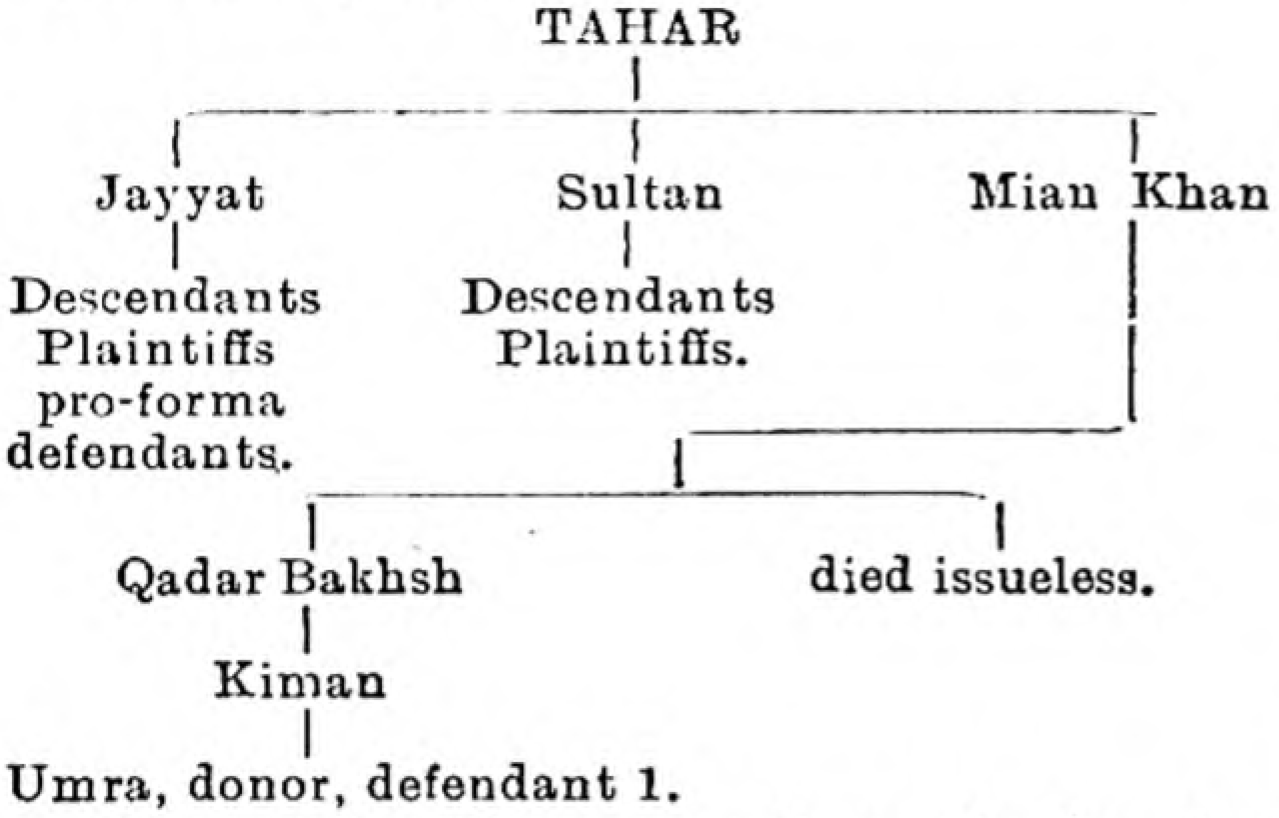
(b) Hindu Law—Ancestral property—Property deserted for eight generations becomes self-acquired in hands of acquirer.

The mere mention of the name of the common ancestor in the settlement pedigree table is insufficient to raise the presumption that the property has descended from him. Therefore land which had been deserted for eight generations becomes self-acquired property of the person who returns to the village after its desertion and re-acquires it and can no longer be treated as the ancestral property: *A.I.R* 1927 *Lah.* 477; *A.I R.* 1922 *Lah.* 320 and *A. I. R.* 1924 *Lah.* 677, *Foll.* [P 274 C 2]

Mukand Lal Puri and *Mehr Chand Sud*—for Appellants.

Bashir Ahmad and *Asadullah Khan*—for Respondents.

Addison, J.—The following pedigree table is necessary in order to understand the present case:



The plaintiffs are collaterals in the fifth degree of one Umra, who has gifted 362 kanals 13 marlas of land to his daughter, Mt. Bahishtan, by a registered deed dated 8th April 1926. This suit is for the usual declaration that as the property is ancestral, the gift should not affect the plaintiffs' reversionary rights upon the death of Umra. It was denied by the contesting defendants that the property was ancestral *qua* the plaintiffs and it was pleaded that Mt. Bahishtan and her husband were kept in the house by Umra in the capacity of khanadamad. Only two issues were framed, namely, whether the property was ancestral *qua* the plaintiffs and whether Mt. Bahishtan was a khanadamad. The trial Judge held that the property was not ancestral *qua* the plaintiffs and that there was a custom of khanadamadi in the District of Gujrat and that Mt. Bahishtan and her husband were the khanadamads of Umra. On both of these findings the suit was dismissed and the plaintiffs have appealed.

If the property is held to be non-ancestral *qua* the plaintiffs it will not be necessary to go into the second issue as the daughter is admittedly a preferential heir in such cases. In 1857 the land was recorded to be in the possession of Qadar Bakhsh who was then a very old man. In 1868 the revenue papers show Kiman to be in possession. In 1891-92 Umra was recorded as being in possession and his possession continued up to the date of gift. Further, the remarks at the bottom of the Shajra Nasab of 1868 give the history of this village in some detail. These remarks show that the village was deserted eight generations after it was founded by Sukha and Mukha and that it was re-settled about 1808 A. D. According to the Shajra Nasab, Tahar, the common ancestor of the parties, is in the eighth generation from Sukha. It was thus about his time that the village was deserted. It is obvious from this and from the fact that Qadar Bakhsh is a grandson of Tahar that it cannot be held that Tahar was one of the persons who came to re-settle in the village. It follows that the land must be held to be non-ancestral *qua* the plaintiffs. There is ample authority to this effect. In *Chanda Singh* v. *Mt. Banto* (1), a Division Bench of this Court held that the mere mention of the name of the common ancestor in the settlement pedigree table was insufficient to raise the presumption that the property had descended from him, while in *Manohar* v. *Mt. Nandi* (2), it was held that land which had been abandoned bacame the self-acquired property of the persons who returned to the village 20 years after its desertion and re-acquired it and could no longer be treated as the ancestral property of the descendants of the common ancestor who may have originally possessed the whole village. To a similar effect is *A. I. R.* 1924 *Lah.* 677. The remarks at the bottom of the pedigree table of 1857 are not the same as those recorded in 1868 but in this case I have no hesitation in holding that the genialogical table of 1868 is to be preferred to that of 1857. The decision of the trial Court therefore was correct that the property is not ancestral *qua* the plaintiffs. This is sufficient to dispose of the appeal which I would dismiss with costs.

Agha Haidar, J.—I agree.

V.S. *Appeal dismissed.*

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1. A I R 1927 Lah 477=102 I C 313=8 Lah 584.
2. A I R 1922 Lah 320=66 I C 399=2 Lah 366.

A. I. R. 1933 Lahore 274

BROADWAY AND COLDSTREAM, JJ.

Abdul Rahim—Plaintiff—Appellant.

v.

Fateh Ullah and *others*—Defendants—Respondents.

First Appeal No. 2634 of 1926, Decided on 7th June 1932, against decree of Revenue Asst. Judge, Lyallpur, D/- 6th July 1926.

(a) Civil P. C. (1908), S. 11—Co-defendants—In previous suit, one set of defendants admitting plaintiff's claim—Decision regarding admissibility of certain document indirectly necessary—Issue regarding admissibility of that document in subsequent suit between two sets of defendants would be barred.

In the previous suit one set of defendants admitted plaintiff's claim. For the decision of the question in that suit it was necessary to decide whether a certain document was admissible in evidence, though no issue on that question was framed in the suit.

Held: that the issue regarding the admissibility of that document in a subsequent suit between the two sets of defendants would be barred by res judicata: 21 *Cal.* 430; *A. I. R.* 1932 *P. C.* 161 and *A. I. R.* 1931 *P. C.* 114, *Rel on.* [P 278 C 1]

(b) Civil P. C. (1908), S. 11—Decision on question whether document is award or not acts as res judicata.

The question whether a document was an award or not, is clearly not one of law alone, but has to be determined with reference to the evidence of the circumstances on which the document concerned came to be executed, and so a decision on the question may certainly act as res judicata: *A. I. R.* 1927 *P. C.* 102, *Disc.* and *Dist.* [P 277 C 2]

(c) Part performance — Plaintiff alleging that suit properties were partitioned by award—Defendant pleading that no final partition had taken place—Parties in possession of equal shares—Part performance, doctrine cannot be applied

Where a plaintiff alleges that the suit properties ave been partitioned by an arbitrator's award and that the parties are in possession of approximately equal shares, but the defendant pleads that no final partition had taken place the doctrine of part performance cannot be applied to show that the award was acted upon. [P 278 C 1]

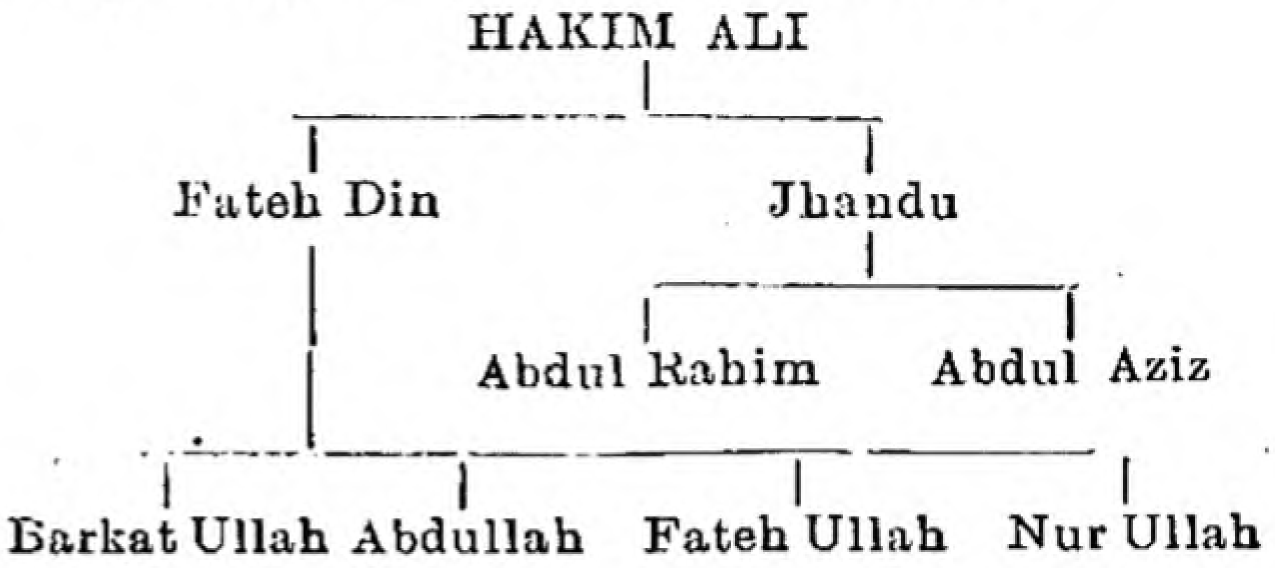
(d) Evidence — Admissibility — Mere request of counsel that record should be sent for does not result in placing on evidence every document contained in that record.

Mere request of a counsel that a record should be sent for does not by itself result in placing on evidence every document contained in that record. The documents have to be stated to be relied upon and formally proved before they can be admitted: *A. I. R.* 1921 *Lah.* 119, *Rel on.* [P 278 C 2]

J. N. Aggarwal and *Mehr Chand Mahajan*—for Appellant.

Badri Das and *Iqbal Singh*—for Respondents.

Coldstream, J.—This judgment will dispose of the two Appeals Nos. 2634 and 2635 of 1926, the facts and the questions for decision in which are admittedly the same. The suits from which they arise related to areas of land in chak No. 207 and chak No. 224 in the Chenab Colony in the Lyallpur District. These lands were acquired in the time of Fateh Din (father of Fateh Ullah, Abdullah, Nur Ullah and Barkat Ullah) and his brother Jhandu, father of Abdul Rahim and Abdul Aziz, Arains, originally of Jullundur District.



Fateh Ullah and Abdullah applied to the revenue authorities in 1922 for partition of the lands. Their applications were opposed by Abdul Rahim who asserted that the lands had been partitioned by an arbitrator on 10th January 1920 and that the sons of Fateh Din and Jhandu had taken possession of their allotted shares (some areas having been left joint) in accordance with the arbitrator's award. The parties were referred to the civil Court and on 1st September 1925, Abdul Rahim instituted two suits in respect of the land in the two chaks which he claimed to be his by virtue of the arbitration praying for a declaration against the sons of Fateh Din to the effect that the lands had been partitioned and that Fateh Ullah's and Abdullah's applications for partition were not competent. Abdul Rahim's brother Abdul Aziz was impleaded as a pro forma defendant. The suits were resisted by the sons of Fateh Din (the petitioners for partition and their two brothers) who, while admitting that the lands had been partitioned in 1920 for temporary purposes, denied that there had been any final partition by virtue of an award. They also pleaded that the document put forward by the plaintiff as the alleged award marked as Ex. P. W. 8/A. B. was not admissible in evidence for want of registration.

The suits were tried together by the Revenue Assistant, Lyallpur, in exercise of his powers as a Subordinate Judge of the First Class, proceedings being recorded for the most part in the suit relating to the land in chak No. 307 (Appeal No. 2634 of 1926) and the following issues were struck: (1) Has the land in dispute been finally partitioned ? (2) Is the registration of the deed of partition, attached to the record of the case, not compulsory ? (3) If compulsory, what is its effect ? After hearing one witness produced by the plaintiff and before the examination of the second (Attar Chand; Patwari) had been concluded the Subordinate Judge on 1st March 1926, struck two more issues on a plea raised by the plaintiff that the question of the admissibility of the document recording the alleged award was res judicata. The issues framed were: (1) Has it been decided in a civil Court that the registration of the deed of partition is not compulsory ? (2) What is its effect ? The hearing was adjourned "for citing the law." On 15th April 1926, proceedings were again adjourned with the approval of counsel on both sides pending the arrival of the records of "all cases between the parties," which had been requisitioned from the High Court, as the presence of these records was necessary "for the decision of the case and disposal of the additional issues and for the advancement of arguments."

Arguments were heard on the 22nd June and on 6th July 1926, the Subordinate Judge gave judgment against the plaintiff holding that the document in dispute was a deed of partition compulsorily registrable under S. 17, Registration Act, and that other evidence in proof of its contents could not be heard. Against this decision the plaintiff Abdul Rahim has preferred the two appeals before us through Mr. Jagan Nath Aggarwal. Mr. Jagan Nath's contentions are firstly that the document in question was determined, rightly or wrongly, to be an award (and therefore not compulsorily registrable under S. 17, Registration Act), in a suit to which the appellant and the respondents were party (*Nur Ullah* v. *Abdul Rahim, etc.*), decided by the Senior Subordinate Judge, Lyallpur on 21st May 1923, and that this decision made the question res judicata; secondly, that if the question was still open for adjudication the finding that the document was a dispositive deed of partition is incorrect, for the document was merely a recital of a previously completed arrangement by an arbitrator and thirdly, that even if the document was one compulsorily registrable the equitable doctrine of part performance ought to have been applied and the partition given effect to.

The dispute over the lands first appears to have arisen after the death of Jhandoo in 1900. An account of the previous litigation between the parties is given in the judgment by the Senior Subordinate Judge, Lyallpur, dated 21st May 1923, mentioned above (at p. 26 of the printed book). The suit (No. 266) decided by that judgment was instituted by Nur Ullah (defendant 4 in the present suit) for possession of five squares of land in chak No. 224 (part of the property now in suit) which he claimed to be his separate property by virtue of a bequest by one Bathu. All the parties to the present suit were impleaded as defendants. The suit was contested by Abdul Rahim and his brother only. They pleaded that Bathu was merely a benamidar for Fateh Din and Jhandu who had really acquired the land, to which all the sons of Fateh Din and Jhandu were entitled to succeed, and asserted that there had been a compromise between the parties resulting in the five squares in dispute being included in a general partition of properties between the sons of Jhandu and the sons of Fateh Din. In proof of their case Abdul Rahim and Abdul Aziz relied upon the document now under consideration as evidence of the fact that a partition had followed the compromise. Objection was taken by Nur Ullah to the use of this evidence on the ground that the document was a partition deed and was inadmissible under the provisions of S.91, Evidence Act. The learned Subordinate Judge overruled the objection holding that (1) in any case the document was admissible to prove the fact of partition, citing on this point *Wazir Ali* v. *Mahbub Ali* (1); and (2) that the document was an award and therefore exempt from registration under Cl. 6, sub-S. (2), S. 17, Registration Act. The question is whether this decision is now binding on the defendants-respondents.

For the respondents Mr. Badri Das contends that the decision of 1923 cannot operate as res judicata because in the previous suit there was no conflict between Abdul Rahim the present appellant, and the contending respondents, the sons of Fateh Din. He also takes the point that the previous decision was not upon a matter directly and substantially in issue in the former suit. He contends lastly that the matter decided was one of pure law and therefore always open to re-decision. If these contentions prevail the decision of the trial Court must, Mr. Badri Das argues, be upheld for the document is not an award (and Mr. Jagan Nath does not argue that it is) but clearly a dispositive document purporting to recording an agreement to partition.

The previous suit, as already noted was instituted by Nurullah and contested by Abdul Rahim and Abdul Aziz,

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1. A I R 1914 Lah 238=10 P R 1917.

the sons of Jhandu, Nurullah's brothers being joined as defendants pro forma. The judgment in the suit itself emphasized the fact that the sons of Fateh Din had "a common interest against the sons of Jhandu," while Barkat Ullah had actually been acting for Nurullah as his best friend. On one side it was contended that there had been a compromise settling the title in the five squares then in suit; on the other this was denied, and it is manifest that in this conflict Nurullah's brothers admitted Nurullah's exclusive title in the suit property, a position wholly inconsistent with the claim set up by Jhandu's sons. It seems to me impossible to hold in the circumstances that there was no conflict between the sons of Jhandu and their co-defendants, Nurullah's brothers, on the question whether there had been a valid compromise. For the decision of this question it became necessary to adjudicate on the plea that there had been a partition in furtherance of the compromise. This adjudication could not be effected without determining whether the document concerned was admissible in evidence, a question necessary for the decision of the suit and therefore a matter directly and substantially in issue between the parties. The mere fact that no distinct issue on the point was struck for trial is immaterial: see *Dakhyani Debee* v. *Dolegobind Chowdhry* (2)—as is the fact that there was no active contest between the co-defendants: see *Maung Sain Done* v. *Ma Pan Nyuan* (3). The circumstances in the present case thus appear to me to fulfil the three conditions laid down as requisite for the application of the rule of res judicata between co-defendants by their Lordships of the Privy Council in *Munni Bi* v. *Triloka Nath* (4), namely, that (1) there must be a conflict between the defendants concerned; (2) that it must be necessary to decide the conflict in order to give the defendants the relief claimed (had the plaintiff succeeded the sons of Jhandu could have appealed on the ground that their evidence had been improperly excluded); and (3) that the question must have been finally decided.

In pressing his argument that the matter decided in the previous suit (1) was a question of law alone, (2) the decision of which must always be open to redecision in a subsequent suit, Mr. Badri Das has refered us to *Moti Sagar* v. *Dhanna Mal* (5) a judgment of this Court which came before the Privy Council in further appeal. The judgment of their Lordships of the Privy Council is published in *Dhanna Mal* v. *Moti Sagar* (6). In that case it was decided that a document purporting to be a lease could not be regarded as something other than a lease simply because it was a unilateral document. It was also held that the question whether, on the facts proved, the defendants in the case were mere tenants at will (as contended by the plaintiff) or were entitled to a permanent inheritable right subject to payment of a fixed rent, was one of law, a previous decision of which did not operate as res judicata and was also open to review by the High Court on second appeal. I see nothing in these judgments compelling us to hold that in this case the question whether the document in dispute is an award or not is again open to redecision.

The judgments show that the lease put forward in that case was admittedly one which created a tenancy and the matter in issue was merely the question whether a lease drawn up as a unilateral document was or was not a document compulsorily registrable under the Registration Act. No question of res judicata arose in connexion with this point. In the case now before us the matter in issue (the question whether the document was an award or not) was clearly not one of law alone but had to be determined with reference to the evidence of the circumstances on which the document concerned came to be executed. The decision in such a matter may certainly operate as res judicata. For this there is ample authority to which I do not think it necessary to refer. The Privy Council in the course of their judgment certainly found that in the particular case before them, the question whether a tenancy was permanent or precarious was not itself a question of fact which could be agitated in second appeal, but their decision that the question was not res judicata by means of a previous decision of the District Judge was not, it seems, based on this finding but on the ground stated at p. 580 (of 8 *Lah.*) namely, that the District Judge must be taken to have withdrawn his previous decision. As pointed out by

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2. (1894) 21 Cal 480.
3. A I R 1932 P C 161=137 I C 828=10 Rang 322=59 I A 247 (P C).
4. A I R 1931 P C 114=132 I C 598=58 I A 158=53 All 103 (P C).
5. A I R 1922 Lah 329=72 I C 177.
6. A I R 1927 P C 102=101 I C 855=54 I A 178=8 Lah 573 (P C).

Broadway, J., in the judgment of this Court, the District Judge had not in the previous litigation come to any definite decision on the point. Indeed, the nature of the tenancy had never been adjudicated upon (p. 1923 of the report in the Indian Cases).

I am therefore of opinion that the decision of the Senior Subordinate Judge, Lyallpur, in Suit No. 266 that the document Ex. P. W. 8/A. B. is in fact an award and therefore admissible in evidence although unregistered is binding on Nurullah's brothers and was not open to revision in the case before us. On this conclusion the appeals must succeed and it is not necessary to discuss at length the other contentions urged by appellant's counsel. I think it proper however to record that I fail to see why in a case like this the equitable doctrine of part performance could be applied even if it was open to us to apply it in face of the statutory provisions of the Indian Law of Evidence. The admitted fact that the parties are individually in possession of separate and approximately equal areas of the suit property is not incompatible with the defendants' plea that no final partition has taken place and by itself does not show that an award has been acted upon. It is conceded by Mr. Jagan Nath that there is no evidence showing that in the land revenue records the parties are shown as exclusive owners of the areas in their possession. My decision that the document Ex. P. W. 8/A. B. must be held to have been decided, as between parties to be an award and therefore exempt from compulsory registration must not, of couse, be understood to go any further than is expressed by these words. The question whether there was a final partition giving effect to a compromise and determining the parties' title in the areas taken into possession still remains to be decided. The learned Subordinate Judge who decided Suit No. 266 did not express any clear decision upon it.

I wish to add here that if it had still been open to us in spite of the previous decision, to come to a finding on the question whether the document under consideration is or is not an award, we could not have decided it until the parties had been given an opportunity to produce all their evidence relating to the circumstances in which the document was drawn up and signed by the parties. The plaintiff had summoned two more witnesses. We do not know what evidence they would have given. As already stated, the learned Subordinate Judge abruptly closed the evidence and proceeded to decide the suit before the plaintiff's evidence was complete. His decision on the point of res judicata certainly made it necessary for him to proceed to decide what was the nature of the document concerned but to do this it was surely necessary for him to hear all the evidence relevant to the question. The result is that the appeals are accepted and the cases remanded to the lower Court for redecision in view of this Court's ruling that the document Ex. P. W. 8 A. is admissible in evidence. The Subordinate Judge will hear and consider such further evidence as the parties were entitled to produce. I note that the lower Court appears to have disregarded the rules regarding the production and proof of documents having apparently admitted to the record a mass of documents which have not been formally proved or even stated to be relied upon by the parties. It is reasonable to suppose that some of these documents would have been proved by the Patwari, P. W. 2, had his evidence not been summarily cut short. Both parties wished the Court to refer to the provious records to which the order of 15th April 1926, relates, but the mere request of a counsel that a record should be sent for does not by itself result in placing on evidence every document contained in that record. The attention of the lower Court is drawn to *Maya Dhari* v. *Chunni Lal* (7), which describes the procedure to be followed. The costs of these appeals will be paid by the respondents.

Broadway, J.—I agree.

S.N./R.K. *Case remanded.*

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7. A I R 1931 Lah 119=131 I C 374.

A. I. R. 1933 Lahore 278

JAI LAL, J.

Mangladha Shah— Plaintiff— Appellant.

v.

Abdul Ghani — Defendant — Respondent.

Second Appeal No. 409 of 1929, Decided on 18th October 1932, against decree of Dist. Judge, Attock, D/- 12th December 1928.

Landlord and Tenant—Rent suit based on registered lease deed—Oral evidence to prove rescission of lease should not be admitted—Evidence Act (1872), S. 92.

In a suit for recovery of rent for five years, alleged to be due from the defendant under a registered lease, the execution of the registered lease was admitted by the defendant, but he alleged that he had never taken possession of the land and that there was rescission of the lease. The plaintiff objected to the oral evidence led by the defendant, to prove the rescission of the lease which was registered.

Held: that the view of the District Judge that oral evidence was admissible under the circumstances to prove the rescission of the lease was erroneous: *A. I. R.* 1928 *Lah* 873; *A I R.* 1919 *Mad.* 833 and *A. I. R.* 1920 *Bom.* 115, *Rel. on.* [P 279 C 1]

Shamair Chand—for Appellant.

Ghulam Mohiuddin—for Respondent.

Judgment.—This second appeal arises out of a suit for recovery of Rs. 1,500 as rent for five years, alleged to be due from the respondent under a registered lease. The execution of the registered lease was admitted by the respondent, but he alleged that he had never taken possession of the land. In the witness-box he stated that he took possession for a short time but found the land to be unsuitable for the purposes for which he had taken it and therefore by mutal agreement the lease was rescinded and possession of the land was restored to the plaintiff, who has since been in possession thereof. It may be mentioned that Rs. 300 had been paid by the respondent in advance as rent for three years. The case for the respondent was that this Rs. 300 were allowed to be forfeited by the plaintiff in consideration of the rescission of the lease. The District Judge has found that the defendant did take possession of the land originally, but soon after there was an agreement between the parties that the lease should be considered to be rescinded, Rs. 300 being forfeited to the plaintiffs and in consequence of this agreement the plaintiff took possession of the property and during the period of five years for which the rent is claimed the plaintiff and not the respondent has been in possession of the land. He has dismissed the suit holding that a fresh agreement rescinding the lease has been proved. An objection taken by the plaintiff that oral evidence to prove the rescission of the lease which was registered and which was required to be registered under the law could not be admitted. The view of the learned District Judge that the oral evidence is admissible under the circumstances to prove the rescission of the lease is erroneous, as will appear from *Chanaya Lal* v. *Rallia Ram* (1), *Mallappa* v. *Matun Nagu Chetty* (2) and *Jagannath* v. *Shankar Ganpat* (3). It has however been found by the District Judge that during the period for which rent is claimed by the plaintiff he himself was in actual possession of the land and that defendant was not in possession. In my opinion therefore there has been a failure of consideration and the plaintiff is not for that reason entitled to recover any rent.

The learned counsel contends that the finding of the District Judge that possession was with the plaintiff should not be accepted as binding in this Court and that the case should be remanded for further inquiry because no issue was raised on this question. The only issue on the merits which as framed was, whether the plaintiff was entitled to the rent claimed by him, but evidence was led by the plaintiff to prove that the defendant was in possession during the period for which the rent is claimed and to rebut this evidence the defendant produced some evidence which has been believed by the District Judge who has definitely given a finding on the question of possession. He has used this finding to support his conclusion that there was a rescission of the contract. In my opinion there is no necessity to remand the case and the conclusion of the District Judge on the factum of possession is conclusive. It was also contended on behalf of the appellant that there has been variation in the pleadings of the defendant and that the Court has made out a new case for him. There is however no force in this contention because both the parties understood in the trial Court and in the Court of the District Judge what their respective cases were and there was not misapprehension in this respect. Consequently I dismiss this appeal though on grounds different to those found by the District Judge and leave the parties to bear their own costs in this Court.

V.S. *Appeal dismissed.*

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1. A I R 1928 Lah 873=110 I C 424=9 Lah 597.
2. A I R 1919 Mad 833=48 I C 158=42 Mad 41.
3. A I R 1920 Bom 115=54 I C 689=44 Bom 55.

A. I. R. 1933 Lahore 279

TEK CHAND, J.

Chiragh and *others*—Defendants—Appellants.

v.

Gul Mohammad and *others*—Plaintiffs—Respondents.

Second Appeal No. 711 of 1931, Decided on 20th July 1932, against decree of Dist. Judge, Jullundur, D/- 24-1-31.

(a) Custom (Punjab)—Succession—Non-proprietary holding — Non-proprietor entailing forfeiture—Heirs of last holder are not entitled to succeed.

In a non-proprietary holding succession to the rights of the non-proprietor arises only if the tenure is still in existence at the time of the death of the last holder. If by an act or conduct on his part, the last holder has entailed the penalty of forfeiture, the proprietor is entitled to resume possession forthwith and the descendants or near collateral heirs of the non-proprietor who would have succeeded to the tenure on his death are not entitled to step in and claim to be let in possession. The analogy of "reversioners" succeeding to proprietary holding according to the personal law of the last holder, does not hold good in the case of a non-proprietor. [P 281 C 2]

(b) Custom (Punjab)—Succession—Life tenant can surrender estate and accelerate succession only on relinquishment of entire estate—Hindu Law—Reversioner.

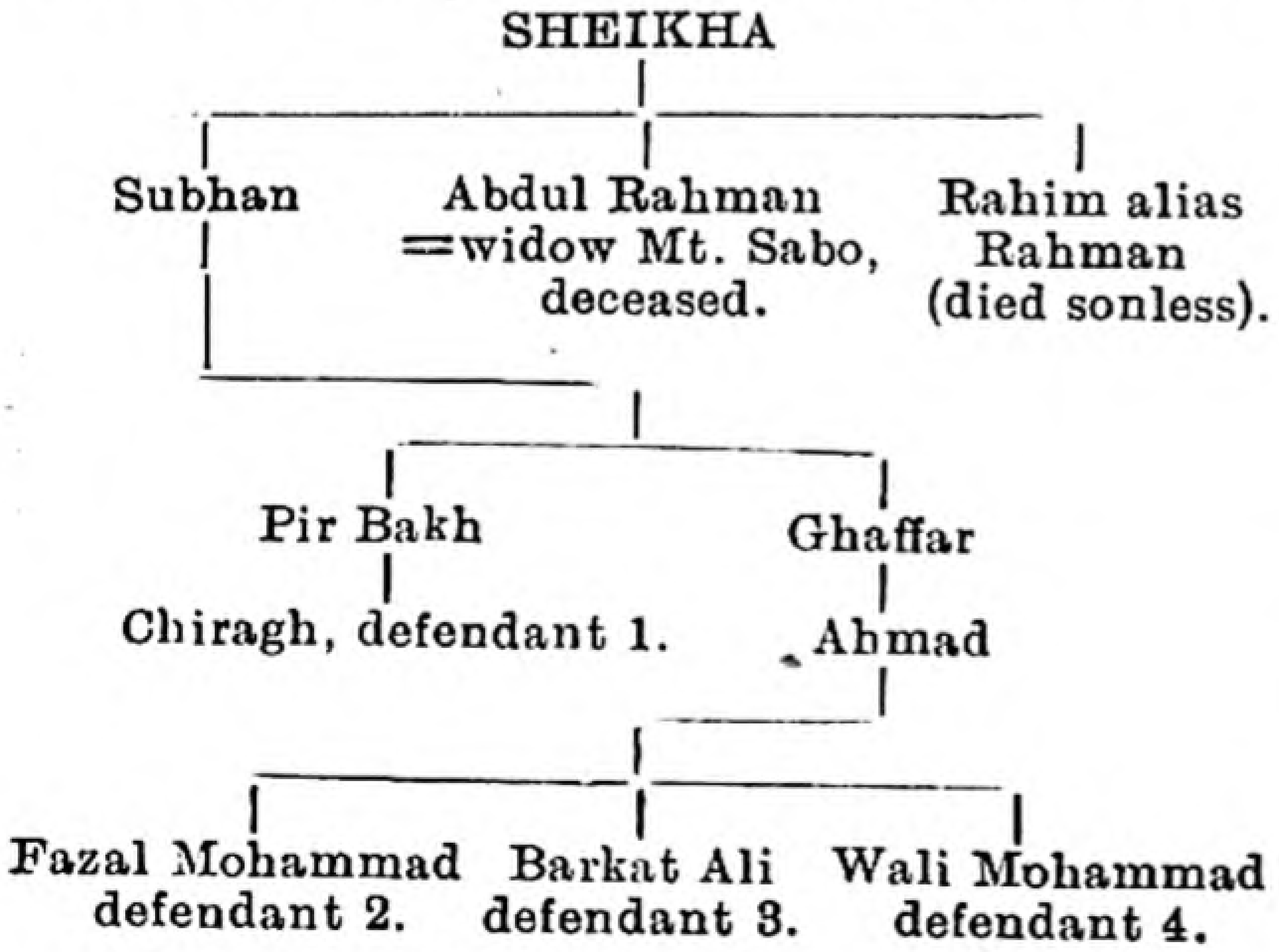
Under Hindu law as well as Customary law a "life tenant" holding property can no doubt surrender the estate and accelerate the succession of the next heir, but she can do so only if she completely effaces herself and relinquishes the entire estate to him: 17 *P. R.* 1902 and 8 *I. C.* 558, *Foll.* [P 281 C 2]

(c) Civil P. C. (1908), S. 11, Expl. 4—Applicability.

For applicability of Expl. 4 it is not only necessary that the defendant could have raised the defence in reply to the former suit, but it must also be shown that he was bound to do so: *A. I. R.* 1929 *Lah.* 872, *Foll.* [P 282 C 1]

Fakir Chand—for Appellants.
Achhru Ram—for Respondents.

Judgment.—In order to understand the facts of this case it is necessary to refer to the following pedigree table:


SHEIKHA
Subhan
Abdul Rahman =widow Mt. Sabo, deceased.
Rahim alias Rahman (died sonless).
Pir Bakh
Ghaffar
Chiragh, defendant 1.
Ahmad
Fazal Mohammad defendant 2.
Barkat Ali defendant 3.
Wali Mohammad defendant 4.

The plaintiffs-respondents are Afghan proprietors of house property in Basti Danishmandan, Jullundur City. More than a century ago their ancestor made over a house to Sheikha, ancestor of the defendants, as a raiyat on the usual non-proprietary tenure, the tenant agreeing to pay to the proprietor certain customary dues on ceremonial occasions. Sheikha died before the Annexation, and on his death the house was occupied by his sons Subhan, Abdul Rahman and Rahim alias Rahman in three separate blocks, each block being regarded as a separate house held by the occupant thereof under the proprietor. Rahman died sonless long ago and it is stated that his "block" was taken possession of in equal shares by Abdul Rahman and the descendants of Subhan. Some time in the nineties of the last century, Abdul Rahman also died childless and his widow Mt. Sabo continued in possession. Soon after his death Mt. Sabo allowed Ghaffar and Pir Bakhsh, sons of Sabhan, to live with her in her house, and he also constructed a chaubara and effected some other improvements with funds supplied to her by Pir Bakhsh and Ghaffar. Thereupon in 1896 the plaintiffs proprietors brought a suit for possession of the house occupied by Mt. Sabo, against her, Ghaffar and Pir Bakhsh, alleging that according to the custom prevailing in the Basti, Mt. Sabo had no right to make additions to the house or to allow Ghaffar and Pir Bakhsh to reside in it with her, without the permission of the proprietors, and that such unauthorized conduct on her part entailed forfeiture of the tenure and she was liable to ejectment.

The defendants, Mt. Sabo, Ghaffar and Pir Bakhsh admitted that the plaintiffs were proprietors of the house and they were the raiyat, but pleaded that they all held the house in suit as joint tenants and that the chaubara was not a new structure, but had fallen down and was rebuilt with the permission of some of the proprietors. They accordingly contended that they were not liable to ejectment. This suit was eventually decided by Mr. Kensington, Divisional Judge, Jullundur, on 6th December 1897. He found as a fact that the property which had been originally made over to Sukhia (Sheikha) had been distributed among his sons, that consequently the defendants were not joint tenants of the portion then in dispute, but that it was held by Mt. Sabo alone. He also found that on her husband's death Mt. Sabo had brought his nephews to live with her, that this was a very natural arrangement to make in the circumstances, and that the additions to the building which had been made were of a very pretty kind. As to what the effect of this conduct on the part of Mt. Sabo was, the learned Judge held that there was no clearly defined custom in such matters and that each case was to be decided on its merits. He accordingly passed a decree directing that the house in question shall remain in possession of Mt. Sabo for her lifetime subject to payment of the usual customary dues to the plaintiffs, that during her life she was at liberty to allow Pir Bakhsh and Ghaffar to occupy the house with her, but that they would not thereby acquire any right as joint tenants, and that on the death of Mt. Sabo the house would revert to the plaintiffs proprietors against whom no claim would lie for compensation in respect of the additions or repairs to the building which had been made without the plaintiffs' permission.

Accordingly Pir Bakhsh and Ghaffar, and after their death their sons and grandsons, continued to live in the house in question along with Mt. Sabo. Mt. Sabo died on 17th September 1917, and after her death the plaintiffs proprietors took no action for nearly 12 years. On 1st June 1929, they brought the present suit against the descendants of Pir Bakhsh and Ghaffar for possession of the house in question alleging that on the death of Mt. Sabo the house reverted to the proprietors and the defendants were in wrongful possession. The defendants pleaded that on Mt. Sabo's death they, being near collaterals of her husband. were according to well-recognized custom entitled to succeed to his rights in the house and that their possession was not wrongful. The trial Court dismissed the suit, but the learned District Judge has decreed it holding that the question as to whether the defendants were entitled to occupy the house after the death of Mt. Sabo was res judicata by reason of the decision of Mr. Kensington in the previous litigation referred to above. The defendants have preferred a second appeal to this Court and the sole question for determination is, whether the rule of res judicata has been rightly applied to this case.

It is conceded that the question, whether according to the custom applicable to non-proprietary holdings in the Basti, the house occupied by a non-proprietor devolves on his near collaterals on his death, was not directly raised or decided in the litigation of 1896-7, but it is urged that the matter is barred by the doctrine of "construdtive res judicata," which is recognized by the legislature in Expl. 4 to S. 11, Civil P. C., whether it is laid down, that any matter which might and ought to have been a ground of defence in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit. This contention has found favour with the learned District Judge, who has held that, as in the previous litigation the prayer was for ejectment of Mt. Sabo as well as Pir Bakhsn and Ghaffar, and the latter were bound to put forward all possible grounds of defence and to urge that, even if the acts and conduct imputed to Mt. Sabo in that case entailed forfeiture of her tenure, Pir Bakhsh and Ghaffar were entitled to retain possession by reason of "acceleration of succession."

In my opinion, Expl. 4 has no application to the case and has been wrongly applied by the learned District Judge. In the first place, no question of "acceleration of succession" could possibly arise on the possible forfeiture of the tenure by Mt. Sabo. In a non-proprietary holding succession to the rights of the non-proprietor arises only if the tenure is still in existence at the time of the death of the last holder. If by an act or conduct on his part, the last holder has entailed the penalty of forfeiture, the proprietor is entitled to resume possession forthwith and the descendants or near collateral heirs of the non-proprietor who would have succeeded to the tenure on his death, are not entitled to step in and claim to be let in possession. The analogy of "reversioner" succeeding to a proprietary holding according to the personal law of the last holder does not hold good in the case of a non-proprietor. As an illustration, it may be pointed out that a married daughter of a deceased non-proprietor who would be entitled to succeed to his self-acquired property does not succeed at all to a house held by the non-proprietary tenure; and an unmarried daughter succeeds only till marriage or death, whichever is earlier. A daughter's son, who is an heir to his self-acquired property has no right of succession at all. Again, remote collaterals who, in the absence of direct descendants of the last owner, might be entitled to succeed to his property, are not allowed under the general custom prevailing in the Punjab to occupy a house held by him on a non-proprietary tenure.

The analogy of "acceleration of succession" is inapplicable to the present case for another reason. Under Hindu law as well as Customary law, a "life tenant" holding property can no doube surrender the estate and accelerate the succession of the next heir, but she can do so only if she completely effaces herself and relinquishes the entire estate to him: cf. *Wazir Chand* v. *Makhu* (1) and *Bala Singh* v. *Khushal Singh* (2). In the case before us, Mt. Sabo had merely allowed Pir Bakhsi and Ghaffar to reside in the house along with her. She had not stepped aside altogether, and had not relinquished possession in favour of the so-called reversioners. The learned counsel for both parties have cited before me a large number of cases decided in reference to the provisions of Expl. 4 to S. 11, but it is not necessary to discuss them as they all proceed on their own peculiar facts. It is clear from the phraseology of the explanation, as well as the principle on which the doctrine is based, that it is not only necessary that the defendant could have raised he present defence in reply to the ormer suit, but it must also be shown that he was bound to do so: see inter alia *Parshotam Singh* v. *Balwant Singh* (3). Now it is quite clear that the former case could not have been defeated if the defence of the alleged right of Pir Baksh and Ghaffar to succeed to Mt. Sabo's rights in the house in the event of her death had been raised at the time. Such a defence, if raised would have been really irrelevant to the decision of the dispute then before the Court.

Mr. Achhru Ram has laid emphasis on the fact that in his judgment Mr. Kensington had defintely laid down that on the death of Mt. Sabo the house in dispute would revert to the (plaintiff) proprietors. But this finding must be read in reference to the preceding sentences in the judgment, where it was held that they were not joint tenants with Mt. Sabo in the portion of the house occupied by her and that though during her lifetime she was "at liberty to allow Pir Bakhsh and Ghaffar to occupy the house with her; they would not thereby acquire any right as joint tenants." I am therefore of opinion that the suit has been wrongly dismissed as barred by the rule of res judicata. I accept the appeal, set aside the judgment and decree of the learned District Judge and remand the case to him for disposal of the remaining points arising in the appeal before him. Court-fee on this appeal shall be refunded; other costs shall be costs in the cause.

P.N./R.K. *Case remanded.*

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1. (1902) 17 P R 1902=16 P L R 1902.
2. (1910) 8 I C 558.
3. A I R 1929 Lah 872=121 I C 428=11 Lah 99.

A. I. R. 1933 Lahore 282

BHIDE, J.

Balabh Das Kothari and *others*—Appellants.

v.

M. Muhammad Ishaq and *others*—Respondents.

Misc. First Appeal No. 476 of 1931, Decided on 23rd June 1931, from order of Sub-Judge, First Class, Lahore, D/- 9th March 1931.

(a) Civil P. C. (1908), O. 39, R. 1—Order granting injunction is appealable—Notice to show cause against injunction is immaterial.

Where a temporary injunction has been granted and would remain in force till cancellation, an appeal is competent from the order granting it and it makes no difference that consequent to the order a notice was issued to show cause against the injunction. [P 283 C 1]

(b) Civil P. C. (1908), O. 39, Rr. 1 and 3—No risk of irreparable injury—Drastic injunction without notice cannot be granted.

A drastic injunction without issuing notice cannot be granted unless there is any risk of irreparable injury or grave inconvenience: *A. I. R.* 1926 *Lah.* 435, *Foll.* [P 283 C 2]

Manohar Lal and *Ram Lal Anand*—for Appellants.

Barkat Ali—for Respondents.

Judgment.—This is an appeal from a temporary injunction granted in a suit instituted by the plaintiff-respondents to restrain the defendants from interfering with the management or the affairs of a school situate in Lahore Cantonment. The facts alleged briefly were that the school was founded sometime about the year 1870 by Rai Bahadur Seth Ram Rattan, but was subsequently handed over for management to the Cantonment Magistrate. The school remained under that management till the year 1930 when owing to certain communal differences proposals were made for handing over the management of the school to the Cantonment Board and a resolution was also passed by the Board consenting to take over the management. Before however the management was actually transferred, defendants 1 to 3 instituted a suit in order to restrain the transfer, alleging that the school was a private Hindu institution. This suit was compromised on 1st December 1930, and a decree was passed according to the terms of the compromise, which were to the effect that the control of the school should pass to the Lahore Cantonment Board and that it should be managed by the Board with the assistance of a managing committee on which different communities should be properly represented. Thereafter however somehow or other the management of the school was taken over by the defendants and hence the plaintiffs instituted the present suit. After institution of the suit, the plaintiffs applied for a temporary injunction restraining the defendants from interfering with the management of the school and an ad interm injunction was accordingly granted by the learned Subordinate Judge on 9th March 1931. He directed a notice to issue to the defendants to show cause against the injunction but fixed 1st May 1931, for this purpose. An a result of this order, the defendants would have been required to close the school at once till 1st May 1931 and hence they preferred an appeal from the order of the learned Subordinate Judge to this Court.

A preliminary objection was raised that no appeal was competent as the learned Subordinate Judge had issued notice to the defendants to show cause against the injunction. But this only meant that the injunction would have been cancelled if sufficient cause were shown. As the injunction had been granted and would have remained in force till cancellation an appeal was, in my opinion, competent under O. 43 (1) (r), Civil P. C. On behalf of the defendants-appellants it was stated that the management of the school had been made over by the executive officer of the Cantonment Board (who has now taken the place of the Cantonment Magistrate) to Rai Sahib Seth Ballab Das that the latter had appointed a committee for the sake of efficient management of the school. The defendants produced letters from the executive officer in support of this and there can be no doubt that the suggestion of the plaintiffs that the defendants had usurped the control of the school was wholly unjustified.

It was urged on behalf of the plaintiffs-respondents that the executive officer was a trustee and had no authority to make over the control of the school to Rai Sahib Seth Balabh Das, that there was risk of the committee appointed by him mismanaging the school and misappropriating funds and that the interest of the school were likely to suffer as the Punjab Government had decided to withhold its grant from the school for the present. As regards the first point, there is no material before me to show that the position of the executive officer was that of a trustee in the legal sense. No trust-deed or any other document has been produced in support of the allegation. There is also nothing to show that the committee is likely to mismanage the school. There were apparently certain charges of misappropriation, etc., pending against the Head Master of the school, but the matter is in the hands of the Education Department and I do not think that question has really any bearing on the issue before me. As regards the decision of the Punjab Government to withhold its grant for the present, this is said to have been taken recently after the issue of the injunction. There is no material before me to show whether any mismanagement on the part of the defendants was responsible for it. It cannot be believed that the executive officer would have handed over the charge of the school to Rai Sahib Seth Balabh Das, unless there were good grounds for adopting that course and unless he thought that the school would be properly managed by him. It has been pointed out that all the communities are not represented on the committee. It would certainly have inspired confidence if a few representatives of all the important communities in the Lahore Cantonment had been included in the personnal of the committee and perhaps they would be well advised to do so even now. But this objection cannot be considered to be sufficient to justify the injunction issued by the Subordinate Judge, which would have had the result of closing the school at once, and consequent interruption of the instruction of hundreds of students.

The learned Subordinate Judge has given no reasons for issuing drastic injunction and after careful consideration of the facts before me, I have not been able to discover any. It is well-settled that an injunction of this kind is not granted unless there is any risk of irreparable injury or grave inconvenience: cf. *A. I. R.* 1926 *Lah.* 435. No such case has been made out by the respondents. On the contrary there is risk of such injury and inconvenience, if the injunction were allowed to stand. The learned counsel for the appellants stated that as a matter of fact, the plaintiffs-respondents themselves are not anxious to retain control of the school and that negotiations have been going on for transfer of the control to the Cantonment Board. Correspondence was produced in support of this statement, from which it appeared that the matter has been delayed merely owing to the fact that the Northern Command has not yet given its consent to the proposal. I accept the appeal with costs and set aside the order of the learned Subordinate Judge granting the temporary injunction.

V.B /R.K. *Appeal allowed.*

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* A. I. R. 1933 Lahore 284

JAI LAL AND MONROE, JJ.

Kishen Kishore—Petitioner.

v.

Commissioner of Income-tax—Opposite Party.

Civil Ref. No. 19 of 1932, Decided on 9th November 1932.

* **(a) Income-tax Act (1922), S. 34—"Escape"—Meaning and scope of.**

The expression "escape" in S. 34 connotes failure by the taxing authority to tax the income owing to accidental or deliberate omission by the assessee to declare it or to some similar circumstances. It does not, however, include cases where the income is known or disclosed to the income-tax authority and has been the subject of assessment which has however been set aside by superior authority owing to some mistake in procedure or to the income being treated in a wrong category. [P 285 C 2]

(b) Income-tax Act (1922), S. 9 (1) (4)—Impartible estate and rule of primogeniture—Junior member given allowance in lieu of share—Share allowance does not form part of income of family.

Where a family of two brothers was governed by the rule of primogeniture and owing to the consequent impartibility of the estate the junior member was given in lieu of his share a separate allowance:

Held: that allowance cannot form part of the income of the family or of the senior member. [P 286 C 1]

* **(c) Hindu Law—Partition—Son in Punjab has no right to enforce partition during father's lifetime.**

Though under the Mitakshara system of Hindu law a son can enforce partition even during his father's lifetime, in the Punjab this form of Hindu law is not in force: 105 *P. R.* 1917 (*FB*), *Foll.* [P 286 C 2]

* **(d) Income tax Act (1922), S. 55—Impartible estate and rule of primogeniture—Such estate may be owned by a Hindu undivided family—Impartible estate—Nature.**

An estate which is governed by the rule of primogeniture can belong to an undivided Hindu family and need not be the sole property of the person who has succeeded to it by the rule of primogeniture, and the assessable limit for the purpose of super tax when the holder of such an estate is the head of the family is that fixed for a Hindu undivided family: 4 *Mad.* 250; 17 *Mad.* 316; 38 *All.* 590 and *A. I. R.* 1921 *P. C.* 62, *Ref.* [P 287 C 2]

Badri Das—for Petitioner.

R. C. Soni—for Commr., Income-tax.

Jai Lal, J.—This is a reference made by the Commissioner of Income-tax to this Court under S. 66 (2), Income-tax Act. The questions referred for the opinion of this Court are as follows:

> (1) "Whether in the circumstances of the case, the income of the petitioner for the assessment year 1929-30 can be said to have escaped assessment and whether S. 34 of the Act was correctly applied to it. (2) Whether, in view of the fact that the rule of primogeniture prevails in the petitioner's family and of the terms of the award of Mr. Atkins, the petitioner can be said to be the sole owner of the impartible estate, the taxable income of which has been assessed on him as an individual. (3) Whether the sum of Rs. 7,200 paid to Diwan Jai Gopal, the brother of the petitioner, as maintenance is an admissible deduction from the petitioner's income under the head of property."

The facts are these: Diwan Bahadur Krishen Kishore is a Rais of Lahore. He has a brother Diwan Jai Gopal and has also sons. The brother is living separately from Diwan Bahadur Krishen Kishore and is paid a yearly allowance of Rs. 7,200 and is also given some buildings for his residence. Diwan Raj Kumar, the father of these two gentlemen, having died there was a dispute between them about the succession to the estate and Mr. Atkins, who was Deputy Commissioner of Ferozepore at the time, was appointed an arbitrator. He gave his award in which it was held that the family was governed by the rule of primogeniture and

> "all that the younger sons could demand was; (1) their allowances and their houses for residence; or (2) a lump of money and a final severance from the estate"

Diwan Raj Kumar, it appears, had made a will before his death, and after considering the custom of the family and the terms of the will Mr. Atkins decided that Diwan Jai Gopal should have Rs. 120 per month as his allowance and should also be given separate residence out of the family estate. This allowance was subsequently increased to Rs. 200 per month and finally to Rs. 7,200 a year. For the year 1929-30 the Income-tax Officer assessed Diwan Bahadur Krishen Kishore, who for the sake of brevity shall be hereafter referred as the assesse, to income-tax as the head of an undivided Hindu family on the income of the family during the previous year. The total income so assessed included Rs. 7,200 the allowance paid by the assessee to his younger brother Diwan Jai Gopal. At the same time an assessment was made on the assessee in respect of what was styled his personal income which was derived by him from dividends and fees as director of some joint stock companies. The assessee thereupon appealed to the Assistant Commissioner, his main contention being that he was entitled to claim that

of Rs. 7,200 is not the income of Diwan Bahadur Krishen Kishore but that it is the income of his brother Diwan Jai Gopal. It may be mentioned that Diwan Jai Gopal is separately assessed to this income as counsel on both sides stated before us. If the estate had been partible Diwan Jai Gopal would have been entitled to separate his share and to collect its income directly. Obviously in such a case both the brothers would have been separately assessed. In view however of the rule of primogeniture and the consequent impartibility of the estate all that Diwan Jai Gopal has been given in lieu of his share is a separate allowance. That allowance in my opinion cannot form part of the income of the family or of Diwan Bahadur Krishen Kishore.

Some cases which were cited before us and in which it has been laid down that an allowance given by the head of the Hindu co-parcenary to its members by way of maintenance is liable to be assessed as the income of the co-parcenary, have no application to the facts of this case. I have already stated that the two modes of separation of the interest of the younger son in this family, as stated by Mr. Atkins, are the payment of an allowance and assignment of residence or the award of a lump sum and final severance from the estate. A complete separation between the members of the Hindu co-parcenary is only possible at the time of partition otherwise the co-parceners, who receive separate maintenance, still remain members of a joint Hindu family. In the present case Diwan Jai Gopal cannot claim to be a member of the co-parcenary with the assessee, who, in my opinion, is merely acting as a collector of the allowance on his behalf. It is the separate property of Diwan Jai Gopal, who can dispose of it as he likes. It is also to be observed that the amount payable to him is not a voluntary payment and does not vary with the income of the estate. According to the arrangement made the assessee is bound to pay this amount to Diwan Jai Gopal, even if the annual income of his estate is less than Rs. 7,200. In the alternative Diwan Jai Gopal cannot legally claim an increase in the allowance if the income of the estate materially increases.

No analogy can therefore be drawn from cases where the head or the manager of a joint Hindu family is assessed to income as such and he claims deduction of the amount paid to some of the co-parceners by way of maintenance. In the present case it is obvious that the payment is not made to a co-parcener. The two brothers in this case are not as I have already stated members of a joint Hindu family. With regard to the second question its importance lies only as to super-tax. The assessable limit for the purposes of super-tax in the case of a Hindu undivided family is higher than in the case of an individual. It is therefore claimed by the assessee that the assessment must be deemed to be an assessment of the income of a Hindu undivided family and not of an individual. The Commissioner on the other hand is of opinion that the assessee has been and is liable to be assessed as an individual and that he cannot, as claimed by him, be said to be the managing member of an undivided Hindu family, the other persons claimed to be the members of his family being his sons. The case was argued before us by both sides on the assumption that the assessee's sons are living with him and are being maintained by him as any Hindu father would maintain his sons and as would happen in a normal undivided Hindu family. It is however contended on behalf of the Commissioner that as the family is governed by the rule of primogeniture and consequently as the estate is not partible between the assessee and his sons therefore the family cannot be an undivided Hindu family consisting of the father and the sons because the partibility of the joint estate is an essential feature of the joint Hindu family.

Now it is undeniable that the Hindus in this province are governed by the Mitakshara law and that according to that law when the father and the sons constitute a joint Hindu family the sons can ordinarily claim partition of the co-parcenary property in the lifetime of their father even against his will. In *Hari Kishan* v. *Chandu Lal* (1) however a Full Bench of the Chief Court, Punjab has held that though under the Mitakshara system of Hindu law a son can enforce partition even during his father's lifetime, in the Punjab this form of Hindu law is not in force. This judgment appears to be a complete answer to the only ground on which counsel for the Income-tax Commissioner contended that the assessee cannot be deemed to be a member of a joint Hindu family

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1. (1917) 105 P R 1917=43 C 667 (F B)

with his sons and therefore the father and the sons cannot constitute an undivided Hindu family; the learned counsel was accordingly forced to take refuge in the assertion that *Hari Kishan* v. *Chandu Lal* (1) lays down bad law. Being a judgment of the Full Bench however it is binding on us; but I would prefer not to base my finding merely on the dictum in this case alone. In *Naraganti* v. *Venkatachala Pati* (2), it was held that

> "an impartible Paleiyam governed by the rule of primogeniture, though possessed exclusively by one member of the family, is the joint property of the family, and in the event of a death passes by survivorship"

This was a judgment of a Division Bench of the Madras High Court and it was further observed in it that

> "separate possession, but not separate ownership is the characteristic of property in such cases which although impartible is ex hypothesi joint. . . . The impartibility of the subject does not necessitate the denial of the right of survivorship and there are not wanting in the admitted rules which govern the enjoyment of such property and the succession to it indicia of co-ownership and consequent survivorship."

This observation was cited with approval by another Division Bench of the Madras High Court in *Subramania Pandya Chokka Talavar* v. *Shivasubramania Pillai* (3). This principle was further recognized in *Baijnath Prasad Singh* v. *Tej Bali Singh* (4), where it was held that the normal constitution of a Hindu family is union, and that it is the very essence of an impartible estate that there is no legal right to insist on partition and further that the estate is enjoyed by the whole family through the occupant of the "Gaddi." In *Baijnath Prasad Singh* v. *Tej Bali Singh* (5), their Lordships of the Privy Council affirmed these principles. The head-note of the judgment is as follows:

> The successor to an impartible estate which is ancestral property of a joint Hindu family governed by the Mitakshara is designated by survivorship subject to the custom of impartibility; the eldest member of the senior branch of the family, therefore, succeeds in preference to the direct lineal senior descendant of the common ancestor if the latter is more remote in degree."

Naraganti v. *Venkatachala Pati* (2) was cited with approval by their Lordships. The learned counsel for the Income-tax Commissioner relied upon *Gangadara Rama Rao* v. *Raja of Pittapur* (6), a judgment of their Lordships of the Privy Council in what is called the second Pittapur case. In this judgment no doubt some observations are made which support his contention and specially the remark that in an impartible zamindari there is no co-parcenary. This judgment was however noticed by their Lordships in *Baijnath Prasad Singh* v. *Tej Bali Singh* (5) and it was observed that:

> "the dictum that custom when it is found to exist supersedes the general law, which however still regulates all beyond the custom is the key-note of the position. The question of how to select the head of the family in a joint family is part of the general law. That the custom of impartibility does not touch it is shown by the long list of authorities above cited, and there is in their Lordships' view no necessary logical deduction from the decisions in the *Sartaj Kuari* and the second *Pattapur* cases (6) which forces them to an opposite conclusion,"

In an earlier part of their judgment in the same case their Lordships considered that certain remarks relied upon by counsel for the Commissioner before us and made in the second Pittapur case must be treated as obiter dicta. 54 *I. A.* 289 was also cited on behalf of the learned Commissioner. The decision in that case however goes against his contention. It was as follows:

> "The holder of an impartible zamindari can alienate it by will although the family is undivided, unless a family custom precluding him from doing so is proved."

It would thus be observed that their Lordships did recognize that an impartible estate may be owned by a Hindu undivided family and that the holder of such an estate may be the head or managing member of the family. In my opinion therefore there is no legal sanction for the proposition that an estate which is governed by the rule of primogeniture cannot belong to an undivided Hindu family but must be the sole property of the person who has succeeded to it by the rule of primogeniture. There is no ground for departing from the normal rules of the Hindu law in this case. I would therefore answer the first question in the negative, the second also in the negative and the third in the affirmative. The costs of this reference must abide the result and shall be consequently paid by the Commissioner.

Monroe, J.—I agree.

K.S. *Reference answered.*

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2. (1882) 4 Mad 250.
3. (18 4) 17 Mad 316=4 M L J 152.
4. (1916) 38 All 590=33 I C 894.
5. A I R 1921 P C 62=60 I C 534=48 I A 195=43 All 228 (P C).
6. A I R 1918 P C 81=47 I C 354=45 I A 148=41 Mad [illegible] P C).

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

A. I. R. 1933 Lahore 288

BROADWAY, J.

Mangal Sain-Harbans Lal -- Defendants—Petitioners.

v.

Roshan Lal and *Brothers*—Plaintiffs—Opposite Parties.

Civil Revn. Petn. No. 73 of 1931, Decided on 8th May 1931, against order of Addl. Sm. C. C. Judge, Lahore, D/- 17th November 1930.

(a) Civil P. C. (1908), O. 5, R. 20—High Court cannot examine facts for order under R. 20.

It is not within the power of the High Court to examine the facts on which an order under O. 5, R. 20 is made. [P 289 C 1]

(b) Civil P. C. (1908), O. 9, R. 13—Petitioners under O. 9, R. 13 must satisfy Court that service was not duly effected—Lower Court not satisfied that petitioners are entitled to have ex parte decree set aside—There can be no interference in revision.

Under O. 9, R. 13 it is for petitioners applying to have an ex parte decree set aside to satisfy the Court that the service was not duly effected. [P 289 C 1]

It was clear from the record, that although no formal order under O. 5, R. 20 was passed the Court was satisfied that service could not be effected in the ordinary course and then ordered an advertisement in a newspaper and took ex parte proceedings subsequently and that the Court was not satisfied that the petitioners had made out a case which would entitle them to the setting aside of the ex parte decree, no evidence having been produced by them:

Held: that there could be no interference in revision. [P 289 C 1]

Nawal Kishore—for Petitioners.

Shamiar Chand and *Qabul Chand*—for Opposite Parties.

Judgment.—The suit out of which this revision petition has arisen was instituted on 14th March 1927, the plaintiffs being residents of Lahore and the defendants being residents of Karachi. The case was fixed for 15th June 1927, but the defendants did not appear on that date, the report on back of the summons being that the defendants could not be found. The case was then adjourned to 20th October 1927, on which date again the defendants were absent and the report on the back of summons was to the same effect. Thereupon the case was adjourned to 5th January 1928, and it was ordered that service should be effected: (1) by the despatch of a registered latter acknowledgment due, (2) being posted up on the premises of the defendants, and (3) by beat of drum. The record shows that steps were taken to carry out the service as directed, but there is nothing on the record to indicate that the others were actually carried out. The case again came up on 5th January 1928, on which date the defendants were again absent and it was ordered that an advertisement should be published in the Tribune. An application was filed by the plaintiff alleging that the defendants were evading service and the publication was made in the issue of the Tribune of 17th January 1928. On 26th January 1928, the defendants failed to appear and the Court recorded the fact that service had been sufficiently effected and proceeded to grant an ex parte decree. On 13th August 1930, an application was filed by the defendants under O. 9, R. 13, Civil P. C., to have the ex parte decree set aside. That application was supported by an affidavit and it was alleged that they had only become aware of the existence of the decree on 27th July 1930, that is, within thirty days of the date of the filing of the application.

As stated above this application was supported by an affidavit and on 17th November 1930, the matter came up for decision in the presence of both parties. On that date the record shows that the plaintiffs-respondents opposed the application and the counsel for the petitioners stated that he did not wish to produce any evidence and rested his case on the affidavit already filed. Thereupon the learned Subordinate Judge of the Small Cause Court recorded the order which is now under consideration. The order in question appears to have been passed somewhat hastily as the facts contained in it are obviously wrong. In it the learned Judge of the Small Cause Court incorrectly says that the application did not contain any allegation as to the date on which the defendants became aware of the existence of the decree. The affidavit was also considered insufficient on the ground that the designation of the gentleman purporting to have attested it was not apparent. The learned Judge of the Small Cause Court apparently lost sight of the fact that there was an official seal affixed to the affidavit. These errors in the order led to the issue of the notice, and I have now heard Mr. Nawal Kishore for the petitioners and Mr. Shamair Chand for the respondents.

It has been urged on behalf of the petitioners that this Court can go behind the order passed under O. 5, R. 20, Civil P. C., reliance being placed on ***Panju Ram* v. *Uttam Chand* (*A. I. R.* 1928 *Lah.* 799)**. On the other hand it has been pointed out by

Mr. Shamair Chand that it has repeatedly been held by this as well as other High Courts that substituted service must be regarded as duly effected service and that therefore the time prescribed by Art. 164, Limitation Act, commenced from the date of the decree. Mr. Nawal Kishore, while admitting this contention urged that it was within the power of this Court to examine the facts on which the order under O. 5, R. 20, Civil P. C., was made. Having regard to the authority cited it seems to me that this contention is incorrect. *Panju Ram* v. *Uttam Chand* (*A. I. R.* 1928 *Lah.* 799) was decided on the particular facts of that case. A wrong address palpably having been given the learned Judge came to a definite finding that an attempt had been made to obtain an ex parte decree fraudulently. An examination of the record of this case disclosed the fact that although no clear and formal order under O. 5, R. 20, Civil P. C., was passed the learned Judge, Small Cause Court, who was then dealing with the case was satisfied that service could not be effected in the ordinary course. Three attempts to serve the defendants had been made and it was after this that the advertisement in the Tribunal was ordered and proceedings subsequently taken ex parte. Under O. 9, R. 13, Civil P. C., it is for the petitioner to satisfy the Court that service was not duly effected. In spite of the fact that the learned Judge of the Small Cause Court had made serious errors in his judgment on questions of facts it is clear that he was not satisfied that the petitioners had made out a case which would entitle them to the setting aside of the ex parte decree. It has to be noted that on the date of the hearing of this petition the petitioners definitely stated that they did not desire to call any evidence. In these circumstances I am not prepared to interfere in revision and dismiss this petition with costs.

R.M./R.K. *Petition dismissed.*

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* A. I. R. 1933 Lahore 289

BHIDE, J.

Alia—Defendant—Appellant.

v.

Ram Chand—Plaintiff — Respondent.

Second Appeal No. 897 of 1932, Decided on 22nd November 1932, from preliminary decree of Dist. Judge, Ludhiana, D/- 30th March 1932.

1933 L/37 & 38

*** Mortgage— Mortgagor executing lease-deed to mortgagee—Rent to be credited towards interest on mortgage—Mortgagee is entitled to treat interest due under mortgage as charge on property—Interest.**

Where a mortgagor executes a lease-deed to the mortgagee in respect of the mortgaged property and agrees to pay rent which is to be credited towards the interest under the mortgage, and the mortgagor pays neither rent nor interest, the mortgagee is entitled to treat the interest due under the mortgage as a charge on the property in the absence of a contract to the contrary and the mortgagor cannot take advantage of his own default in paying rent and contend that the mortgagee is only entitled to claim rent in lieu of interest. All that the mortgagor can claim is that the rent, if any is paid, should be credited towards the interest: *A I R* 1924 *P C* 183, *Rel on.* [P 290 C 1]

A recital in the mortgage-deed that in default of payment of interest, it may be recovered from the person and property of mortgagor does not by itself necessarily mean that interest ceases to be a charge on the property: *A. I. R.* 1926 *Lah.* 624, *Ref.* [P 290 C 1]

Muhammad Tufail—for Appellant.

Hem Raj Mahajan — for Respondent.

Judgment.—This was a suit by a mortgagee for recovery of Rs. 215 on account of principal and interest. The mortgage was executed on 5th July 1926, and it was stipulated that interest would be payable at Rs. 1-7-0 per cent per mensem. The mortgage-money was to be paid within two years and in case of default interest was to be charged at Rs. 2 per cent per mensem. On the same day on which the mortgage was executed, the mortgagor executed a lease of the mortgaged house in favour of the mortgagee agreeing to pay Rs. 1-7-0 per mensem as rent which was to be credited towards the interest on the mortgage. Neither rent nor interest is said to have been paid and the mortgagee instituted the present suit for recovery of Rs. 215 by sale of the mortgaged property on 1st May 1931. The trial Court granted a decree for Rs. 99 only, disallowing the claim for interest. On appeal the learned District Judge has allowed the claim for interest in part and granted a decree for Rs. 200 with proportionate costs. From this decision a second appeal has been preferred.

It has been urged on behalf of the appellant that the interest in this case was not a charge on the property mortgaged and that the plaintiff was only entitled to claim rent in lieu of the interest. As regards the first point, it was held by their Lordships of the Privy Council in *Gangaram* v. *Nathu Singh* (1), that a mortgagee is en-

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1. A I R 1924 P C 183=80 I C 820=51 I A 377=5 Lah 425 (P C).

titled to treat interest due under a mortgage as a charge on the property in the absence of any contract to the contrary. In the present instance, no such contract to the contrary has been proved. The mortgage-deed recited no doubt that in default of payment of interest it may be recovered from the person and property of the mortgagor. But this by itself does not necessarily mean that interest ceases to be a charge on the property: cf *A. I. R.* 1926 *Lah.* 624. It is true that the mortgagee was formally put in possession of the house and the mortgagor took it on rent from the mortgagee. But all that the mortgagor can claim is that the rent realized should be credited towards the interest. The learned District Judge has found that no payment of rent is proved and this being a finding of fact cannot be challenged in second appeal. The mortgagor cannot derive any advantage from his own default in paying rent. I dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 290

BROADWAY AND ABDUL QADIR, JJ.

Bir Bhan—Assessee—Petitioner.

v.

Income-tax Commissioner, Punjab.

Civil Misc. Petn. No. 63 of 1931, Decided on 1st June 1931.

Income-tax Act (1920), Ss. 23 (4) and 30—Notice under S. 22 (2) read with S. 34 to partner of firm—Partner denying any knowledge of profits or income of firm, or possession of any money, account books or moneys of firm and returning form unfilled—Subsequently at request of partner time extended in order to enable him to comply with requirements of law and in order to get necessary information—Partner intimating that no information was available — Income-tax Officer assessing him under S. 23 (4) treating case as one of no return — Assessment held properly made.

A firm carried on business in Patiala territory. Some of the members of firm and partners resided in British India at Kaithal. On information that the firm had made handsome profits the Income-tax Officer of the District in which these partners resided issued a notice to one of them under S 22 (2) read with S. 34 along with a form prescribed by law to be filled by assessee. Instead of making the return, the partner made a note on the prescribed form leaving the various columns blank, stating that he was the sleeping partner of the firm, that he had no control over its business, knew nothing of its income or profits, that he was not in possession of any account books or moneys belonging to the said firm and that no income had accrued to that firm through him, nor had he received any income on behalf of the firm. The partner further intimated that he was making endeavours to obtain the necessary accounts and information from his partner in Patiala Territory. Thereupon in order to enable him to comply with the requirements of law and in order to get the necessary information, the time for making the return was extended by the Income-tax Officer on two separate occasions, but finally the partner intimated that neither the accounts nor the information sought was available. The Income-tax Officer under the circumstances treated the case as one of "no return" made assessment under S. 23 (4). The partner preferred appeal under S 30:

Held: that the case was properly treated as one of "no return" and no appeal was competent against the order under S. 30: *A I R* 1923 *Lah* 729, *Foll.* [P 291 C 2]

Aziz Ahmad—for Petitioner.

J. N. Aggarwala — for Income-tax Commissioner, Punjab.

Broadway, J. — This is a petition under S. 66 (3), Income-tax Act, 1922, in which it is prayed by one Chaudhry Bir Bhan on behalf of a firm entitled Rikhi Ram Kundan Lal, that the Income-tax Commissioner be directed to refer certain questions of law to this Court for opinion. These questions are enumerated in para. 7 of the petition. The facts may be briefly stated as follows: The firm of Rikhi Ram-Kundan Lal carries on business at Dhuri in the Patiala territory. They purchase and gin cotton and send it for sale to Bombay and other places. Five of the members and partners of this firm, of whom Bir Bhan is one, reside at Kaithal in the Karnal District. They have a telegraphic address which is "Chaudhri, Kaithal." Each of these partners have been from time to time assessed in regard to their own private income. On information received from Bombay the Income-tax Officer of Karnal discovered that the partnereship had made very handsome profits in the year ending 31st March 1929. Acting on this information a notice dated 20th January 1930, was issued to Chaudhri Bir Bhan under S. 34 read with S. 22 (2). With this notice was sent a form prescribed by law to be filled in by an assessee. Instead of making the return Bir Bhan made a note on the said prescribed from leaving the various columns blank and in the note stating that he was the sleeping partner of the firm and had no control over its business and knew nothing of its income or profits; further that he was not in possession of any account books or moneys belonging to the said firm and that no income had accrued to that firm through the petitioner and that the petitioner had received no income on behalf of the firm. The Income-tax Officer extended the time for the filling up of the return at the instance of the petitioner, Chaudhri Bir Bhan, who in his correspondence intimated that he was making endeavours to obtain the necessary accounts and information from his partners in Dhuri. Finally he intimated that neither the accounts nor the information sought for were available. The Income-tax Officer thereupon treated the case as one of "no return" and proceeded to make an assessment. The assessable income was fixed at Rupees 70,000, and a tax of Rs. 7,812-8-0 was demanded.

Against this assessment an appeal was preferred to the Assistant Commissioner who however declined to entertain it on the ground that the assessment had been made by the Income-tax Officer under the provisions of S. 23 (4), Income-tax Act, and that therefore by virtue of S. 30 of the Act, no appeal was competent. The Income-tax Commissioner was then approached but he refused to revise the order and also refused to make any reference. Now, the notice in question was addressed to Bir Bhan, as a partner of the firm. That he clearly understood that he was being called upon to furnish a return relating to the income of the firm is beyond question and has been very properly and frankly admitted by Mr. Aziz Ahmad. It is further clear that no return was made to the notice that was issued. In circumstances somewhat similar to the present case it was held by a Divison Bench of this Court in *Messrs. Rattan Chand Duni Chand* v. *Commr. of Income-tax, Punjab* (1), that the case had been properly treated as a "no return" case. In these circumstances I have no hesitation in holding that the present case is also one of "no return." None of the particulars required by law have been furnished either in the correspondence or in the prescribed form. The real contention has been throughout that the notice was bad for the reason that the provisions of Ss. 42 and 43, Income-tax Act, had not been complied with in that no notice under S. 43 had been issued to Bir Bhan informing him that he was to be treated as the agent of this particular firm. Whatever weight might have been given to this contention had the matter stopped there need not now be considered for there can be no doubt whatever that Bir Bhan, although protesting against his being treated as an agent, clearly and unequivocally accepted the position that had been thrust upon him by the Income-tax Officer.

Admittedly in the correspondence which followed his sending the form back unfilled he has repeatedly stated that he was making every endeavour to get the accounts and the information required from the partners in Dhuri and finally had to admit that he had failed to do so. In order to enable him to comply with the requirements of law and in order to get the necessary information the time for making the return was extended by the Income-tax Officer on two separate occasions. In these circumstances I consider that there is no force in this contention and that the case was properly treated as one of "no return" and that no appeal was therefore competent having regard to the provisions of S. 30. I would therefore dismiss this petition with costs.

Abdul Qadir, J.—I agree.

V.B./R.K. *Petition dismissed.*

A. I. R. 1933 Lahore 291

TEK CHAND AND MONROE, JJ.

Qurban Hussain Shah and *another*—Plaintiffs—Appellants.

v.

Fazal Shah — Defendant — Respondents.

First Appeal No. 1012 of 1928, Decided on 7th November 1932, from decree of Senior Sub-Judge, Shahpur, D/- 3rd January 1928.

Colonization of Government (Punjab) Act (1912), S. 19— Purchase of tenancy from Collector— Secret agreement by purchaser with another that each to advance half purchase money and to take possession of half of land and half profits—Such possession continued for several years—Subsequent agreement that enjoyment of land should continue as such is not illegal.

G bought with the sanction of the Collector a tenancy which was held on horse breeding terms. Prior to the purchase *G* had made an oral agreement with *T* that *T* would advance half the purchase money of Rs. 10,000, pay half the outgoings and have possession of one half of the land and receive one half of the profits. Though the agreement was a void agreement under S. 19 Act 5 of 1912, the parties to it observed it loyally for several years and subsequently *G* executed a formal written document in which after reciting the earlier transaction he expressly made an agreement to the effect that the enjoyment of the lands should continue as before, but in case of a breach the agreement it was provided that he, and after his death his children, should pay the full purchase money of the land to the other parties to the agreement. On death of *G*, his son succeeded and ejected *T*'s sons. In a suit by *T*'s son for the amount fixed in the agreement:

Held: that the subsequent agreement was entirely distinct from the prior one, that it was

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1. A I R 1928 Lah 729.

not illegal as it only provided that a certain state of affairs should continue and that even though the prior dealing was inoperative, plaintiff was entitled to half the purchase money which his father had paid: *A I R* 1922 *P C* 403, *Rel on.* [P 292 C 2]

Ferozeuddin and *R. C. Soni* for *S. K. Ahmad*—for Appellants.

Bhagu Ram Kapur and *S. L. Puri*—for Respondent.

Monroe, J. — On 20th November 1917, Gauhar Shah bought with the sanction of the Collector a tenancy which was held on horse breeding terms. Prior to the purchase Gauhar Shah had made an oral agreement with Talib Hussain Shah and Qurban Hussain Shah that they would advance half the purchase money of Rs. 10,000, pay half the outgoings and have possession of one-half of the land and receive one half of the profits. Talib Hussain Shah and Gauhar Shah are now dead. Plaintiff 2, Sadiq Hussain Shah is the son of Talib Hussain Shah and defendant Fazal Shah is the son of Gauhar Shah. Though the agreement was a void agreement under S. 19, Act 5 of 1912, the parties to it observed it loyally for several years and on 26th September 1922, Gauhar Shah, who evidently was then getting old, executed a formal written document in which after reciting the earlier transaction of 1917 he expressly made an agreement to the effect that the enjoyment of the lands should continue as before but in case of a breach of the agreement it was provided that he, and after his death his children, should pay the sum of Rs. 10,000, to the other parties to the agreement. On the death of Gauhar Shah not long after the execution of this agreement the defendant succeeded to the tenancy which was mutated in his name and he then obtained from the Collector an order ejecting the plaintiffs. The plaintiffs have brought the present suit for the recovery of the sum of Rs. 10,000, under the agreement of 26th September 1922. The first issue which was fought in the trial Court was that the transaction for sharing the enjoyment of the lands was illegal and that consequently this agreement was bad and nothing could be recovered under it. The trial Judge held that the plaintiffs had no interest in the land but that nevertheless they could recover the sum advanced to Gauhar Shah for the purchase of the land, that is, Rs. 5,000, and the Judge then proceeded to hold that as they had been in possession for nearly ten years they must have amply compensated themselves for the amount of Rs. 5,000, alleged to have been advanced by them and accordingly he dismissed the suit.

It has been argued strenuously before us that the agreement for a division of the land was illegal and that consequently the agreement being for an illegal consideration nothing could be recovered under it. In my opinion, the effect of the agreement of 26th September 1922, which I hold to be in itself an agreement entirely distinct from that of 1917, was to provide that a certain state of affairs, namely, the joint occupation of the land should continue but if that state of affairs should be brought to an end by Gauhar Shah or his successors then he or they should pay the sum of Rs. 10,000. This sum of Rs. 10,000, may have been fixed as the sum representing the value of the half share of the land at the date of the agreement or it may have represented the sum advanced and a deterrent penalty. I can see nothing illegal in this agreement nor is there any reason for holding it a transfer of the land and even if it be by the provisions of the Act void it is not necessarily illegal, and so even apart from the express provision to pay the sum of Rs. 10,000, I think that the sum originally advanced, namely, Rs. 5,000 would be recoverable even though the attempted dealing with the land is inoperative and in this behalf I would rely on *Thakurain Harnath Kuer* v. *Indar Bahadur Singh* (1), a decision of the Privy Council. I do not follow the reasoning of the trial Judge when he sets off the profits received against the sum advanced. The profits received were in the nature of income; the sum advanced was a capital sum and while I think that nothing more than the capital sum itself can now be recovered; if there is to be any set off it should be of the interest on the capital sum and the work done by the plaintiffs and their predecessors as against the profits received by them out of the land. Accordingly I would allow this appeal and give the plaintiff a decree for the sum of Rs. 5,000 with costs in both Courts against the estate of Gauhar Shah deceased.

Tek Chand, J.—I agree.

K.S. *Appeal allowed.*

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1. A I R 1922 P C 403=71 I C 629=50 I A 69=26 O C 223=45 All 179 (P C).

S. N. DAR, B. A. LL. B.,
Vakil High Court.

A. I. R. 1933 Lahore 293

COLDSTREAM AND CURRIE, JJ.

Gurdit Singh—Plaintiff—Appellant.

v.

Mt. Man Kaur and *another*—Defendants—Respondents.

First Appeal No. 2316 of 1927, Decided on 21st July 1932, against decree of Senior Sub-Judge, Sheikhupura, D/- 29th June 1927.

(a) Punjab Colonization of Government Lands Act (1912), Ss. 17, 24, 25, 26 and 36—What is excluded from jurisdiction of civil Court is matter, which Collector is empowered by Act to dispose.

A widow, *M* of the original grantee of land was in possession in accordance with S. 20 (b). *M* gifted her rights to her daughter *B* with Collector's sanction under S. 19. The sanction was withdrawn by Commissioner. Subsequently Commissioner granted *M* permission to surrender her rights to her daughter *B* and mutation of names in the land revenue records was effected accordingly. A suit was brought by a reversioner praying for a declaration that the gift and the orders of the Commissioner would not affect his rights after the death of *M*. The lower Court held that jurisdiction of the civil Court was barred in virtue of S. 36:

Held: that what was excluded from the jurisdiction of the Court was any matter of which the Collector was empowerd by the Act to dispose (e. g. such a matter would be action taken under S. 17 or Ss. 24 and 25 or S. 26) and that the jurisdiction of the civil Court was not barred. [P 293 C 2]

Held further: that one of the matters to be ascertained for the proper disposal of the case would be what was the effect of the mutation effected in *B*'s favour, viz., whether the legal effect of the mutation was to create new tenancy in *B*'s favour or whether only *M*'s interest in property was relinquished: *A I R* 1932 *Lah* 412, *Ref*. [P 293 C 2; P 294 C 1]

(b) Punjab Colonization of Government Lands Act (1912), Ss. 20 and 21—Widow of original grantee in possession—Succession is governed by S. 21—Widow cannot nominate successor.

Where widow of original grantee of land is in possession in accordance with S. 20 (b), prima facie the succession would be governed by the provisions of S. 21 and S. 21 does not give widow power to nominate a successor. [P 293 C 2]

Iftikhar Ali and *Muhammad Amin Andrabi*—for Appellant.

S. L. Puri and *Chandra Gupta*—for Respondents.

Coldstream, J.—On 22nd January Mt. Man Kaur, widow of Nihal Singh, the original grantee of square No. 79, R. B. in Sheikhupura District, executed a deed of gift conveying her rights in the square (of which she was in possession in accordance with S. 20 (b), Colonization of Government Lands (Punjab) Act, 1912) to her married daughter Mt. Bua Ditti. For this transfer Mt. Man Kaur had obtained the Collector's sanction under S. 19 of the Act. This sanction was however withdrawn by the Commissioner, Lahore, on appeal by Gurdit Singh, Nihal Singh's brother, the present appellant, on 19th March 1926. The gift was thus invalidated.

Subsequently however on 15th March 1927, the Commissioner granted Mt. Man Kaur permission to surrender her rights to her daughter and mutation of names in the land revenue records was effected accordingly. An appeal by Gurdit Singh against the Commissioner's order was rejected by the Financial Commissioner on 30th April 1927. Gurdit Singh then instituted the suit out of which this appeal arises praying for a declaration that the gift and the orders of the Commissioner and Financial Commissioner would not affect his rights after the death of defendant, Mt. Man Kaur. The suit was dismissed by the Subordinate Judge First Class, Sheikhupura, on the grounds that it was not cognizable by a civil Court and that the plaintiff affect his rights after the death of had no locus standi to sue. Gurdit Singh has appealed. The lower Court's decision that the jurisdiction of the civil Court is barred as regards "matters under the Colonization of Government Lands Act" is based on S. 36 of the Act. But that section has no such wide effect. What is excluded from the jurisdiction of the Court is any matter of which the Collector is empowered by the Act to dispose. For instance, such a matter would be action taken under S. 17, or Ss. 24, 25 or 26 of the Act.

In the present case the plaintiff comes forward as a reversioner of Nihal Singh. The lower Court has decided that the plaintiff has not a reversionary right. This decision may be correct but the learned Subordinate Judge has based it on a misreading of the law. He finds that after Mt. Man Kaur's death Mt. Bua Ditti would have succeeded her if she had been nominated by Mt. Man Kaur with the sanction of the Collector. There is nothing in the Act to warrant this finding. Prima facie the succession would be governed by the provisions of S. 21 which gives Mt. Man Kaur no power to nominate a successor. The lower Court's judgment is erroneous and must be set aside.

For the proper disposal of the case one of the matters to be ascertained will be, what exactly is the effect of the mutation effected in Mt. Bua Ditti's favour? It appears that Mt. Man Kaur's tenancy was terminable on her death or re-marriage. Presumably therefore it was this interest alone that was relinquished in favour of Mt. Bua Ditti. There is however no clear evidence about this. Possibly the intention and legal effect of the mutation was to create a new tenancy in Mt. Bua Dittis favour. If this could be done by a Revenue Officer under the Act, it is possible that S. 36 of the Act will bar the jurisdiction of the civil Court. As I have already remarked however the case at first sight appears to be one of succession to a tenancy already existing and there is no doubt that when the Commissioner passed his order on 15th March 1927, he regarded it as one of a succession to a tenancy acquired by Nihal Singh which had devolved on his widow under S. 20 (b), and would, in the ordinary course, devolve upon Mt. Man Kaur's successors in accordance with the provisions of S. 21. In this connexion the attention of the lower Court is drawn to *A. I. R.* 1932 *Lah.* 412. I would accept this appeal and setting aside the judgment remand the case for re-trial in the light of these remarks. The costs will abide the event.

Currie, J.—I agree.

P.N./R.K. *Case remanded.*

A. I. R. 1933 Lahore 294

BHIDE AND TAPP, JJ.

Dalip Singh Parja Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 206 of 1931, Decided on 18th May 1931, against order of Sess Judge, Amritsar, D/- 21st February 1931.

(a) Evidence Act (1872), S. 133—Corroborative evidence must be taken.

Corroborative evidence must be taken by Court in case of the evidence of an accomplice although legally no such corroboration is necessary. [P 295 C 2]

(b) Evidence Act (1872), S 133—Corroborative evidence must confirm in material particulars evidence that crime was committed by accused—It need not be direct and may be circumstantial.

The corroborative evidence in the case of evidence by an accomplice, must be evidence which implicates the accused, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the accused committed it. The nature of corroboration necessarily varies according to the particular circumstances of the offence charged. The corroboration need not be by direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connexion with the crime: *R.* v. *Baskerville*, (1916) 2 *K B* 658, *Foll.* [P 296 C 1]

(c) Evidence Act (1872), S. 133—Accomplice need not be confirmed in every detail of crime.

In the matter of corroboration of an approver's story it is impossible to expect and indeed it is not required that an accomplice must be confirmed in every detail of the crime. If this could be done the evidence of the accomplice would not be necessary or essential to the case. [P 296 C 1, 2]

J. G. Sethi—for Appellant.

D. C. Ralli—for the Crown.

Tapp, J.—The brutal and cowardly murders of Kartar Singh aged 18 and Ajit Singh aged 12, the two sons of Achhar Singh, lambardar of Batala, in the Amritsar District on the night of 2nd/3rd May 1930, and the almost complete destruction of the bodies by burning has led to the trial of eight persons all of whom have been found guilty by the learned Sessions Judge in agreement with the assessors and convicted of both the murders under S. 302, Penal Code, and each sentenced to the extreme penalty of the law. Of the eight appellants, Dalip Singh has appealed through Mr. J. G. Sethi (Appeal No. 206 of 1931): Jhanda Singh, a first cousin of Achhar Singh through Mr. Gobind Ram Khanna (Appeal No. 230 of 1931) and the remaining six Teju or Teja Singh, Arur Singh, Harya, Sadhu, Darya and Jiwna from jail (Appeals Nos. 290 to 295 of 1931). These six appellants have been represented by Mr. Mohammad Rafiq. The case of each appellant is also before us under S. 374, Criminal P. C., for confirmation of the death sentences. Dalip Singh, Jhanda Singh, Arur Singh and Teju are Jats while the other four appellants Sadhu, Harya and Darya (two brothers) and Jiwana are sweepers. Pakar Singh a young Jat of 19 of Batala, was also implicated in the affair but was tendered a pardon and has become an approver in the case. The complicity of the eight appellants in the murders depends almost entirely on the evidence of the approver but before giving a summary of his story as told in Court and which was not disclosed till September or more than four months later it will be convenient to recount briefly the facts which led to the discovery of the murders and the steps taken immediately thereafter.

Up to the night of the murders Achhar Singh and his two sons had been sleeping at home but owing to the theft of some sheaves from the wheat threshing floor on the night preceding, it was arranged that the father should sleep at the wheat threshing floor and the two sons at the gram threshing floor. On the early morning of the 3rd May Achhar Singh on his way home met his sepi Fauju (P. W. 5) going out to plough and told him not to do so but to go to the gram threshing floor and help Kartar Singh in winnowing the gram. On reaching the threshing floor, Fauju found the dead and burnt bodies of the two boys lying on a heap of smouldering gram stalks. He at once went and informed Achhar Singh and the unfortunate father on seeing the awful fate of his two sons fainted and remained unconscious for sometime. Amir, daffadar of chaukidars (P. W. 4), was despatched to the Police Station at Beas, seven miles distant, to make a report. This was made at 10 a. m., and the Sub-Inspector immediately went to the spot. One of a pair of gold ear-rings and a gold finger ring which Kartar Singh was wearing, his shoes, those of Ajit Singh and an axe were found to be missing. Suspicion fell on Jhanda Singh and Arur Singh, appellants who were said to be on very friendly terms with each other and on inimical terms with Achhar Singh. No evidence was apparently forthcoming against these two persons nor was there any clue as to the person or persons concerned and so the investigation was dropped.

The post mortem examination on the bodies of Kartar Singh and Ajit Singh which was held on 4th May 1930, by P. W. 1, revealed six incised wounds on that of Kartar Singh. These were situated on the left and right arm, left side of chest and left leg. The major portion of the body was burnt and black, also the brain and some of the internal organs partly so. Two incised wounds on each thigh were discovered in the case of Ajit Singh, the burnt condition of whose body and internal organs was much the same as that of his brother's. In the case of both, death in the opinion of the doctor had resulted either from burning or from injuries inflicted previously, which injuries owing to the condition of the bodies could not be detected. The medical witness was further of opinion that the bodies must have been burning for some hours.

Pakhar Singh approver who is said to be the dharam bhai or spiritual brother of the two sons of Lachhman Singh, (P. W. 13), fell ill some 2½ months after the murders and one day at the end of August or beginning of September, Lachhman Singh found him lying in the deorhi of the dharamsala suffering from fever and a cough and in a very depressed state of mind. The approver seemed to think that he was going to die and apparently stricken by remorse or pity he confided in Lachhman Singh under a promise of secrecy and told him that he and the eight appellants had murdered Kartar Singh and Ajit Singh. Some four days later Kesar Singh, (P. W. 12) and Lachhman Singh while passing through the village on their way to Miani to get some reeds, heard the wife of Achhar Singh lamenting the loss of her two sons. This appears to have greatly distressed these two witnesses and when they had gone some little distance Lachhman Singh told Kesar Singh what he had learnt from the approver. They separated at Miani, and on reaching Jhalari, on his way back, Kesar Singh told Ujagar safedposh (P. W. 30), of what he had heard from Lachhman Singh. This was on the 6th September, and on the following day Ujagar Singh sent Ghulla sweeper (P. W. 31), a friend of Sadhu appellant to make inquiries from him about the matter. Ghulla returned with the information that since the investigation had dropped Sadhu had admitted having been concerned in the murders along with the seven other appellants and the approver.

Ujagar Singh passed on the information he had received to the police on the 8th and the investigation was reopened. The approver was sent for and he made a statement to the police on the 12th. On the same day Sadhu produced from his house the axe and the two pairs of shoes found to be missing from the threshing floor. Pakhar Singh was tendered a pardon on 23rd September 1930, and his statement was recorded on 23rd September 1930. He claims to know all the eight appellants and further states that the appellants Dalip Singh and Teja Singh are dharm brothers and that Jhanda Singh and Arur Singh are very friendly. (His Lordship then stated the story of the crime as given by the approver and proceeded). The first three points cannot perhaps be .treated as affording material corroboration of the approver's story as these three matters occurred before the crime was committed. They however do afford general corroboration of his story. Legally no corroboration is required of the evidence of an accomplice, but it is now the settled practice which is based on the dictates of prudence and common sense and well-settled by numerous authorities to require such corroborative evidence. The nature and extent of such corroboration have been well defined in the fullest and most authoritative manner in *R.* v. *Baskerville* (1), by the Court of criminal appeal as:

> "Independent testimony which affects the accused by connecting or tending to connect the accused with the crime. In other words, it must be evidence which implicates him, that is which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. . . . The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime."

I propose to examine the evidence tendered by the prosecution in corroboration of the approver's story in the light of the principles enunciated above. (His Lordship then discussed the evidence and proceeded). I have given the story of the approver my most careful consideration and have examined and tested it from every possible point of view and cannot regard it as being a mere figment of his imagination. It is difficult to see why four months after the murders the approver should come out with this story and implicate no less than eight persons between whom and him no ill-feeling has been proved. There is a complete absence of motive on the part of the approver for implicating the appellants falsely. Nor is there any ground for holding that the story told by him is the invention of some interested person or persons and has been put into his mouth by such. The police had completely dropped the investigation and but for the approver having fallen ill and presumably suffered from the prickings of conscience no light would ever have been thrown on this brutal and ghastly crime. In the matter of corroboration of the approver's story it must be borne in mind that it would be impossible to expect and indeed is not required that an accomplice should be confirmed in every detail of the crime. If this could be done the evidence of an accomplice would not be necessary or essential to the case.

To sum up I would hold that so far as the appellants, Jhanda Singh, Arur Singh and Sadhu are concerned there is sufficient corroboration of the approver's story connecting them with the crime in the evidence of Bantu supported by that referred to and discussed under S. (4), (6) and (7) above. It is doubtful whether Bantu could have recognized all the appellants when he saw them on the canal bank but the identity of Jhanda Singh and Arur Singh would be fixed in his mind by the fact that these two appellants caught him by the ears and threatened him. As regards the participation of the other five appellants, there is only the evidence of Bantu in corroboration of the approver and I hesitate to accept this in the absence of other material corroboration. Motive in the case of these five appellants is also not so apparent and while there are strong suspicions against them the absence of the necessary corroborative proof makes it unsafe to convict them. I would accordingly hold that the appellants, Jhanda Singh, Arur Singh and Sadhu have been rightly convicted and I would confirm the sentence of death in the case of Jhanda Singh and Arur Singh and commute the said sentence in the case of Sadhu to one of transportation for life as he was only a minor actor in the affair. For the reasons given I would accept the appeals of Dalip Singh, Teja Singh, Harya Darya and Jiwna and setting aside their convictions and sentences acquit them and direct they be set at liberty.

Bhide, J.—I agree.

R.M./R.K. *Order accordingly.*

A. I. R. 1933 Lahore 296

BHIDE AND CURRIE, JJ.

Muzaffar and *another*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 28 of 1931, Decided on 9th July 1931, from order of Addl. Sess. Judge, Mianwali, D/- 19th November 1930.

(a) Criminal P. C. (1898), S. 423—Interference with judgment of acquittal on question of fact—It is sufficient if finding is clearly wrong on evidence and unreasonable—But errors in judgment of acquittal ought to be clearer and evidence more cogent and convincing to justify its setting aside than in case of judgment of conviction.

In order to justify interference with a judgment of acquittal on a question of fact it is sufficien

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1. (1916) 2 K B 658=86 L J K B 28=115 L T 453=80 J P 446=25 Cox C C 524=60 S J 696.

if the finding is clearly wrong on the evidence and unreasonable in the opinion of the appellate Court whether or not the unreasonableness amounts to perversity, stupidity or incompetence but upon sound principles of criminal jurisprudence the indications of errors in the judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a judgment of conviction: 7 *P R* 1904, *Cr*, *Foll*. [P 298 C 2]

(b) Penal Code (1860), S. 302—Men attacking opponents with spears and vaholas must be held to have knowledge that they are likely to inflict injuries as will result in death and are guilty under S. 302—Case held not covered by Penal Code (1860), S. 300, Excep. 4.

Peaceful men are not ready armed with spears when a sudden fight occurs. Men who go to attack their opponents with spears and vaholas must be held to have, if not the definite intention of killing, at least the knowledge that they are likely to inflict such injuries as will result in death.

When therefore the accused were armed with spears and other sharp edged weapon and lathis while persons on the other side were armed with lathis only and it was clear from the nature of the injuries sustained, which were inflicted with spears in the side of breast and abdomen, that the accused had the intention of causing death: *Held*: that the offence of the accused was one of murder punishable under S. 302 and was not covered by Excep. 4 to S. 300. [P 299 C 2]

B. R. Puri—for Appellants.

R. C. Soni—for the Crown.

Currie, J.—On 7th April 1930 two men, Abbas Khan and Muzaffar Khan were killed in the village Musa Khel, while others were injured. Eleven men were tried on charges under Ss. 302, 326 and 324 read with S. 149, I. P. C. Eventually the learned Additional Sessions Judge convicted two men, Muzaffar and Sadullah Khan, under S. 304, part 1, I. P. C., and sentenced them to transportation for life. Sadullah Khan was also convicted under S. 326, I. P. C. They were acquitted on the remaining charges and the remaining nine persons were acquitted entirely. Muzaffar and Sadullah Khan have appealed against their conviction and sentence and the Crown has appealed against their acquittal on the charge of murder. The Crown has also appealed against the acquittal of three of the persons who were acquitted by the Additional Sessions Judge, viz., Khan Zaman, Ghazi Khan and Mohammad Khan.

The prosecution story is to the effect that there had been a heavy shower that afternoon. About digar-wela, say between 4 and 5 p. m., Sardud Khan went out to the small bund in the lane outside his house. He has given various reasons for this. At one time he stated that he went to see the bund, at another time that he went to cut the bund as water was coming into his compound, and thirdly that he went to divert the water into his bhore or enclosure. According to his story, he found there eleven of the opposite party, Mohammad Khan and Sadullah Khan being armed with vaholas or mattocks while the remainder were armed with spears. An altercation ensued and men of his party arrived. His son, Abas Khan, was the first person person attacked and then Muzaffar Khan came and was attacked with the result that these men died. Then Kamand Khan, P. W. 6, appeared on the scene and was attacked. Then he himself was assaulted. Hayat Khan, P. W. 7, then appeared and was chased and, on their return from the pursuit of Hayat Khan, the party injured Mt. Chandne, P. W. 8, and Mt. Sahiban, P. W. 9, who were attending to the two dead men. The dead and the injured were then removed to the old police chauki near by. A constable, Abidullah, P. W. 11, appeared on the scene and took Sardud Khan to the police station where he made the first information report at 7-30 p. m.

Ghazi Khan, respondent, gave a blank denial and so did Khan Zaman who stated that he resided at his own vandah. Mohammad Khan also blankly denied the commission of the offence. Muzaffar Khan offered an absurd explanation of the injuries found on his person and Sadullah Khan made a long statement making out that the complainants were the aggressors. He stated that he was trying to stop water from entering his courtyard when Sardar Khan and others of his party came and asked him to go with them to the Mohar Land. He accordingly accompanied them and, while they were talking loudly about the flowing of water in the lane, Sardud Khan and Kamand Khan came out with four or five others and overtook them near the old police post and began to assault them. He himself ran away. He received a vahola blow on the head at the hands of Hayat Khan and became unconscious. The prosecution case rested on the evidence of Sardud Khan, Kamand Khan, Hayat Khan and the two women, Mt. Chandne and Mt. Sahiban. These witnesses agreed in giving the leading part in the affray to Sardar Khan. But Sardar Khan fortunately for himself was in a position to prove the alibi put forward by him to the effect that he was travelling to Mianwali in the same lorry as a Sub-Inspector of Police at the time the affray is said to have taken place. The learned Additional Sessions Judge accepted the alibis put forward by Jaffar, Dost Mohammad, Allah Dad, Muqarrab and Shah Jahan which were supported, in his opinion, by convincing evidence coupled with the fact that these men had no injuries on their persons. He was obviously not impressed by the evidence for the prosecution and, remarking that a person, who has no injury, should be convicted of having taken part in the attack only on very cogent evidence which does not exist, acquitted Ghazi Khan, Khan Zaman and Mohammad Khan, who had no injuries on their persons.

The learned Additional Sessions Judge further accepted the story put forward by two defence witnesses, D. Ws. 5 and 6, that originally Hayat Khan had started for the police station to make the report but had been recalled with a view to implicating a larger number, and that it was only the arrival of the constable on the scene that caused the report to be made when it was. Certainly there is no other explanation of the failure of any one to report the case promptly at the police station which is only a quarter of a mile distant.

In arguing the case for the Crown Mr. R. C. Soni admitted that no reliance could be placed on the statements of Hayat Khan and Mt. Chande which were a tissue of contradictions and absurdities. Thus the only evidence, to which he has invited our attention, is that of Sardud Khan, Kamand Khan and Mt. Sahiban. The latter lady however cannot obviously be relied upon, as in very many instances her statement before the Sessions Court is diametrically opposed to what she had stated before the police or the Committing Magistrate. As regards Sardud Khan and Kamand Khan it appears to me that what they say must be received with some caution in view of the fact that the learned Additional Sessions Judge has held that six out of the eleven persons against whom they gave evidence had succeeded in proving alibis. It is urged that Khan Zaman was named in the First Information Report as having struck Sardud Khan with a spear and that this story has been maintained throughout unaltered. As regards Mohammad Khan it is urged that three of the assessors were of opinion that he was present but took no active part in the fight. As against Ghazi Khan it is pointed out that Sardud Khan states that he definitely saw him stab Abbas Khan and Kamand Khan supports this less definitely. He was also absconding until the 20th. Now, whatever view one might have taken, if one had been trying the case, as regards the guilt of these men, the question to be considered is whether there are sufficient grounds for interfering with the findings of the Additional Sessions Judge. The principle governing appeals from acquittals was enunciated in *King-Emperor* v. *Chattar Singh* (1), where it was said that:

> " in order to justify interference with a judgment of acquittal on a question of fact, it is sufficient if the finding is clearly wrong on the evidence and unreasonable in the opinion of the appellate Court, whether or not the unreasonableness amounts to perversity, stupidity or incompetence * * * * *; but upon sound principles of criminal jurisprudence the indications of error in the judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a judgment of conviction."

In the present case the learned Additional Sessions Judge is in agreement with the unanimous opinion of the assessors as regards two of the respondents, Khan Zaman and Ghazi Khan. As regards the third respondent the majority of the assessors, though of opinion that he had been present thought that he had taken a minor part in the affair. As already noted the only evidence to be considered is that of Sardud Khan and Kamand Khan and, if these men are found to be unreliable as they had been as regards the majority of the persons against whom they have have given evidence it cannot be said, in my opinion, that the Additional Sessions Judge was clearly wrong in refusing to believe them as regards the three respondents who had no injuries on their persons. I would therefore dismiss the appeal of the Crown as regards Khan Zaman, Ghazi Khan and Mohammad Khan and direct that they be set at liberty. As regards the two men who have been convicted, Muzaffar and Sadullah Khan, there can be no doubt, in my opinion, that they were present and took part in the affray. Sadullah Khan in fact admits his own presence and both of them bore traces of injuries which cannot be otherwise

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1. (1904) 7 P R 1904 Cr=97 P L R 1904=1 Cr L J 781.

explained. I would therefore hold that the learned Additional Sessions Judge was right in his conclusion as regards the presence and participation in the fight of these two men.

The only question that remains therefore for consideration is whether the learned Additional Sessions Judge was right in convicting these two men under S. 304-1, I. P. C., or whether they should have been convicted of the offence of murder. The learned Additional Sessions Judge had held that there being no sufficient reliable evidence as to how the fight commenced, it should be presumed that it took place suddenly and therefore the offence was covered by the fourth exception of S. 300, Penal Code. Now, in the present case it is clear from the nature of the injuries sustained by Abbas Khan and Muzaffar Khan that they were the subject of a savage attack carried out with spears. Abbas Khan had one incised stab wound passing through the second intercostal space and through the left ventricle of the heart. Apart from that he had another contused wound on the outer side of the right upper arm and ten contusions and other abrasions caused by blunt weapons. He died as the result of haemorrhage and shock from the incised stab wound of the chest which passed through the heart.

Muzaffar Khan had no less than three stabs, one passing through the pericardium and the right and left ventricle of the heart, the second entering the abdominal cavity and the third entering the liver. Kamand Khan had five incised wounds caused by a sharp edged weapon. Apart from this other injuries—Sardud Khan had one gaping incised wound in the chest, and Mt. Chande had an incised wound—Hayat Khan had only a contused wound. On the other hand, of the two convicts Sadullah Khan had three contused wounds, a scratch and a cut on the left border of tongue caused by his own teeth. Muzaffar had a contused wound on the right parietal bone, a scratch on the right knee and a contusion on the right temple. It is thus evident that the assailants were armed with spears and other sharp-edged weapons probably, as stated, with mattocks (vaholas) as well as with dangs or lathis. From the nature of the injuries sustained, inflicted as they were with spears in the side, breast and abdomen, there can be no doubt, to my mind, that the assailants had the intention to cause death. It is clearly taking undue advantage to use spears and vaholas on men armed with lathis.

As regards the origin of the fight, the learned Additional Sessions Judge remarked:

> "In view of the application (under S. 145, Criminal P. C.) that was pending against him it is probable that he had gone to stop the flow of water in the direction of the bhora of Mohammad Khan. In any case the origin is obscure so the fight must be presumed to be a sudden one."

It is clear that the fight took place over the bund in the lane. From the injuries of the two parties it is patent that Muzaffar and Sadullah Khan with other supporters came on the scene and attacked Sardud Khan and his men. The very fact that they were armed with spears shows that they intended to attack the opposite party and sallied forth with that intention. Peaceful men are not ready armed with spears when a sudden fight occurs. I therefore am of opinion that the learned Additional Sessions Judge was clearly wrong in holding that the fight was a sudden one, and that the offence committed by Muzaffar and Sadullah Khan was covered by the fourth exception to S. 300. Penal Code. Men who go to attack their opponents with spears and vaholas must be held to have, if not the definite intention of killing, at least the knowledge that they are likely to inflict such injuries as will result in death. I would therefore hold that the offence of these men was one of murder punishable under S. 302, Penal Code. The prosecution evidence is however unsatisfactory as to the part played by each of the two men. Further the prosecution have not frankly stated how the fight arose. In these circumstances I am not prepared to enhance the sentence. The Crown appeal is therefore accepted as regards Muzaffar and Sadullah to the extent of modifying the section under which they are convicted to S. 302, Penal Code. As regards the remaining respondents the appeal is dismissed and they are to be released.

Bhide, J.—I agree.

R.M /R.K. *Order accordingly.*

A. I. R. 1933 Lahore 299

ABDUL QADIR, J.

Chanan Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 269 of 1931, Decided on 5th June 1931, against order of Magistrate, First Class, Ferozepore, D/- 28th February 1931.

(a) Criminal Trial—Identification—Value of.

Identifications made at night during a dacoity or when the people are terrorized are generally of very little value: *A I R* 1927 *Cal* 820, *Ref.* [P 301 C 1]

(b) Criminal Trial—Evidence—Comparison of footprints after two months — Original tracks not preserved—Evidence has no value.

Where a tracker compares the admitted foot-prints of an accused person with the impression that was left on the tracker of the footprints which he saw when he went to the spot where the crime was committed such a comparison made about two months after the occurrence where the original tracks were not preserved cannot have much value. [P 301 C 1]

J. C. Sethi—for Appellant.

Din Dayal Khanna for *Govt. Advocate*—for the Crown.

Judgment.—There was a dacoity in the house of Raman Mal in Kurahiwala in Ferozepore District, on the night of 9th October 1930. Raman Mal was away that night and his wife Mt. Paro and daughter Mt. Sodhan were in the house. About 10 p. m. six or seven dacoits came to the house, some of whom were armed with guns. They obtained the keys of the safe from Mt. Paro and took away some cash and ornaments. Phumman Mal, a neighbour of Raman Mal, was sent in the morning to the police station Kot Bhai to report the matter and did so. For about two months the culprits could not be traced. About 3rd December 1930, the police got information that a man named Channan Singh, was in possession of some ornaments that were taken away in the dacoity above referred to and would get out at Faqasar Railway Station on the night of the 3rd December. The police went to that station and arrested Chanan Singh, who came out of the train with a number of ornaments in his possession. These were tied in a cloth. A list of the property recovered from him was prepared and 34 silver ornaments subsequently identified by Raman Mal and his witnesses as the property of Raman Lal, were recovered from him. On 7th December, there was an identification parade in which Mt. Paro and Mt. Sodhan, identified Chanan Singh as one of the persons whom they saw in their house on the night when the dacoity was committed. On the 16th a tracker named Shamun picked out the foot-prints of Chanan Singh, from among those of a number of others with whom he was made to walk, alleging that he had seen the tracks originally covered near the scene of occurrence and could say that the tracks picked out by him were those of one of the men who had left their tracks near the spot. On this evidence Chanan Singh has been convicted under S. 395, Penal Code, and sentenced to five years' rigorous imprisonment and has appealed against his conviction and sentence.

The appeal has been argued before me by Mr. Jai Gopal Sethi, who questions the identification of the ornaments by Raman Mal and his relatives and friends and also questions the identification of Chanan Singh by Mt. Paro and Mt. Sodhan. He adds that the tracker's evidence is hardly of any value and contends that the evidence produced by the prosecution is by no means sufficient to bring home the offence to Chanan Singh. Chanan Singh in his statement in Court denies the fact that the ornaments were recovered from his possession and does not claim the ornaments as his own. He does not make any attempt to explain the evidence of those witnesses for the prosecution who prove the fact of his arrest and of the recovery of the ornaments from him at Faqarsar. His learned counsel offers an ingenious explanation in this Court, which was not offered by his client, and that is that a man named Pritam Singh who was a co-accused with Chanan Singh and has been accquitted by the Court below, was probably one of the dacoits and was with Chanan Singh at Faqarsar and that he appears to be the man who gave information to the police and who got Chanan Singh arrested and may have placed the ornaments in Chanan Singh's possession for the time being. It is true that Pritam Singh was a co-accused with Chanan Singh in this ccase, but no property having been recovered from him, the evidence of his identification by an outsider as well as the evidence of the tracker against him have naturally been considered insufficient to justify his conviction.

There is nothing however on the record which lends colour to the belief that he was the informer or that he was ever in possession of the ornaments in question or had passed them on to Chanan Singh. This theory therefore cannot help the appellant. As argument is put forward on his behalf, in the alternative, that even if the ornaments are held to belong to the complainant and were found with Chanan Singh about two months after the dacoity, the more reasonable presumption from the fact of their possession would be that he may be the receiver of property with regard to which this dacoity had been committed; and that considering the suspicious nature of his identification by Mt. Paro and Mt. Sodhan it should not be held that he was one of the dacoits. (His Lordship considered the evidence as to the identification of the ornaments and proceeded). I am afraid I cannot attach the same value to the identification of Chanan Singh by Mt. Paro and Mt. Sodhan for various reasons and I think the reliability of their identification is rather doubtful. The first information report made by Phuman Mal, stated clearly that he saw some eight men with muffled faces standing in front of Raman Mal's house, that one of them stood in front of the house while the others scaled over the wall and got down into the house by means of a ladder. The man outside fired three shots from the gun he had with him and Phumman Mal ran away out of fear at that time. It is possible that when the dacoits went in and proceeded to open the boxes, to take away property, the faces of some of them may not have remained muffled, but there is no clear evidence on this point.

No specific part is assigned by the witnesses to Chanan Singh and even if his face was exposed, it is not likely that two women ,who were alone in the house in which suddenly some seven dacoits appeared at night, would be able, in the confusion of the moment, to remember distinctly a face that they saw under those circumstances. Mr. Sethi refers to *Emperor* v. *Irjan*, *A. I. R.* 1927 *Cal.* 820, where it was held that identifications made at night during a dacoity or when the people are terrorized are generally of very little value. The tracker's evidence also is not of much importance in this case, as he compared the admitted footprints of Chanan Singh with the impression that was left on him of the footprints which he saw when he first came to the spot. A comparison like this, made about two months after the occurrence, where the original tracks were no longer preserved, cannot have much value. Eliminating therefore the evidence as to the identification of Chanan Singh and as to the comparison of his tracks, there remains only the evidence as to possession by him of the property which was the proceeds of this dacoity. This possession is proved convincingly by the evidence on the record and it may be presumed that he was a receiver with guilty knowledge and is liable to be convicted under S. 412, Penal Code. I would therefore alter his conviction from one under S. 395, Penal Code, to that under S. 412, Penal Code, and reduce his sentence from five years' to three years' rigorous imprisonment. To this extent the appeal is acccepted.

P.N./R.K. *Order accordingly.*

A. I. R. 1933 Lahore 301

TEK CHAND, J.

The Indian Companies Act (7 *of* 1913),
In the matter of.
The Punjab Flying Club Limited,
In the matter of.

Civil Original No. 21 of 1932, Decided on 6th March 1933.

(a) Company—Company is under duty to issue balance sheet.

A company is under a statutory duty to issue proper balance sheet and the existence of some disputes regarding amount due to the company does not relieve the company from such duty. [P 302 C 2; P 303 C 1]

(b) Companies Act (1913), S. 162—If company is commercially insolvent, order under S. 162 can be passed.

In petitions under S. 162, the Court has to see whether the company is commercially insolvent, i. e. whether it is unable to meet its current demands although the assets when realized may exceed its liabilities. If the company is commercially insolvent it may be wound-up. [P 303 C 2]

Carden Noad—for Petitioner.

Edmunds—for Burma Shell Oil Co.

Rustomji—for Lette.

Judgment.—This is a petition under S. 162, Companies Act, presented by the Secretary of State for the compulsory winding up of the Punjab Flying Club Limited, which is a Company incorporated under the Companies Act, having its Head Office at Lahore. It is averred in the petition that the Company is unable to pay its debts, that it has ceased to function and is not fulfilling its objects and that it is just and equitable that it be wound up by the Court. The petition was duly advertised in the Punjab Government Gazette, the Statesmen, the C. & M. Gazette and the Tribune and the usual notice was served on the company. The petition was opposed by Mr. K. L. Gauba, President of the Company, while Mr. Norman Edmunds, advocate, on behalf of the Burma Shell Oil Co., Limited; and Mr. Rustomji on behalf of Mr. Leete, alleged creditors of the Company, have appeared and supported the prayer for the compulsory winding up. The Company was incorporated on 4th October 1929 with the object of promoting the art and science of flying, imparting instruction to its members and others in aeronautics and providing facilities for flying and housing of aircraft. It has no share capital but is a company "limited by guarantee" under the provisions of S. 7, Companies Act, each member having undertaken to contribute to the assets of the Company, in the event of its being wound up, a sum not exceeding Rupees 25 for payment of its debts and liabilities. The number of members of the Company is stated to be over 300, and it appears to have received considerable assistance from Government at least in the earlier years of its existence.

By an agreement dated 1st April 1930 (Ex. P. 1) entered into between the Secretary of State and the Company, the Secretary of State agreed (1) to provide Rs. 27,600 for the purchase of two light aeroplanes, (2) to pay Rupees 15,000 towards the purchase and erection of a combined hangar and workshop at Lahore; (3) to contribute to the Company quarterly in advance the sum of Rs. 5,000 for a period of two years, or Rs. 40,000 in all, for the expenses of the Company during the continuance of the agreement; and (4) to pay at the rate of Rs. 150 for each person trained and qualified as a pilot, a sum not exceeding Rs. 2,250 in the first year and Rs. 5,000 in the second year of the agreement. The term of the agreement was fixed at two years and it was stipulated that the aeroplanes, the hangar and the equipments purchased from the grants made by the Secretary of State shall remain the absolute property of Government and shall, at the expiration of the agreement on 31st March 1932, or the sooner determination thereof, be delivered up to the Secretary of State in good condition, reasonable wear and tear excepted. The Company undertook to conduct its affairs to the satisfaction of the Secretary of State to employ a qualified Air Pilot, Ground Engineer and Mechanic, to maintain the aeroplanes and hangar in good condition, to have the necessary insurance effected, and to keep proper books of account. It is admitted that in accordance with the terms of this agreement the Secretary of State has paid to the Company the sum of Rs. 27,600 for purchase of aeroplanes, Rs. 15,000 for purchase and erection of the hangar and workshop, Rs. 40,000 as subsidy for two years, besides other smaller subsidies as provided in the agreement. By another agreement (Ex. P. 2) dated 25th February 1931 the Secretary of State leased to the Company an area of 132.23 acres of land in Rakh Kot Lakhpat and Bhabra at a rent of Rs. 661-4-0 per annum and on this land the Company duly constructed the hangar and the aerodrome with the money received from the Secretary of State and small sum contributed out of its own funds. The Company also purchased two aeroplanes with the amount provided by the Secretary of State and a third aeroplane with its own money. One of these aeroplanes crashed some time in December 1931, the second crashed in March 1932, and the third in April or May 1932. All the three machines were insured, and it is admitted by Mr. Gauba, the original Secretary and the present President of the Company, that it received Rs. 6,000 from the Insurance Company to cover the loss of the first plane. but that this amount was not used for the purchase of a new machine but was spent on effecting repairs to the other two machines and in paying off the salary and allowance of the staff. With regard to the insurance money for the other two planes, counter-claims are stated to have been put in by the Company and Government, and pending the settlement of these disputes the Insurance Company has not made payment to either party.

It is common ground between the parties that since the crash of the third machine in April or May 1932 no flying has been done in the Club, nor has it had any pilot or technical staff for several months. It is admitted by Mr. Gauba that the Company has not issued a balance-sheet after 30th June 1931, though under the law it is obligatory on every limited liability company to get prepared and issued to every member a duly audited balance-sheet at least once in every year and at intervals of not more than fifteen months. Mr. Gauba has explained that a balance sheet for the half year ending 31st December 1931 was prepared and was audited, but that it was not circulated to the members or placed before the general meeting held on 29th February 1932, as disputes had arisen with Government relating to the ownership of the aeroplanes and the right of the Club to realize the insurance money, and as these disputes are still unsettled it has been thought proper to withhold the balance-sheet. He has further stated that for the same reason the balance-sheets for the two succeeding half-years have not been got prepared or issued. Mr. Gauba has however failed to refer me to any provision of the law under which the existence of disputes of this kind relieves a company from its statutory duty to issue proper balance sheet. (After considering the evidence the judgment proceeded). It is clear from what has been stated above that the company is not functioning at present, that its affairs are in a moribund condition and that there are no prospects of the work being resumed in the near future. Indeed, Mr. Gauba who alone of all the three hundred members has opposed the petition frankly admitted in the statement which he made before me on 3rd Februray 1933 that without receipt of the subsidy from Government for the year 1932-33 it would not be possible for the Club to restart flying. He has however urged that the petition for winding up has not been made bona fide as the present unsatisfactory state of affairs of the Club is due principally to the hostile attitude adopted by the Government of India since August 1931, when it was discovered that two of the technical employees, Messrs Leete (Pilot) and Samules (Ground Engineer) had not rendered a satisfactory account of the quantity of petrol which was in their charge and the Managing Committee started an investigation into the matter.

Mr. Gauba alleges that these gentlemen made false allegations against the Club to the Director of Civil Aviation who thenceforward placed numerous obstacles in the way of the working of the Club, and acting on his advice Government refused to continue the subsidy for the year commencing 1st April 1932, even though the necessary funds for the purpose had been voted by the Legislative Assembly. Mr. Gauba has placed on the record the correspondence which had passed between him and the Government of India during the last eighteen months and contends that Government has backed out of its promise to continue the subsidy for 1932-33, I have carefully examined this correspondence and find that all that it establishes is that negotiations for the continuance of the subsidy for another year went on for some time, but I have not been able to discover anything which might show that these negotiations had materialized into a binding contract. It is admitted by Mr. Gauba that no formal document was ever executed on behalf of the Secretary of State agreeing to continue the subsidy after 31st March 1932. It is clear therefore that Government was under no legal liability to make any further payments to the company. In this view of the case it is not necessary for the purposes of this petition to enter into a detailed examination of the correspondence in order to ascertain the reasons for the failure of the negotiations for renewal of the subsidy. Government was making payments to the company ex gratia, and if for any reason it did not think it fit to enter into a binding agreement to continue its grants for another year, the company has no legal right to decline to fulfil its obligation under the earlier agreements, Exs. P. 1 and P. 2.

After a careful consideration of the evidence on the record and the arguments addressed to me by both parties I can find no basis for the suggestion that the petition for winding up has not been made in good faith and that the real object of Government is to escape liability for payment of the grants for 1932-33, or to put pressure on the Club to give up its claim against the Insurance Company for the amount due by reason of the destruction of the second and the third aeroplanes. Mr. Gauba finally contended that the Club has got sufficient assets in the form of arrears of subscriptions, etc., recoverable from its members, and the claim against the Insurance Company and that if this petition is dismissed these amounts will be realized and payments made to the creditors. But, as has been stated already, the claim against the Insurance Company is a disputed one; the members have not paid their dues for several years and do not appear to be taking any interest in the affairs of the Club, and further, it is doubtful that the amount of arrears if and when realized, will be sufficient to meet all the liabilites. But even if it be assumed that the Club has got a valid claim to recover the insurance money and the members are likely to pay voluntarily the full amount due by them, this is no answer to the petition. It is settled law that what the Court has to see in a case like this is whether the company is "commercially insolvent," i. e., whether it is unable to meet its current demands, although the assests when realized including uncalled capital exceed its liabilities (Halsbury's Laws of England, Vol. V, p. 397). As observed by Lord Wrenbury

> "in such a case it is useless to say that if the assets of the company are realized there will be ample to pay 20 shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investment not presently realizable but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up:;'

(Buckley's law and Practice under the Companies Acts, p. 364).

In my opinion it has been established beyond doubt that the company has not complied with the statutory demands made under S. 163 (2) by the Secretary of State and the Burma Shell Oil Co., that it is unable to meet its current demands, that it has ceased to function and its affairs are in a moribund condition, that it has no cash in hand nor does it possess the necessary equipment to carry out the object for which it was incorporated, and that there are no prospects of its being able to resume its activities within a reasonable time. On these findings the Secretary of State is entitled ex-debito justitiae to a winding up order and his petition must be granted. I accordingly pass an order under S. 162, Companies Act, that the Punjab Flying Club Limited be compulsorily wound up by this Court; and I appoint Mr. L. Hudson of Messrs. A. F. Ferguson and Co., Chartered Accountants, and Mr. R. C. Soni, Bar-at-law, Lahore. as Joint Official Liquidators. Both these gentlemen shall be summoned to appear before me on the 8th March, at 3-30 p. m., when the question of their remuneration will be settled. As the petition was opposed on wholly unsubstantial grounds, the Secretary of State shall get his costs from the company.

K.S. *Petition allowed.*

A. I. R. 1933 Lahore 304

TAPP, J.

Kesar Singh and *another*—Appellants.

v.

Bansi Ram and *others*—Respondents.

Misc. Second Appeal No. 1059 of 1932, Decided on 21st December 1932, from order of Dist. Judge, Ferozepore, D/- 7th April 1932.

Civil P. C. (1908), O. 41, R. 20—Discretion to allow additional parties when should be exercised.

There were three appeals against one order. Two were rejected on the ground that a necessary party was not made a respondent. The third was accepted on merits, the Court refused to condone the omission in the first two appeals. The points in all appeals were similar:

Held: that the Court should have exercised its discretion under O. 41, R. 20 and condoned the omission. [P 304 C 2]

Fakir Chand and *Chandar Gupta*—for Appellants.

B. P. Khosla—for Respondents.

Judgment.—Bhaghat Singh was adjudicated an insolvent on 19th July 1930 on a creditor's petition presented on 2nd December 1929. On 17th April 1931 the official receiver applied to the insolvency Court for the annulment of six transfers effected by the insolvent in favour of different persons. The insolvency Court accepted the application of the official receiver and in a very brief and summary order annulled the transfers in question. Two of these alienations were in favour of Kesar Singh and Bur Singh the latter of whom having died on 9th September 1931 is represented by Mal Singh and both these persons preferred a joint appeal to the District Judge. They failed to implead the official receiver and on that ground their appeal was dismissed. In an appeal by a third alienee named Bagga Singh the official receiver was impleaded and the learned District was asked to condone the omission in the appeal of Kesar Singh and Mal Singh owing to the appeal of Bagga Singh being covered by the same order of the insolvency Court. He however did not see his way to accept this contention.

In my opinion the circumstances were such that the learned District Judge might well have exercised the discretion vested in him by O. 41, R. 20 and directed that the official receiver be made a respondent in the appeal. The appeal of Bagga Singh has, I understand, been accepted and the case remanded to the insolvency Court for decision of two issues and it seems to me unjust that while the good faith of the alienation in favour of Bagga Singh has to be determined the alienations in the case of Kesar Singh and Mal Singh which were dealt with by the same order cannot be reopened owing to a pure technicality. For the above reasons I accept the appeal and remand the case to the lower appellate Court with the direction that the official receiver be impleaded in the appeal and the appeal heard and disposed of in accordance with law. Parties will bear their own costs in this Court.

M.N. *Appeal allowed.*

A. I. R. 1933 Lahore 305

COLDSTREAM AND JOHNSTONE, JJ.

Hari Kishan—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 141 of 1931, Decided on 24th February 1931, against order of Sess. Judge, Lahore, D/- 26th January 1931.

Penal Code (1860), S. 302—Sentence—Accused convicted of murder—Fact that he was encouraged in his crime by mischievous literature cannot justify lesser punishment than death.

Where an educated young man who has attained majority, has been convicted of murder, the mere fact that he was encouraged to commit the crime by reading the mischievous literature and that his motive was not personal, but was to attack only the highest officer of the State, does not justify a refusal to enforce the ordinary punishment for murder, which is death and awarding the lesser punishment of transportation for life, because neither of the grounds is sufficient for leniency being shown to the accused and as also youth alone does not constitute an extenuating circumstance for the award of the lesser punishment: *A. I. R.* 1928 *Lah.* 855, *Ref.* [P 306 C 1, 2]

Bhagat Ram Puri—for Appellant.

Ram Lal—for the Crown.

Judgment. — On 23rd December 1930, when His Excellency the Governor of the Punjab was leaving the Lahore University Hall at the close of Convocation proceedings shortly after one o'clock, six shots were fired from a revolver by Hari Kishen, the appellant, who was at a distance of five or six yards from him in the Hall. One of these shots struck His Excellency's left arm passing through the fleshy part behind the humerus end and another grazed the left side of his back. A third struck Sub-Inspector, Chanan Singh, who was on duty at the entrance through which His Excellency was about to pass, on the right side of his neck. Two other shots hit Inspector, B. S. Wadhawan on the right fore-arm and on the right loin. Doctor McDermott, a lady doctor, was also wounded in the abdomen by a bullet from the revolver. Sub-Inspector Chanan Singh died of wound about five o'clock the same evening. Hari Kishan was committed for trial charged with the murder of Sub-Inspector Chanan Singh, and the attempted murder of His Excellency the Governor and Inspector B. S. Wadhawan. He was tried by the Sessions Judge of Lahore, with the assistance of a jury of nine. The jury returned a verdict of guilty on all three charges, and the learned Sessions Judge in agreement with the verdict sentenced the appellant to death under S. 302, Penal Code, for the murder of Sub-Inspector Chanan Singh, and to transportation for life on the charges of attempt under S. 307, Penal Code. Hari Kishan has appealed through Mr. B. R. Puri and Mr. Amin Chand Mehta and we have heard Mr. Puri on his behalf.

Mr. Puri opened his case by saying that in view of the statements made by his client at the trial and in his confession recorded by a Magistrate on 1st January 1931, he did not propose to take us through the evidence or to challenge the correctness of the findings of the jury and the Sessions Judge but would restrict himself to some of the grounds mentioned in the memorandum of appeal. We have however read the record and find that it clearly establishes the guilt of the appellant in respect of the offence with which he was charged. The only grounds argued before us by Mr. Puri are: (1) that the appellant was tried (a) by an improperly constituted Tribunal, and (b) in an unfavourable atmosphere; and (2) that the capital sentence should not have been passed under S. 302, Penal Code, in view of the unanimous recommendation for mercy made by the jurors to the Sessions Judge. The exception taken by Mr. Puri to the constitution of the Court is based on the refusal of the Sessions Judge to accept the objection made at the opening of the trial to the empanelling of three of the jurors: Mr. Mahbub Shah, who is employed in the office of the Director of Land Records, Mr. Hassan Ali Shah serving in the Accountant General's office, and Mr. Mohan Singh, who is a lecturer in the Government College, Lahore. These gentlemen were objected to because they were in Government service. Mr. Puri seeks support for his argument in the fact that an objection to another juror summoned was accepted, the objection being that he was employed in the Civil Secretariat. The learned Judge appears to us to have exercised great caution in accepting that objection. As regards Messrs. Mahbub Shah, Hassan Ali Shah and Mohan Singh, all we think necessary to say is that no presumed partiality was made out to the satisfaction of the Court (as is required by S. 278, Criminal P. C.), in respect of these three jurors, and we are satisfied that the Judge's decision was legal and proper. We are justified in this conclusion by the fact that the jurors objected to were parties to the recommendation made for mercy.

Mr. Puri contends that the trial took place in an unfavourable atmosphere because numerous resolutions had been passed by public bodies throughout the province condemning the attempt on His Excellency's life and there was a general desire to have the culprit punished. We see no force in this contention. There is no reason for supposing that the general public in other parts of India regarded the crime with feelings other than of horror, nor any reason to believe that desire for the punishment of the criminal was keener in the Punjab than elsewhere, nor for believing that any such feelings and desire could, in any manner whatever, have influenced the procedure or the result of the trial, wherever it was held. The evidence would have been the same as that which was produced in Lahore and, as already made clear, Mr. Puri admits that he is unable to attack the decisions of the jury and the Judge upon the merits of the record. Lastly we may note that this objection was raised before the Court on the 14th January when appellant's counsel mentioned the possibility of an application being made for a transfer of the case to some place outside the jurisdiction of this High Court. On the same day however counsel withdrew his objection to the trial being held in Lahore and stated that an application for transfer would not be made. After this the hearing was adjourned from the 15th to the 21st January, during which time no attempt to have the case transferred was made. There remains to be considered only the plea that the offence was not one for which the extreme penalty should have been inflicted.

The recommendation for mercy was made only on account of the appellant's youth. It is conceded by Mr. Puri that youth alone does not constitute an extenuating circumstance such as would justify the lesser penalty prescribed by the law (I may refer in this connexion to the remarks of Shadi Lal, C. J., in the case of Harnami, a boy of 17, *A. I. R.* 1928 *Lah.* 855), but his contention is that here we have not only youth but another matter which, he argues, should be taken into consideration. The matter to which he refers is that the motive which led to the crime was not personal enmity but merely a desire to injure the head of the Punjab Government, a desire engendered in the appellant's mind by grief at his brother's imprisonment in Peshawar for making a speech (here Mr. Puri relies on the appellant's confession of 1st January), and fostered by the reading of mischievous literature intended to arouse sympathy with revolutionary crime. We see no ground for leniency either in the fact that the appellant's object in coming to Lahore was to kill not a private enemy but an innocent servant of the State who had done him no harm, (he admitted at his trial that he came from the North-West Frontier Province with the purpose of shooting the Governor and did so of his own accord), or in the alleged fact that he was influenced by mischievous literature. It may be true that, as Mr. Puri has remarked in the course of his argument that so long as such literature is disseminated in the country, it is not to be wondered at that crimes like those of which his client has been convicted are committed; but we cannot for a moment accept the proposition that such a state of affairs justifies a refusal to enforce the ordinary punishment provided by law when a criminal has been convicted. The appellant is not an ignorant boy but an educated man who attained majority under the law four years ago.

The ordinary punishment for murder is death and finding no sufficient ground for imposing the lesser penalty, we dismiss this appeal and confirm the sentence of death.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 306

TAPP, J.

Jiwan Khan—Defendant—Petitioner.

v.

Muhammad Fazal Azim—Plaintiff—Opposite Party.

Civil Revn. Petn. No. 407 of 1932, Decided on 9th November 1932, from decree of Addl. Sm. C. C. Judge, Delhi, D/- 2nd May 1932.

Provincial Small Cause Courts Act (1887), Sch. 2, Art. 8—Open site for stacking fuel containing chhappar for shelter and for carrying on business is neither house nor shop.

An open site on which fuel is stacked containing a chappar used for shelter and carrying on business can hardly be regarded as a house or a shop and hence a suit for rent is not cognizable by a Court of Small Causes. [P 307 C 1]

Bishan Narain—for Petitioner.
Shamair Chand and *Qabul Chand*—for Opposite Party.

Judgment.—This is a petition for revision of the order of the Additional Judge, Small Cause Court, Delhi, decreeing the claim of the respondent-plaintiff for recovery of Rs. 96 on account of house rent, on the ground that under Art. 8, Sch. 2, Small Cause Courts Act, the Court had no jurisdiction to entertain the suit.

It appears from the facts on the record that the petitioner-defendant had a *tal* or fuel stack on an open site rented from plaintiff and on which there is also a chhappar in which he shelters and keeps his scales, weights, etc. The question whether this chhappar was erected by and belongs to the plaintiff-respondent or the defendant-petitioner appears to be immaterial as in my opinion an open site on which fuel is stacked and containing a chhappar used for shelter and carrying on business can hardly be regarded as a house. No doubt shop can be used as a house and vice versa but I do not think that in the present case the chhappar can be treated as falling under either category.

In my judgment the suit was not cognizable by a Court of Small Causes and accepting the petition I set aside the decree and direct that the plaint be returned for presentation to a Court of competent jurisdiction. Petitioner will get his costs in this Court.

K.S. *Petition accepted.*

A. I. R. 1933 Lahore 307 (1)

BHIDE, J.

Chiragh Din—Creditor—Appellant.

v.

Fateh Mohammad and *others*—Insolvent and Creditors—Respondents.

Civil Appeal No. 1101 of 1932, Decided on 26th January 1933, from order of Senior Sub-Judge, Sheikhupura.

Provincial Insolvency Act (1920), S. 75—Order of Senior Sub-Judge in insolvency—Appeal lies to District Judge.

An appeal from an order passed by the Senior Sub-Judge in the exercise of insolvency jurisdiction lies to the District Judge. [P 307 C 2]

Shamair Chand—for Appellant.

Ram Lal Anand—for Respondents.

Judgment.—This is an appeal from an order passed by the Senior Sub-Judge, Sheikhupura in the exercise of insolvency jurisdiction. A preliminary objection is raised that the appeal lies to the District Judge. The counsel for the appellant conceds this. I accordingly direct the memo of appeal to be returned to the appellant or his counsel for presentation to proper Court. The appellant will pay costs Rs. 32, to the respondents.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 307 (2)

TAPP, J.

Bohuru Mal —Appellant.

v.

Jagan Nath—Respondent.

Misc. First Appeal No. 1256 of 1932, Decided on 20th December 1932, from order of Senior Sub-Judge, Gurgaon, D/- 11th May 1932.

(a) Civil P. C. (1908), S. 59 (1) and (2)—Discretion exercised by lower Court under S. 59 will not be interfered with in appeal unless it is wrongly exercised—Asthma and indigestion do not constitute serious illness.

Under S. 59 (1), Civil P. C., a Court may cancel a warrant for the arrest of the judgment-debtor on the ground of his serious illness and under sub-S. 2, where a judgment-debtor has been arrested, a Court may release him if in its opinion he is not in a fit state of health to be detained in the civil prison. The adoption of either or both courses lies entirely within the discretion of the Court. [P 308 C 1]

Asthama and indigestion do not constitute serious illness. And where a Court refused to cancel the warrant of arrest, the appellate Court will not interfere unless the discretion is wrongly exercised. [P 308 C 1]

(b) Decree — Execution — Arrest of judgment-debtor and attachment of property can be simultaneously made.

Where a judgment-debtor conceals himself, arrest and attachment of his property can simultaneously be made in execution of a decree against him even though he owns considerable property and is a lambardar and kursinashin. [P 308 C 1]

Kanshi Nath Aggarwal and *Nanwa Mal*—for Appellant.

Duni Chand Gupta — for Respondent.

Judgment.—In execution of a decree for Rs. 5,000, which the respondent obtained against the appellant judgment-debtor in September 1931, the former applied for attachment of the property and arrest of the judgment-debtor. A warrant of attachment was issued but was returned unexecuted. A warrant of arrest was issued on the 9th May and on the same day the judgment-debtor filed an application alleging that he was suffering from asthma and indigestion and praying for the cancellation of the warrant. This application was rejected by the executing Court which left for future decision the question as to the fitness of the judgment-debtor to arrest and detention in the civil prison.

Now under S. 59 (1), Civil P. C., a Court may cancel a warrant for the arrest of the judgment-debtor on the ground of his serious illness and under sub-S. 2 where a judgment-debtor has been arrested a Court may release him if in its opinion he is not in a fit state of health to be detained in the civil prison. The adoption of either or both courses lies entirely within the discretion of the Court and I am not prepared to hold that the discretion in the present case which was obviously exercised under sub-S. 1 was wrongly exercised. Asthma and indigestion do not, in my opinion constitute a serious illness and it is clear that the Court refused to cancel the warrant of arrest as it was not satisfied that the judgment-debtor was seriously ill simply because he was suffering from asthma and indigestion. The question as to his being in a fit state of health to be detained in the civil prison after his arrest has been left open by the Court. Here it may be mentioned that the report on the warrant of arrest was to the effect that the judgment-debtor had concealed himself. The further contention on behalf of the judgment-debtor appellant that arrest and attachment should not be similtaneously made in view of the fact that the judgment-debtor owns considerable property and is a Lambardar and Kursinashin has, in my opinion, no force. The position of the judgment-debtor and his consequent ability to meet the decree imposed an obligation on him to discharge it and in the circumstances I see no reason for interference with the action taken by the Court below. I therefore dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 308

TAPP, J.

Gowardhan Lal and *another*—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 241 of 1931, Decided on 1st June 1931, against order of Magistrate, First Class, Lahore, D/- 25th February 1931

(a) Penal Code (1860), S. 463—Imitation closely copied from disputed writing cannot be proper standard of comparison.

It is hardly conceivable that a suspected forger will deliberately imitate the forged writing and create evidence against himself and consequently a specimen not written from dictation but closely copied from the disputed writing cannot afford a proper standard for comparison. [P 310 C 1]

(b) Criminal Trial—Identification.

Where persons between 18 and 26 were paraded with the accused about 16 years old, and the identifying witnesses were waiting outside the thana when the persons were called in for the identification parade and identifying witness identified the accused:

Held: that the identification was unfair. [P 310 C 2]

(c) Criminal Trial — Circumstantial evidence in forgery cases — Evidence of fraud must not fall short of proof— Penal Code (1860), S. 463.

Proof of fraud by positive and express evidence cannot be expected in the large majority of cases of forging a document or writing, and in such circumstantial evidence is the only means available. But such evidence must not fall short of proof and no conviction can rest on mere suspicion or conjecture however strong these may be. [P 310 C 2]

(d) Criminal Trial — Circumstantial evidence—When conviction would be justified stated.

In all criminal cases the evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused. In cases in which the proof afforded is of a presumptive nature or rests on circumstantial evidence to justify an inference of guilt the inculpating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. [P 310 C 2; P 311 C 1]

Bhagat Ram Puri—for Appellants.

J. W. Farlie for *Govt. Advocate*—for the Crown.

Judgment. — On 12th September 1930, a cheque for Rs. 80,000 drawn on the Lahore branch of the Imperial Bank of India by Mohammad Amin of the firm of Ahmad Din Illahi Bakhsh, hide merchants, in his own favour, was presented at the said bank by the drawer himself. He signed his name in two places on the reverse of the cheque which was entered in the ledger by Brahm Dev (P. W. 4) the clerk concerned who, according to his evidence, issued token No. 333 and wrote this number and his initials below in the top left hand corner on the face of the cheque. It was then passed by Mr. Hay, Assistant Accountant (P. W. 6), who in accordance with practice entered it in his own Scroll Book, affixed a rectangular rubber stamp bearing the letter *C* and wrote within the stamp the figure 9 and his initials. The cheque then reached the cashier and was duly paid by the teller Behari Lal (P. W. 5), who by an "oversight" omitted to affix the stamp "paid" on the cheque. In the course of the day this cheque along with others was made over by one Chet Ram to one of the scroll writers on the debit side, Hardit Jhoshi, (P. W. 13), who duly entered it in the Bank Scroll Cash Book as will appear from the carbon copy (P-K1), the original page having been removed. The total number of vouchers according to the summary on the last page of the carbon copy was 413 and this figure was entered in the Voucher Register, P. H., but on the Record Keeper, (P. W. 7), to whom the vouchers were eventually sent, bringing to the notice of Mr. Hay on 13th that he had only received 411 the necessary alteration was made in P. H. and the correction initialed by Mr. Hay. It is immaterial whether the correction was actually made by Mr. Hay or some one else as according to the Agent of the Bank, Mr. Nixon, (P. W. 11) the responsibility lay with Mr. Hay. Two vouchers of 12th September were thus undoubtedly missing, one the cheque for Rs. 80,000 referred to above and another for Rupees 25,000. Apparently the latter has not been found so far but as the sequel will show the former made its appearance again in the Bank.

On 3rd November 1930, a cheque for Rs. 80,000 bearing token No. 332 was received by Daulat Ram, (P. W. 1) a teller in the Bank along with other cheques. On inquiry of Daulat Ram a Hindu boy of the age of 18 or 19 years presented token No. 332 but on being asked the amount of the cheque stated it to be Rs. 8,000. Suspicions appear to have been aroused and the Treasurer Sohan Lal, (P. W. 2) on being informed of the matter and on seeing that the cheque had been passed by Mr. Hay while Mr. Woodward was Passing Officer of 3rd November took the cheque to the latter officer who seems to have reported the matter to the Agent. It was then apparently soon discovered that the same cheque had already been paid on 12th September. In the meanwhile the "Hindu boy" who had presented token No. 332 and claimed Rs. 8,000 on a cheque for Rs. 80,000 had disappeared. The figures 12.9 representing the date on the face of the cheque had been altered to 1.11 and the correction signed "Mohd Amin." According to the evidence of Brahm Dev, (P. W. 4) the token No. 333 which he had endorsed on the cheque when originally presented had been altered to 332. On the reverse of the cheque and above the two signatures of Mohammad Amin an endorsement to pay the amount to the Sub-Agent Mr. Prem Nath of Messrs Dhani Ram and Company, Lucknow, had been made. Below the two signatures an endorsement of receipt by Prem Nath Sub-Agent Messrs. Dhani Ram and Company, Lucknow, dated 1st November 1930, had been made and across the left side a certificate by Ram Parshad Khana that he knew Mr. Prem Nath. These three endorsements are respectively referred to in the evidence as D/1, D/3 and D/2 and will be similarly referred to hereafter.

The daring and bare-faced attempt to defraud the Bank of Rs. 80,000 and which was within an ace of succeeding was promptly reported to the police. The investigation which followed led to Gowardhan Lal and Chet Ram, two clerks in the Bank and Raghunath Rai the younger brother of Gowardhan Lal and who is alleged to have filled the role of the "Hindu boy" being sent up for trial on various charges. Chet Ram was discharged by the Magistrate, while Gowardhan Lal has been convicted of forging a valuable security under S. 467 and sentenced to five years' rigorous inprisonment and Raghunath Rai for using a forged document under S. 471, I. P. C., and sentenced to one year's rigorous imprisonment. Each of them has also been fined Rs. 500 or in default six months' further like imprisonment. The facts as narrated above are not disputed and the only points which arise for determination and which Mr. B. R. Puri has strenuously contended have not been established are: 1 Whether Gowardhan Lal, appellant forged the endorsements D-1 to D-3 on the reverse of the cheque and 2 whether Raghunath Rai knowing that the cheque was a forged document used it as genuine by claiming payment of it. (After adverting to the evidence, his Lordship proceeded). For purposes of comparison Mr. Stott was sent to specimen copies of each of the three endorsements on the reverse of the cheque. These copies according to the evidence of the Deputy Superintendent of Police, P. W. 9, and Sub-Inspector, P. W. 14, were made by the appellant Gowardhan Lal in their presence on the 11th November. This appellant denied having made these copies and stated he was asked to sign his name on six blank pieces of paper in the left hand corner which he did on 6th November 1930, and put down this date. This date has clearly been tampered with the "6" being altered to "11" as is deposed to by Mr. Stott and there may or may not be anything in what Gowardhan Lal has alleged but the signature in the left hand corner and the alteration of the date do arouse suspicion. There are however no sufficient reasons for disbelieving two responsible police officers when they depose that Gowardhan Lal made those copies in their presence from the endorsements on the cheque. Mr. Stott has deposed and given reasons for his opinion that the person who wrote the 6 specimens also wrote the three endorsements D/1, D/2 and D/3. Now each of the 6 specimens is obviously an imitation of each endorsement and I can hardly conceive of a suspected forger deliberately imitating the forged writing and creating evidence against himself. I do not think that such writing affords a proper standard for comparison. The specimens were written from dictation but were obviously closely occupied and as remarked by Osborn on p. 348 of his work "The Problem of Proof, 1926"

> "specimens of writing are often valueless as standards of comparison because of improper methods followed in obtaining them * * *"

and again on p. 349:

> "It is of course improper to ask a suspected writer to copy the disputed writing directly from the original and as a rule the writer should not even be shown the suspected writing. If it is not shown then it cannot later be claimed that the writer imitated the forms because be was asked to do so."

There must have been plenty of Gowardhan Lal's writing in the bank available for comparison and which would have afforded a good and reliable standard for the purpose. Indeed it is apparent from the written opinion of Mr. Stott that 3 such writings were sent to him but he was for some reason or another not examined as to these. It is not impossible for even an expert to be deceived and in his cross-examination Mr. Stott conceded that this might be done under certain conditions. Turning now to the case of the second appellant, Raghunath Rai I find that the only evidence of his identity with the "Hindu boy" is that of Daulat Ram, Sohan Lal and Balkishen (P. Ws. 1, 2 and 3) who deposed to having identified him at a parade held at the Anarkali Kotwali on 8th November 1930 under the supervision of Tahsildar, Muhammad Khan. The conditions under which this parade was held will appear from the testimony of this witness, entirely, detract from its value. The age of this appellant is given in the record as 14 and as the evidence of the Tahsildar showed that the ages of the other persons paraded ranged from 18 to 26, I sent for Raghunath Rai from the jail in order to judge his age. He is certainly more than 14 by appearance and in my opinion his age lies somewhere between 16 and 18. Even so I do not think that the identification was a fair one in view of the ages of the other persons paraded and the fact that Daulat Ram, Sohan Lal and Balkishen were waiting outside the thana when these persons were called in, appellant being at the time in the courtyard of the building.

Raghunath pleaded an alibi alleging that he was at Jia Bagga where his brother is assistant station master on 3rd November and evidence, which cannot be entirely disregarded in view of the standing of the witnesses, has been produced in support of this plea. Mr. B. R. Puri has not however referred to it naturally preferring to throw discredit on the evidence as to the identification of this appellant. In this I consider he has succeeded, so in the circumstances I need not discuss this evidence. It also appears from the evidence of Sohan Lal that when he accompanied the police to search the house of Kundan Lal (an elder brother with whom the two appellants were living) a person was lying on a charpoy with his body covered. This is denied by the Sub-Inspector P. W. 14) but evidence for the defence has been led to show that this was the case, that this was Raghunath Rai and that his face was uncovered.

Mr. Puri has rightly urged that if this evidence is believed then there was no reason why Sohan Lal should not have then and there identified this appellant as the "Hindu boy." It is however unnecessary to dilate on this argument in view of the unsatisfactory nature of the evidence of identification. The forging of the endorsements on the cheque and the attempt to obtain payment of the amount a second time was undoubtedly an act of fraud. Proof of fraud by positive and express evidence cannot be expected in the large majority of cases and in such circumstantial evidence is the only means available. But such evidence must not fall short of proof as it does in the present case and no conviction can rest on mere suspicion and conjecture however strong these may be.

In all criminal cases the evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused. In cases in which the proof afforded is of a presumptive nature or rests on circumstantial evidence to justify an inference of guilt the inculpating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. In my opinion, formed after careful and anxious consideration, the above tests are not fulfilled in the present case and for the reasons given I am not satisfied that the guilt of the two appellants has been established beyond all reasonable doubt. I therefore accept the appeal and setting aside the convictions and sentences acquit the appellants and direct they be set at liberty forthwith. The fines if paid should be refunded.

V.B./R.K. *Appellants acquitted.*

A. I. R. 1933 Lahore 311 (1)

TAPP, J.

Altaf Hussain Shah and *another* — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1474 of 1932, Decided on 15th December 1932, from order of Sess. Judge, Shahpur, D/- 1st November 1932.

Criminal Trial—Sentence—Minor injuries—Sentence of one and half months is adequate—Penal Code (1860), Ss. 323 and 325.

Where the injuries found to have been sustained were of a very minor nature and were detected only after four or five days:

Held: that a sentence of six months and three months was too severe and that punishment to the period already undergone one and half months was sufficient. [P 311 C 1]

Ram Lal Anand—for Petitioners.

Judgment.—Altaf Hussain Shah and Ghulam Hussain Shah were respectively convicted under Ss. 325 and 323, Penal Code, of causing grievous and simple hurt to one Fateh Mohammad and sentenced to one year's and six months' rigorous imprisonment. These sentences were reduced on appeal by the learned Sessions Judge to six months and three months. The four injuries found to have been sustained by Fateh Mohammad were of a very minor nature as the one described to be grievous and which was detected only after four or five days involved a fracture of a metarcarpal bone in the right hand.

In these circumstances the sentences awarded by the learned Sessions Judge tend to be severe and accepting the application for revision which was admitted on the ground of sentence only I reduce the punishment of the period of imprisonment already undergone (1½ month) and direct that the petitioners be released from jail.

M.N. *Sentence reduced.*

A. I. R. 1933 Lahore 311 (2)

HARRISON AND DALIP SINGH, JJ.

William Michael Drummond—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 480 of 1931, Decided on 1st July 1931, from order of Sess. Judge, Rawalpindi, D/- 15-4-1931.

Criminal P. C. (1898), S. 164—Confession at police station immediately after crime, but not in presence of police officer—Accused informed that he need not make confession, but fact not recorded in certificate—Magistrate giving evidence of it—Confession held proper — Criminal P. C. (1898), S. 533.

Immediately after the murder the confession of the accused was recorded by a Magistrate in the police station in a separate room where no police officer was present. The Magistrate had no copy of the Criminal Procedure Code, with him and he omitted from his certificate that the accused had been told that he need not make a confession. This however was put right by the evidence of the Magistrate himself that he did inform the accused of the fact.

Held: that the confession was recorded at proper time and place and was not bad for failure to record that the accused was informed that he need not make a confession. [P 312 C 2]

Nand Lal—for Appellant.

D. C. Ralli for *Govt. Advocate*—for the Crown.

Harrison, J. — William Michael Drummond has been convicted by the Sessions Judge of Rawalpindi of murdering his wife Alice Maud Drummond by cutting her throat with a razor on the night of 24th December 1930, and has been sentenced to death. The story found to be established is that this man, an Anglo Indian aged 28, came to Rawalpindi in the summer of 1930 with his wife and two small children. He was out of employment and failed to get any, but Mrs. Drummond was engaged as a nurse by Captain Hudson, I. A. S. C., on 20th November 1930. The children were taken in by the Rev. Mother Superior at the Convent at Rawalpindi. After the wife had secured employment, the husband in the middle of December obtained service as a canvasser from Mr. Carter, Dry Cleaner. Relations were strained both between the husband and the wife and between the husband and his brothers. For some reason which is not quite clear William Drummond objected to his wife remaining in service and accused her of neglecting her children. He also appears to have been upset on discovering that she was pregnant. These disputes led to a complaint under S. 107 being presented by Mrs. Drummond as shown in Ex. P. E., on 4th December 1930, but this was dropped on a written agreement being made between the husband and the wife. On one occasion Mrs. Drummond disappeared and her employer Captain Hudson went in his motor car and sent his driver Ram Chand, P. W. 7, to the house where Drummond lived. Ram Chand found Mrs. Drummond tied to a charpoy and with the assistance of Father O'Donoghue she was released from her husband and taken back to her employer's house. On the 24th December, Captain Hudson gave permission to Mrs. Drummond to attend a midnight mass and confession before it. He sent her off with his driver Ram Chand on foot at about 9-30 p. m. After going 300 yards the driver left her and she got into a tonga.

At 9-45 Drummond appeared at the police station in bloodstained clothes. At about the same time Major Simpson and his wife were driving down the Edwards Road, when they saw the corpse of a woman. This Major Simpson reported to Inspector Terry in whose house was his brother Sergeant Terry who had arrived that day. They went to the spot taking Inspector Disney with them and there they found the murdered woman with her throat cut. There was a good deal of blood there and a military greatcoat was lying about a yard from the body. In the greatcoat was a receipt which is proved to have been given to the accused that day, being receipt for the price of a waistcoat which he had bought from Kirpa Ram, shop-keeper. Sergant Terry was left with the corpse and Inspector Terry went to fetch Mr. MacDonald, First Class Magistrate, who was brought from his house between 9-30 and 10 p. m. and after seeing the corpse went to the police station, where he found the accused. The same night this man William Drummond made a lengthy confession which was recorded by Mr. MacDonald. In this he described the many disputes that had been between his wife and himself. He said that he had seen a soldier following her on one occasion, that on the night in question he was walking down the road, and suddenly had the presentment that his wife was coming, went home and fetched a razor from his toilet bag. On coming back he was overtaken by the tonga in which his wife was. He jumped into the tonga and cut her throat with the razor. This is all borne out by the tonga driver who however was unable to identify the accused. The case against Drummond rests on his retracted confession and the corroboration supplied by Captain Hudson as to the strained relations between husband and wife, the evidence of his having arrived at the police station at 9-45 in blood stained clothes, the discovery of the greatcoat with the receipt inside it, the evidence of the tonga driver as to what exactly happened and the general corroboration supplied by documents such as the complaint put in by Mrs. Drummond and the compromise arrived at.

Counsel for the accused has challenged the value of the confession and contends that it was recorded at an improper time and place and that all necessary precautions were not observed. At that time Mr. MacDonald had no copy of the Criminal Procedure Code with him and he omitted from his certificate that the accused had been told that he need not make a confession. This however has been put right by the evidence of Mr. MacDonald himself. He is quite clear that he did inform the accused of this fact. I am satisfied that the Magistrate did take every possible precaution and did observe all the formalities and I have no shadow of doubt that the confession was volutarily made and is true and reliable. It was recorded in a separate room in the police station and no police officer was present. Under the circumstances it could not well be recorded anywhere else unless the Magistrate had postponed action. I can see no reason why he should have done so. From what the accused has stated and from the general history of the case it is, I think, obvious that there must have been some immediate cause, of which we are ignorant, which led the accused to behave as he did. It is useless to theorize as to what this may have been. Counsel has further urged that it is not proved that at the time the greatcoat was first examined the receipt was in the pocket. It appears to me that this is established for the list prepared bears the name of Inspector Disney and had clearly been signed before Mr. MacDonald arrived and looked at the greatcoat a second time. The confession beieng in my opinion, absolutely reliable and true and corroborated as it is by various incidents and the evidence of Captain Hudson, Ram Chand his driver and Taja the tonga driver, it is fully proved that the accused murdered his wife by cutting her throat with a razor. This was a deliberate act as is shown by his return to his house to fetch the razor, and it is clear that the offence of murder is fully established. It is urged by counsel that the fact that he had seen a soldier following his wife, as he says in his confession, on a previous occasion amounted to grave and sudden provocation. This obviously is not the case. Finding William Michael Drummond guilty of having murdered his wife I also find that the sentence passed is the only sentence possible and I would dismiss the appeal and confirm the sentence of death.

Dalip Singh, J.—I agree.

V.B./R.K. *Sentence confirmed.*

A. I. R. 1933 Lahore 313

COLDSTREAM, J.

Khuda Dad and *another*—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 537 of 1931, Decided on 13th August 1931, against order of Sess. Judge, Rawalpindi, D/- 30th April 1931.

(a) Penal Code (1860), Ss. 34 and 325—Two persons making concerted attack on deceased are both guilty although it is not proved that one of them struck any blow.

Where it was established that *A* armed with an axe accompanied *B* who was armed with a spear and with *B* made a concerted attack on *C*, but no particular blow was proved to have been struck by *A*:

Held: that the mere fact that no particular blow was proved to have been struck by *A* did not absolve him from the charge under S. 325 on which he was tried: *A. I. R.* 1925 *All.* 185. *Foll.* [P 314 C 2]

(b) Penal Code (1860), S. 34—Two persons proved to have attacked deceased—One convicted under S. 34, although not charged under S. 34—Accused not misled in defence—Conviction held to be proper—Criminal P. C. (1898), S. 233.

Where two persons were proved to have made a concerted attack on the deceased and one of them was convicted under S. 34 although not charged under S. 34, but it was clear that he was in no way misled in his defence:

Held: that the accused was properly convicted under S. 34: *A. I. R.* 1924 *Bom.* 502, *Foll.* [P 314 C 2]

Nand Lal—for Appellant.

D. R. Sawhney—for the Crown.

Judgment.—The appellants Khuda Dad and his nephew Mamrez have been sentenced by the Sessions Judge of Rawalpindi, the former to seven years' imprisonment under S. 304, part 2, Penal Code, for the culpable homicide of Dadu, and the latter to three years' rigorous imprisonment under S. 325, Penal Code, for causing Dadu grievous hurt on 10th September 1930, in village Maira Kalan. Briefly put the prosecution story is that on the 9th September there was a quarrel between the women folk of Khuda Dad's family and the women of Dadu's family over a fence erected by Dadu's uncle Malak which Khuda Dad's women folk had removed. The two families are collaterals and neighbours. Next morning Khuda Dad's party gathered in force for a fight near a mosque a little way from Malak and Dadu's houses and challenged Dadu's party. Dadu, his brother Khanu, his uncle Malak and Malak's sons Sultan and Azim with others were together at their houses, which open on to one compound. Malak's son Bostan (P. W. 12) who had been to the mosque, told his people on his return home that Khuda Dad had abused him at the mosque and had expressed his intention to beat Dadu and Sultan. Sultan Khanu and Dadu went out and chased Khuda Dad and his companion Painda. Khuda Dad was struck at least one blow. Shortly after this Khuda Dad with eight others, including Mamrez, invaded Dadu's compound and chased Dadu from in front of his house towards Malak's house. Shera, Mamrez's brother, knocked Dadu down with an axe and then, along with Mamrez, held him down while Khuda Dad thrust his spear into Dadu's breast, killing him.

In the general fight Malak and Azim and Sultan, his son, were injured, the former receiving two blows and a punctured wound on his head and sustaining fractures of his left forearm and a rib. Azim had three injuries on his head and ten on other parts of his body. Sultan had fourteen injuries. On the assailants' side Khuda Dad, the appellant, had an incised wound on his forehead and his right ulna was broken. Mamrez had a trifling abrasion on his head and Sultan was hit on the head with sufficient force to render him unconscious for more than 24 hours. The wound of which Dadu died was a punctured wound 5 inches deep near the top of his left arm. The weapon had entered the front of his shoulder and chest and death resulted from shock and heart failure resulting from the injury to the blood vessels and haemorrhage. He had also a contused wound upon his head and a number of abrasions and scratches on his shoulder and chest. There was also a gaping wound close to the fatal injury.

Besides the two appellants, seven other men were sent up for trial charged under numerous sections of the Penal Code, including Ss. 149, 302, 325 and 324. The defence story was that only one fight took place, namely, the first conflict at the mosque, when Khuda Dad was struck, and that there was no invasion of Malak's court-yard. Some evidence was produced in support of this account. The four assessors were unanimously of opinion that all the accused went to Malak's compound to attack Dadu and that Khuda Dad was responsible for Dadu's death. The learned Sessions Judge however acquitted all of them except the two appellants.

I have been taken through the record by Dr. Nand Lal and have heard him at length on behalf of the appellants. Dr. Nand Lal's argument has been devoted to a very detailed criticizm of the prosecution evidence in which there are discrepancies such as invariably appear in cases of this nature. The order committing for trial the accused other than Shera was written in January 1931. Shera was then absconding and he was committed separately after his arrest. The trial began in April 1931. After considering Dr. Nand Lal's arguments I am satisfied that the prosecution story is the true one. It is, I consider, established beyond any reasonable doubt that the party of the accused deliberately invaded Malak's compound with the intention of causing him grievous injury at the least. The presence of blood in large quantities at three places in the compound and the absence of traces of the fight near the mosque prove the falsity of the defence version. The learned Sessions Judge has dealt with the evidence with great caution. Indeed, the reasons for which he has rejected some parts of it do not appear to me cogent. His conclusion that Khuda Dad was personally responsible for Dadu's death is certainly correct and amply justified by the evidence. It is proved that he inflicted the fatal wound with a spear. Dr. Nand Lal has urged that the failure of the prosecution to account for the injuries sustained by the accused's party raises a presumption that the accused acted in the right of private defence. I can find no reasonable justification for such a presumption in this case. I also find it certainly established by the evidence that Mamrez actively assisted Khuda Dad in his attack upon Dadu. This is not a case of a sudden unpremeditated fight and having regard to the nature of the fatal wound I find that Khuda Dad has been rightly convicted and sentenced.

As regards Mamrez, the conclusion of the learned Sessions Judge has not been satisfactorily expressed. In the body of the judgment he has remarked that "the accused's party outnumbered the complainant's party," that is to say, they were more than four. Nevertheless, although none but the accused were alleged to have been present, he has convicted only two. Presumably, therefore he has, in convicting Mamrez, applied S. 34, Penal Code, for he has recorded no definite finding regarding the specific injuries inflicted by him. It is argued by Dr. Nand Lal that as there was no charge under S. 34, Penal Code, against Mamrez, he must be acquitted. It is however clear that in this case Mamrez was in no way misled in his defence; while on the other hand, it has been established that Mamrez armed with an axe accompanied Khuda Dad, who was armed with a spear, and with him made a concerted attack upon Dadu. The mere fact that no particular blow had been proved to have been struck by Mamrez will not absolve him from the charge under S. 325, Penal Code, on which he was tried: see *Emperor* v. *Tulli* (1) and, as regards the omission of a charge under S. 34, Penal Code, *Emperor* v. *Ranchhod Sursang* (2). My conclusion is that Mamrez was also properly convicted. I see no justification for interfering with the sentence upon him and I reject the appeal of both the appellants.

R.M./R.K. *Appeal dismissed.*

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1. A I R 1925 All 185=85 I C 130=26 Cr L J 450=47 All 276.
2. A I R 1924 Bom 502=87 I C 600=49 Bom 84.

A. I. R. 1933 Lahore 314

TEK CHAND, J.

Gian Chand—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1366 of 1932, Decided on 19th January 1933, from order of Sess. Judge, Rawalpindi, D/- 20th September 1932.

Arms Act (11 of 1878), S. 19 (f)—Accused pointing out revolver concealed in cattle-shed near house—Accused living in house with his father and brother—Accused is not guilty.

Accused led the police to a cattle shed near the house in which he was living with his father and brother and pointed out the place where a revolver was lying.

Held: the mere knowledge of the fact that the revolver was lying in the shed or the pointing out of the place from which it was actually found, without proof that the place was in the exclusive possession of the accused was not sufficient to hold the accused guilty under S. 19 (f), Arms Act. [P 315 C 2]

L. M. Datta—for Petitioner.

Chandar Gupta—for the Crown.

Judgment.—The petitioner has been convicted under S. 19 (f) Arms Act, for having in his possession a revolver without a license. He has been sentenced to undergo rigorous imprisonment for two years. The facts found are that the petitioner, who is a military reservist, came to his village about three months before the occurrence and was living in the house which is occupied by his father. The police came to search this house on suspicion that it contained property which had been stolen in a burglary. They failed to find the stolen property in the house but were able to recover a holster containing a number of cartridges buried under the floor of the house. After finding these cartridges, they further questioned the petitioner and he led them to a cattle-shed, which is situated at a short distance from the house, and from there he produced a revolver from underneath a heap of firewood. He was prosecuted under S. 19 (f), Arms Act, in two separate cases for possession of the revolver and the cartridges respectively. The trial Magistrate convicted him in both cases. On appeal the learned Sessions Judge set aside the conviction in the case relating to the alleged possession of cartridges on the ground that they were not proved to be in the exclusive possession of the petitioner as the house in which the cartridges were found concealed was used by the petitioner as well as by his father and brother, and there was nothing to show that the cartridges had been placed there by the petitioner rather than by his father or brother. The learned Judge however upheld the conviction in the case of the revolver.

The petitioner has preferred a petition for revision to this Court and, after hearing both counsel and examining the record, I am of opinion that the petition must succeed. As pointed out already the revolver was found in a cattle-shed and not in the house in which the petitioner was actually living. It was admitted by the prosecution that the cattle-shed was open and accessible to outsiders. There is, moreover, nothing to indicate that the shed was in the exclusive possession of the petitioner. His father actually lives in the house and the petitioner had come on leave to the village only a short time before. It is also in evidence that his younger brother is in the police and had lived in this house a few days before the recovery of the revolver. In these circumstances the revolver cannot be said to have been in the exclusive possession of the petitioner or to have been placed in the shed by him. It is no doubt true that it was the petitioner who led the police to the shed and pointed out the place where the revolver was lying but the mere knowledge of the fact that the revolver was lying in the shed or the pointing out of the place from which it was actually found, without proof that that place was in the exclusive possession of the petitioner, is not sufficient to bring home the offence to the petitioner. In my opinion the prosecution has failed to establish the case satisfactorily against the petitioner. I accept the petition for revision, set aside the conviction and direct that the petitioner be set at liberty forthwith.

K.S. *Petition accepted.*

A. I. R. 1933 Lahore 315

AGHA HAIDAR, J

Sharif—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1282 of 1932, Decided on 5th January 1933, from order of Magistrate, First Class, Attock, D/-14th September 1932.

(a) Penal Code (1860), S. 34— Firing by two persons with common intention—One of shots being effective — Both are guilty of offence committed.

If two persons fire at a particular individual and a shot hits with the result that an offence is committed, then the case of both would come within the purview of S. 34, I. P. C. provided, there is common intention. [P 316 C 1, 2]

(b) Penal Code (1860), Ss. 307 and 324— Accused, soldier practised in use of firearms firing at his grandmother causing simple injury is guilty only under S. 324 and not under S. 307.

Accused who was a soldier and practised in the use of firearms fired at his grandmother in the course of a quarrel. The bullet hit a fleshy part of her body and she recovered from the simple injury caused by the shot:

Held: it is very doubtful that the accused intended to murder her as he would have chosen a more vulnerable and vital part if he had so intended and that he was guilty only under S. 324 and not S. 307. [P 316 C 2]

S. R. Sawhney—for Appellant.

Hem Raj Mahajan—for the Crown.

Judgment. — Two persons, namely, Arsala and Sharif, were placed before the Additional District Magistrate, exercising powers under S. 30, Criminal P. C., at Campbellpur, to take their trial on a charge under S. 307, Penal Code. Arsala has been acquitted, but Sharif has been found guilty and has been sentenced to a term of five years' rigorous imprisonment. Against his conviction and sentence Sharif has preferred the present appeal to this Court through Mr. S. R. Sawhney. The trial Magistrate has written an unnecessarily long judgment in which he has set out the facts leading to the commission of the offence in great detail. For the purposes of this case it is only necessary to point out that there was some dispute in respect of a plot of land situated towards the north of the house of one Mir Afzal. On 25th May 1932, i. e., the day of the occurrence, Mir Afzal happened to be away from his house. The party of the accused came and started levelling the disputed plot of land and uprooting some of the shrubs growing thereon. Mt. Mughlani, P. W. 6, the wife of Mir Afzal, protested against these acts. There was a dispute between the parties when Pir Suleman Shah, P. W. 3, arrived at the spot and tried to bring about an amicable settlement. In fact he proceeded to demarcate the land, but the party of the accused took exception to his mode of demarcation and there was a recrudescence of trouble. There is overwhelming evidence on the record that Arsala and the accused Sharif each took out a pistol and fired shots, one of which hit Mt. Mughlani. There is a certain amount of exaggeration in the evidence of the witnesses for the prosecution as to the number of shots, many of them saying that as many as 10 or 12 shots were actually fired. Making allowance for the exaggeration there cannot be any doubt that at least two shots were fired, though it is not clear as to who was the person actually responsible for the shot which went home and hit Mt. Mughlani. Mr. S. R. Sawhney, who has argued the case for the appellant at considerable length, has put forward the theory, and has stuck to it all along, that it was only one man who had fired the two shots.

Apart from the question of Arsala's acquittal by the trial Magistrate, we have ample evidence on the record which in spite of exaggerations, there is no reason to disbelieve on the point that the two accused fired shots one of which hit Mt. Mughlani. The law on this point is quite clear. If two persons fire at a particular individual and a shot hits with the result that an offence is committed then the case of both would come within the purview of S. 34, Penal Code, provided, of course, there is common intention. The argument put forward by Mr. Sawhney was that the witnesses for the prosecution should not be believed when they implicate his client and that, although only one man actually fired a shot which hit Mt. Mughlani, it was not his client but some body else whose name has been kept back and is not being disclosed. In the face of the evidence on the record I am afraid I cannot accept this version. The affair took place in broad daylight and I do not see any reason why the witnesses for the prosecution, some of whom are related to the party of the complainant, should try to protect the real culprit from the consequences of his act and implicate the accused Sharif who is himself related to Mt. Mughlani as her daughter's son. In my opinion, having regard to the evidence on the record and making allowance for the exaggeration, the fact emerges that the accused along with another did, as a matter of fact, fire a shot and Mt. Mughlani was hit.

The question, which remains to be considered, is as to what offence was committed. In order to bring an offence under S. 307, Penal Code, the act must be done with the intention or knowledge and under such circumstances that, if death had occurred, the accused would be guilty of murder. I doubt very much whether the accused intended to murder his own grandmother. The bullet hit a fleshy part of the woman's body and she appears to have recovered from its effects and, according to the medical evidence, only simple injury was caused. If the accused who is a soldier and practised in the use of firearms had intended to murder the old lady, he would have chosen a more vulnerable and vital part of the body. In my opinion, what really took place is that there was a quarrel over the disputed plot of land and the accused, who is a young man of 22, lost his head and, in order to make impression and to cause some injury to the opposite party, took out a pistol and fired it. In my judgment it would be safer to convict him of an offence falling under S. 324, Penal Code. I therefore alter the conviction of Sharif accused from S. 307 to one under S. 324, Penal Code, but having regard to the serious nature of the crime, give him the maximum punishment provided thereunder, i. e., three years' rigorous imprisonment. With this modification I dismiss the appeal.

K.S. *Conviction altered.*

A. I. R. 1933 Lahore 317 (1)

DALIP SINGH, J.

Mohan Lal—Defendant — Petitioner.

v.

Rahmat and *another*—Plaintiffs—Opposite Parties.

Civil Revn. Petn. No. 340 of 1932, Decided on 20th October 1932, from order of Addl. Sm. C. C. Judge, Delhi, D/- 7th May 1932.

Civil P. C. (1908), S. 9—"Neota" is not legal but social obligation — Words and phrases.

"Neota" is not a legal but a social obligation. Therefore in a plaintiffs' case that a certain sum had been agreed to be given credit for by the defendant in execution of a decree the items of "neota" and interest thereon cannot be sustained: 141 *P R* 1888, *Rel on.* [P 317 C 1, 2]

Shamair Chand—for Petitioner.

Muhammad Munir—for Opposite Parties.

Judgment. — The plaintiff's case was that Rs. 86-3-0 had been agreed to be given credit for by the defendant in execution of a decree for Rs. 1300 obtained by defendant against the plaintiff. The defendant had resiled from this and as the payment was not certified, he had brought the suit. The items were made up of Neota Rs. 35, Rs. 17-15-0 interest, Rs. 30 given to defendant by one Benarsi on behalf of the plaintiff. Rs. 3-4-0 price of a bag of cement. The defendant denied that any Neota was due nor any interest on the same, denied receipt of Rs. 30 from Benarsi, and denied Rs. 3-4-0. The Court decreed the claim with costs. Defendant has come up in revision. He contends that Neota is not a legal obligation but a social one and cites *Lachman Das* v. *Sohan Lal* (1) which supports him. The learned cousel for respondent contends that the right was a customary right confined to the locality of Delhi. The Court held that it was a custom of the class to which parties belong. As plaintiff is a Muslim Pathan and defendant is a Hindu shopkeeper, it is difficult to know what exactly the Court meant by the class of the parties. The evidence is of persons not from Delhi but from villages of Sikandarpur and Bagrauli. It is not stated where these villages are. The decision on the point is to my mind both wrong in law and perverse in fact. The items of Neota Rs. 35 and interest thereon Rs. 17-15-0 cannot be sustained.

As regards Rs. 30 the only evidence is of plaintiff himself supported by his account book. He states the defendant took the money in cash. There is no mention of Benarsi at all. I cannot think this proves the plaintiff's claim that Benarsi paid money to defendant on behalf of plaintiff. This item therefore also cannot stand. Rs. 3-4-0 is proved by evidence of plaintiff and one other witness and the account book of plaintiff. I doubt the truth but it is a finding of fact and I cannot interfere. The result is that revision is accepted and the plaintiff's suit is dismissed except for Rs. 3-4-0 for which he is given a decree. The parties will pay their own costs throughout.

V.S. *Revision allowed.*

A. I. R. 1933 Lahore 317 (2)

TEK CHAND, J.

Secretary of State—Petitioner.

v.

Sohan Singh and *others*—Respondents.

Civil Revn. No. 22 of 1932, Decided on 11th July 1932, against order of Sub-Judge, Second Class, Amritsar, D/- 10th November 1931.

Civil P. C. (1908), S. 115—Decree against *M* as legal representative of railway servant —In execution money in Provident Fund attached—Objection by Railway Authorities to attachment dismissed—Appeal by *M* against order dismissing objection—Revision application simultaneously filed by Secretary of State against same order is incompetent.

In execution of a decree obtained against *M* as the legal representative of a railway servant, the money in deposit in the Provident Fund in the name of the deceased was attached An objection preferred by the Railway Authorities was dismissed. The Secretary of State filed a revision petition against the order dismissing the objection. *M* also simultaneously preferred an appeal under S. 47 against the same order.

Held : that the accuracy of the judgment was sub judice in regular appeal by *M* and any expression of opinion by the High Court in revision petition was bound to adversely affect the rights of *M* and decree-holder in the appeal and would in fact render it wholly infructuous and that the petitioner had also another remedy open to him by a regular suit under O 21, R. 63 and consequently it would not be proper for the High Court to exercise its extraordinary jurisdiction as a Court of revision: 11 *Cal* 6 (*P C*); *A I R* 1917 *P. C.* 71; *A. I. R.* 1928 *Lah.* 140 and *A I R* 1931 *Lah* 666, *Ref.* [P 318 C 1, 2]

C. H. Carden Noad—for Petitioner.

Govind Ram, *Mahesh Das Bahl* and *Kishan Chand*—for Respondents.

***Judgment.*—Sohan Singh respondent brought a suit for recovery of Rs. 2,500 against Mt. Tara Devi, widow of Diwan**

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1. (1888) 141 P 18

Chand, as the representative of her deceased husband. The suit was decreed against the defendant, the decretal amount being held recoverable from the estate of Diwan Chand. In his lifetime Diwan Chand was employed in the North Western Railway and had some money in deposit in the Provident Fund. In execution of the aforesaid decree the decree-holder attached the Provident Fund money. The judgment-debtor Mt. Tara Devi, as well as the Railway Authorities, objected to the attachment urging that the Provident Fund money was not a part of the estate of the deceased and could not be seized in execution of the decree. The executing Court has dismissed these objections and has allowed the decree-holder to take the money in satisfaction of his decree. The Secretary of State has filed a petition in this Court to revise the order dismissing these objections. Simultaneously the judgment-debtor, Mt. Tara Devi, has preferred in the Court of the District Judge an appeal under S. 47, Civil P. C., against the same order. It is admitted by all parties, that the hearing of this appeal has been postponed by the District Judge pending disposal of the petition for revision before me.

Counsel for the decree-holder respondent raises a preliminary objection that, according to the well-settled practice of this Court, the petition for revision should not be entertained, because (1) another remedy by way of a regular suit is open to the petitioner, and (2) the accuracy of the judgment of the lower Court is sub judice in regular appeal filed by Mt. Tara Devi before the District Judge. He also contends that the grounds taken by the Secretary of State assail the findings of the lower Court on questions of law (e. g. whether the rule of res judicata has been correctly applied to this case, whether the provisions of the Provident Fund Act have been infringed, and whether a document (Ex. P-A) has been misconstrued) and that even if it be assumed that the decision of the lower Court on any or all these points was erroneous, this will not afford a good ground for interference by this Court on the revision side: *Amir Hasan Khan* v. *Sheo Bakhsh Singh* (1), *Balakrishna Udayar* v. *Vasudeva Ayyar* (2) and *Sant Singh* v. *Mubarak Singh* (3). In reply the learned Government Advocate relies on a Single Bench judgment of this Court reported as *A. I. R.* 1931 *Lah.* 666.

After considering the matter and giving due weight to arguments of both counsel, I am of opinion, that the preliminary objection has force and must be sustained. As stated already, a regular appeal against the judgment of the lower Court has been filed by the judgment-debtor Mt. Tara Devi in the Court of the District Judge and in that appeal the questions of fact and law involved in the case are open to consideration and adjudication. Any expression of opinion by me in this revision petition is bound to adversely affect the rights of Mt. Tara Devi and the decree-holder in that appeal, and will in fact render it wholly infructuous. It is not denied that it will be highly unusual, if not improper, for the Court of revision to act in a manner which will lead to such a result. Secondly, the Secretary of State was not a party to the decree, in execution of which the questions in dispute have arisen. He intervened on an objection under O. 21, R. 58, and on his objection being disallowed he has a remedy by a regular suit under O. 21, R. 63 in which all the questions now raised by him can be properly adjudicated upon. In these circumstances I think it is not proper for this Court to exercise its extraordinary jurisdiction as a Court of revision to give a finding on the points raised, some of which are indeed not open to attack under S. 44, Punjab Courts Act, or S. 115, Civil P. C. I therefore uphold the preliminary objection and dismiss the petition for revision. In the peculiar circumstances of the case I leave the parties to bear their own costs in this Court.

P.N./R.K. *Petition dismissed.*

A. I. R. 1933 Lahore 318

SHADI LAL, C. J. AND BROADWAY, J.

Ganga—Plaintiff—Appellant.

v.

Phoga . and *others*—Defendants—Respondents.

Letters Patent Appeal No. 100 of 1927, Decided on 6th February 1933, from decree of Jai Lal, J., in Civil Appeal No. 2975 of 1926, D/- 7th April 1927.

Evidence Act (1872), S. 92, Prov. 4 — Sale deed presented for registration—Executant denying deed to be sale-deed but alleging it to be mortgage-deed— Parties agreeing to that transaction as mortgage— Statements

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1. (1885) 11 Cal 6=11 I A 237 (P C).
2. A I R 1917 P C 71=40 I C 650=44 I A 261=40 Mad 793 (P C).
3. A I R 1928 Lah 140=106 I C 901=9 Lah 308.

recorded and deed registered as mortgage—Prov. 4 has no application.

A document purporting to be a sale-deed was presented for registration. The executant denied that he had executed a sale-deed, and stated that he had merely agreed to execute a mortgage-deed. After some dispute the parties agreed that the transaction should be treated as a mortgage and made statements to the Sub-Registrar, who recorded the terms of the mortgage agreed to by the parties and registered the document as a mortgage-deed:

Held: that prov. 4 to S. 92 did not prevent the successor-in-interest of the executant from proving that the transaction entered into between the parties was really a mortgage and not a sale, as he was not producing any evidence to prove any subsequent oral agreement to rescind or modify a contract which had been registered. [P 319 C 1, 2]

Fakir Chand—for Appellant.

Chiranjiva Lal Aggarwal— for Respondents.

Shadi Lal, C. J.—On 13th July 1900, a document purporting to be a sale-deed in respect of a plot of land, and alleged to have beeen executed by Mangtu in favour of Phoga, was presented to the Sub-Registrar for registration. Mangtu denied that he had executed a sale deed and stated that he had merely agreed to execute a mortgage-deed in lieu of the money which was due on the previous mortgage-deed of 12th June 1891. The endorsement of the Sub-Registrar on the back of the deed shows that after some dispute between the parties they agreed that the transaction should be treated as a mortgage and made statements accordingly. The result was that the Sub-Registrar recorded the terms of the mortgage agreed to by the parties and registered the document as a mortgage deed. A mutation in respect of the mortgage was subsequently sanctioned with the consent of Phoga. The question for determination is whether Prov. 4, S. 92, Evidence Act, prevents the successor-in-interest of Mangtu from proving that the transaction entered into between the parties was really a mortgage and not a sale: Now that proviso prevents the reception of evidence relating to a subsequent oral agreement to rescind or modify any contract in cases in which the contract is required by law to be in writing or has been registered according to the law in force for the time being as to the registration of documents. This proviso is, however, inapplicable to this case, because no document evidencing sale was registered by the Sub-Registrar, and, as stated above, only a mortgage was registered. Whether the Sub-Registrar was justified in declining to register the sale-deed is a question which does not arise in the present case, because the fact remains that no sale-deed was, as a matter of fact, registered.

There can therefore, be no doubt that the plaintiff is not producing any evidence to prove any subsequent oral agreement to rescind or modify a contract which has been registered. Indeed, the contract which is evidenced by the endorsement of the Sub-Registrar containing the terms agreed to by the parties and reduced by him to writing is a mere mortgage, and there is no legal obstacle to the plaintiff's proving the mortgage transaction. I would accordingly accept the appeal and setting aside the judgment of the single Bench as well as that of the District Judge restore the decree of the Court of first instance. The contesting respondent must pay the costs incurred by the plaintiff throughout the litigation.

Broadway, J.—I agreeI

R.K. *Appeal accepted.*

A. I. R. 1933 Lahore 319

DALIP SINGH, J.

Ladha Ram and *others*—Appellants.

v.

Lurind Chand-Lachman Das and *others*—Respondents.

Misc. First Appeal No. 249 of 1931, Decided on 19th June 1931, from order of Dist. Judge, Shahpur, D/- 2nd February 1931.

Provincial Insolvency Act (1920), S. 6 (g)—Suspension of payment—Act held not to amount to notice to suspend payment.

A debtor had collected his creditors and had there told them that if they did not want to sell the "property and pay them individually they could take over" the property and realize their debts by selling it "themselves:"

Held: that this did not amount to a notice to suspend payment within the meaning of Cl. (g), S. 6: In re *Walsh*, 52 *L. T.* 694; *A. I. R.* 1928 *Mad.* 393 and *A. I. R.* 1927 *All.* 266, *Ref.* [P 320 C 2]

M. C. Mahajan and *M. L. Batra*—for Appellants.

M. L. Puri and *Khan Chand*—for Respondents.

Judgment. — Nine petitions were given by different creditors to have certain persons alleged to be the proprietors of the firm Jowahar Singh—Amar Singh adjudged insolvents. Ladha Ram, Harnam Dass, Ram Lal and Kesar Singh admitted that they were partners in the firm. Satnam Singh, son of Harnam Das, and Harbans Singh and Ramji Das denied that they were still partners in the firm but admitted that they were so in the beginning. The Court framed two issues as to whether Satnam Singh, Harbans Singh and Ramji Das were or were not partners of the firm. The third issue was whether any of the respondents had committed any act of insolvency within three months of the petitions, and if so, were all liable to be adjudged insolvents. The Court came to the conclusion that the four admitting partners had effected 135 alienations including assignments of debts. The total consideration of the alienations amounted to Rs. 2,90,721. It held that the alienations for the greater portion were in favour of near relations of the debtors, and that there was nothing to show that any special pressure had been brought upon the debtors by the alienees. He therefore held that these alienations were not bona fide transactions and amounted to fraudulent preference. It further held that Harnem Das, debtor, had collected his creditors in August and had there told them that if they did not want to sell the property and pay them individually they could take over the property and realize their debts by selling it "themselves." It held that this amounted to a notice to suspend payment within the meaning of Cl. (g), S. 6, Insolvency Act. The assets, which were valued at Rs. 9,42,007 by the debtors, were, according to it, much overvalued. The admitted debts were Rs. 8,71,516 and the Court therefore held that the debtors were unable to meet their liabilities in full, and that there were acts of insolvency on the part of the four admitting partners, namely, the alienations and the speech at the meeting of the creditors. It therefore adjudged the four admitting partners insolvents and directed the parties to produce further evidence as regards the three non-admitting partners.

The insolvents have appealed, and their learned counsel contends that, of the nine applications, six alone were in time with reference to the acts of insolvency. The other three were clearly barred by time and the learned Judge should not therefore have consolidated these applications in one. The learned counsel for the respondents does not challenge this but the point is only one of procedure and the learned Judge can now make necessary corrections with respect to the petitions dated 13th February 1930, 10th March 1930, and 21st March 1930. The last act of insolvency alleged in all of them is dated 23rd September 1929, and it is clear that these three petitions do not allege an act of insolvency within three months of the petitions. The next point raised by the learned counsel is that the speech at the creditors' meeting cannot by any means be said to fall under S. 6 (g), Insolvency Act. He has cited an English ruling, *In re. Walsh* (1) and *Veerayya Chetty* v. *Doraswamy Reddier, A. I. R.* 1928 *Mad.* 393, and *Narain Das* v. *Chimman Lal* (2). From these rulings, a very strict construction is qiven to the words "suspension of payment." and I do not think that the words used amount to proof of a notice of suspension of payment.

So far as the alienations are concerned, the learned counsel for the appellants contends that Harnam Das was examined as a debtor under S. 24, Insolvency Act, and not as a witness. Therefore the statement can only be used against him and not against the others. This is not so. It is true that the learned Judge omitted to note that Harnam Das had been examined as a witness; but, reading all the orders together, it seems clear that Harnam Das has been examined as a witness for the creditors. His statement therefore can be taken against all. This being so, the only question remaining is whether, on the evidence given by Harnam Das, the learned Judge was entitled to draw the inference that the alienations constituted fraudulent preference with intent to defeat and delay the creditors. In my opinion, the circumstances of the alienations, as proved by Harnam Das do raise a very strong suspicion against the bona fides of the alienations, but the learned counsel for the appellants points out that there is really no proof of the assets of the appellants having been exaggerated and if the assets are taken at their face value, there is nothing to show, in spite of the suspicious nature of the transactions, that the transactions constituted fraudulent preference with intent to defeat and delay the creditors. With some reluctance I hold that this is so. The learned Judge had no evidence on which to base his findings that the assets were exaggerated and without that, though the circumstances might raise a grave suspicion against the appellants, I do not think the facts proved warrant the inference that the alienations

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1. (1885) 52 L T 694.
2. A I R 1927 All 266=102 I C 191=49 All 321.

were acts of insolvency. I therefore accept the appeal, set aside the order of adjudication and order the learned District Judge to proceed with the case according to law. Both sides are entitled to lead any further evidence that they may wish to on the issues as framed. Costs will abide the event.

B.V./R.K. *Appeal allowed.*

** A. I. R. 1933 Lahore 321

BROADWAY AND ABDUL QADIR, JJ.

Emperor

v.

Parma Nand—Accused.

Criminal Misc. Petn. No. 194 of 1932, Decided on 15th March 1933, from decision of Sess. Judge, Shahpur.

**** Criminal P. C. (1898), Ss. 164 and 337—Pardon accepted—Approver examined under S. 164 on oath—This statement can form subject of alternative charge under Penal Code (1860), Ss. 193 and 194.**

A person being offered a pardon under S. 337, and on his acceptance of that pardon, being placed before a Magistrate in order that his statement may be recorded, that Magistrate has the power to administer an oath or solemn affirmation to him while taking his statement under S. 164, and the statement so recorded can form the subject of an alternative charge under the perjury sections of Penal Code: 2 *P R* 1893 *Cr*, *Expl* and *not Foll*; *A I R* 1922 *Bom* 138, *Expl* and *Dist*; *Case law considered.*

[P 322 C 1; P 323 C 2]

C. H. Carden Noad—for the Crown.

M. L. Batra—for Accused.

Broadway, J.—This matter has come before us in the following circumstances: In the course of an investigation in connexion with the murder of one Sarab Dayal a pardon was tendered to Parma Nand under S. 337, Criminal P. C., and was accepted by him on the conditions therein prescribed. After he had accepted this pardon he was placed before a Magistrate of the First Class, Sheikh Allauddin Arshad, who recorded his statement on solemn affimation obviously acting under S. 164, Criminal P. C. In the statement then made Parma Nand implicated two persons named Ram Narain and Narsingh Das as being concerned in the murder. In the course of the magisterial inquiry Parma Nand was, as required by law, produced as a witness and in his examination-in-chief adhered to the statement made by him before Sheikh Alauddin Arshad. Three days later when he was cross-examined he resiled from his statement and stated that the statements made by him implicating Narsingh Das and Ram Narain were false and had been made as a result of torture inflicted on him by the police. At the trial of the Narsingh Das and Ram Narain before the Sessions Court, Parma Nand was again, as required by law, produced as a witness and in examination-in-chief adhered to the first statement made by him implicating the two persons under trial. In his cross-examination however he again resiled from his statements alleging that he had been tortured into making the statements implicating Narsingh Das and Ram Narain. Steps were then taken on behalf of the Crown to take proceedings against Parma Nand under S. 193 and 194, Penal Code. The Public Prosecutor furnished the necessary certificate and an application was made to the learned Sessions Judge praying that a complaint be lodged as required by law. Notice was served on Parma Nand calling upon him to show cause, and a complaint was finally lodged on 23rd April 1932, by the learned Sessions Judge. In this complaint the matters which it was intended to prove against Parma Nand were set out at length and the complaint concluded as follows:

> "The accused stated in his statements before Sheikh Alauddin Arshad, Magistrate, First Class, Sargodha, and Mr. B. L. Bhandari, committing Magistrate, and in the Sessions Court deposed on solemn affirmation that Ram Narain and Narsingh Das took part in the commission of the murder of Sarab Dayal. The accused has himself admitted before the Sessions Court that he made false statements. Hence he committed an offence under Ss. 193 and 194, I. P. C. Hence the complaint, etc. etc."

As required by the provisions of the Code a petition was filed in this Court under S. 339, Criminal P. C., for the necessary sanction for the prosecution of Parma Nand on the complaint framed by the learned Sessions Judge. This was on 3rd October 1932, and on 10th October 1932, a petition was filed on behalf of Parma Nand under S. 439, Criminal P. C., practically praying that the proceedings be quashed. These two petitions came up before Tek Chand, J., before whom an objection was taken by Mr. M. L. Batra for Parma Nand to the effect that the statement made under S. 164, Criminal P. C., before Sheikh Alauddin Arshad could not form the basis of a charge of perjury on the ground that it was not evidence and that the Magistrate was not empowered to administer any oath to him acting, as he was, under S. 164, Criminal P. C. Although the learned counsel admitted that according to the general practice in this province statements under

S. 164, were, as a matter of fact, recorded on oath or solemn affirmation, he contended that this practice was illegal, and in support of this contention he cited a dictum of Plowden, S. J., in *Lalu* v. *Queen-Empress* (1). Reliance was also placed on certain observations in *Emperor* v. *Motilal Hiralal* (2). Tek Chand, J., pointed out that the dictum referred to was in conflict with the general practice in this province in such matters and also with the view taken by the Madras High Court in *Queen-Empress* v. *Alagu Kone* (3) which was followed in *Suppa Tevan* v. *Emperor* (4) and cited with approval in *Emperor* v. *Vishawnath Krishna Sathe* (5) and *Queen-Empress* v. *Khem* (6). Considering the matter to be of importance Tek Chand, J., referred both petitions to a Division Bench.

On the case coming before us the attention of Mr. M. L. Batra was drawn by the learned Government Advocate to the concluding paragraph of the complaint, whereupon Mr. Batra, very frankly, said that he had failed to notice the exact wording of that paragraph and that had he noticed it he would not have raised the point on which the reference was really based, at this stage of the proceedings. As however the cases have been referred to us we have thought it incumbent on us to deal with the question involved. Broadly stated, this question is whether on a person being offered a pardon under S. 337, and, on his acceptance of that pardon, being placed before a Magistrate in order that his statement may be recorded, that Magistrate has the power to administer an oath or solemn affirmation to him. After a discussion of the various authorities Mr. Batra admitted that there was nothing in the Code which precluded a Magistrate from administering an oath or solemn affirmation to such a person, but, he contended, there was no obligation on the part of the deponent to speak the truth and that whatever he stated at the time could not be regarded as evidence. A reference to S. 337, Criminal P. C., shows that the whole object of that section is to tender a pardon to a person with a view to obtaining the evidence of that person because he is supposed to have been directly or indirectly concerned in or privy to the offence, and the same section lays down that every person accepting a tender under it shall be examined as a witness in the later proceedings in connexion with that offence. Mr. Batra urged that having regard to that mandatory provision the intention of the legislature was that as soon as a pardon was accepted the person accepting it could only be examined as a witness in the presence of the person or persons accused of the original offence. This contention is, to my mind, opposed to common sense, and Mr. Batra was unable to cite any authority in support of it. It seems to me obvious that it might be very necessary to obtain a detailed statement of what the person accepting the pardon has to say in order to complete the investigation and inquiry and to ascertain what corroboration of his statement might be forthcoming, and it might very well be extremely difficult to wait for that information till the magisterial inquiry commenced.

Turning now to S. 164, Criminal P. C., it will be seen that provision is made by that section for the recording of two kinds of statements: (1) a statement pure and simple; and (2) a confession. With the recording of confessions we are not here concerned. Sub-S. (2), S. 164 lays down that such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his (the Magistrate's) opinion, best fitted for the circumstances of the case. A reference to S. 5, Oaths Act, (10 of 1873) shows that oaths or affirmations shall be made by "all witnesses," that is to say,

> "all persons who may lawfully be examined, or give or be required to give, evidence by or before any Court or person having, by law, authority to examine such persons, or to receive evidence."

Mr. Batra has very rightly admitted that in this case Sheikh Alauddin Arshad had by law authority to examine Parma Nand and therefore I consider that Sheikh Alauddin Arshad had authority to administer the solemn affirmation which he did administer to Parma Nand. Again, it seems to me that Parma Nand was, by virtue of the conditions laid down in S. 337, Criminal P. C., and his acceptance thereof, bound to speak the truth and the whole truth. In these circumsatnces I consider that the procedure adopted by Sheikh Alauddin Arshad was in accordance with law and that the statement recorded by

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1. (1893) 2 P R 1893 Cr.
2. A I R 1922 Bom 138=64 I C 40=46 Bom 61.
3. (1893) 16 Mad 421.
4. (1906) 29 Mad 89=3 Cr L J 370.
5. (1906) 8 Bom L R 589=4 Cr L J 183.
6. (1899) 22 All 115=(1899) A W N 207.

him of Parma Nand under S. 164, Criminal P. C., was recorded in accordance with law. A reference to *Lalu* v. *Queen-Empress* (1), in which the dictum referred to by Plowden, S. J., was made, shows that the question then before the Court was somewhat different to the one which is now before us and the learned Judges in that case appear to me to have carefully refrained from laying down any definite rule. It is significant that *Lalu* v. *Queen-Empress* (1) has never been followed in any of the cases subsequent to that date, and the practice in this province is opposed to that dictum and is, in my opinion, in accordance with law. The question involved in *Emperor* v. *Motilal Hiralal* (2) was also different, it being held there that where a pardon has been tendered during an investigation and not during an inquiry under the Criminal Procedure Code, and the approver makes a statement accordingly, such a statement cannot form the basis of an alternative charge of an offence punishable under S. 193, Penal Code. It is to be noted that the Judges in that case differentiated between a pardon tendered during an investigation into the offence and a pardon tendered during the inquiry under the Criminal Procedure Code. This authority however need not detain us as the law has been amended subsequent to the delivery of that judgment and S. 337 as it now stands expressly places a pardon tendered during the course of an investigation on the same footing as a pardon tendered during a magisterial inquiry.

I do not think it necessary to discuss the Madras and Allhabad authorities which have been already referred to and which are noted in the order of reference as, in my judgment, they correctly lay down the law on the subject. I would merely add that in *Abdul Aziz* v. *Emperor* (7) Chevis, J., and myself had occasion to consider *Queen-Empress* v. *Alagu Kone* (3) and *Lalu* v. *Queen-Empress* (1) and that we expressed our approval of the view taken by the Madras High Court in that case, and in referring to *Lalu* v. *Queen-Empress* (1) pointed out that though the learned Judges seemed to doubt whether a Magistrate, when recording the statement of a person under S. 164, could administer an oath, nothing was definitely decided and that the decisions of the Madras and Bombay High Courts were entitled to considerable weight. The reference to the Bombay authority in this connexion was to *Emperor* v. *Vishwanath Krishna Sathe* (5). In my judgment therefore it must be held that in recording a statement under S. 164, Criminal P. C., a Magistrate is empowered to administer to the deponent an oath or solemn affirmation and that the statement so recorded can form the subject of an alternative charge under the perjury sections of the Indian Penal Code. In these circumstances I consider that sanction should be accorded to the prosecution of Parma Nand in this case and I would therefore grant the sanction prayed for. The revision petition is dismissed.

Abdul Qadir, J.—I concur.

R.K. *Petition dismissed.*

A. I. R. 1933 Lahore 323

COLDSTREAM, J.

Dogar Singh — Complainant — Petitioner.

v.

Budh Singh and *another*—Accused—Opposite Parties.

Criminal Revn. Appln. No. 1187 of 1932, Decided on 22nd December 1932, from decision of Sess. Judge, Rawalpindi, D/- 31st August 1932.

Criminal P. C. (1898), Ss. 258 and 439—Charges framed — Accused discharged on complainant's withdrawal of complaint—Order of discharge though incorrect cannot be set aside by complainant in revision.

In a criminal case instituted by the complainant the trial Magistrate framed separate charges against the two accused, one being under S. 323, I. P. C., and the other being under S. 394, I. P. C. At a subsequent hearing the complainant appeared and petitioned that as the accused who was charged under S. 394 was his father-in-law, he had come to a compromise and wished to withdraw his complaint. Thereupon the trial Magistrate without any further inquiry passed an order directing that both accused should be discharged under S. 253. Subsequently the complainant himself sought to set aside the order of discharge.

Held: that though the order of the Magistrate was technically incorrect, as the Crown did not file an appeal from the acquittal or support the revision petition, it may be presumed that the Crown had ratified the withdrawal of the complaint and that the High Court will not interfere in revision with the order which was passed at the complainant's own request. [P 324 C 2]

Harnam Singh—for Petitioner.

Ram Lal Anand I — for Opposite Parties.

Facts.—This is an application for revision under S. 435, Criminal P. C., by a complainant against an order discharging two accused. Notice was issued from this Court to the two ac-

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7. (1916) 84 P R 1916 Cr=17 Cr L J 491=86 I C 171.

cused and to Government and all three parties have been represented before me. The facts are as follows: In a criminal case instituted by the complainant the trial Magistrate framed separate charges against the two accused, one being under S. 323, Penal Code. and the other being under S. 394, Penal Code. At a subsequent hearing the complainant appeared and petitioned that as the accused who was charged under S. 394 is his father-in-law he had come to a compromise and wished to withdraw his complaint. Thereupon the trial Magistrate without any further inquiry passed an order directing that both accused be discharged under S. 253.

Grounds.—Two legal defects are obvious: 1. Once an accused person has been charged he cannot be discharged under S. 253. 2. A case under S. 394 is not compoundable and no compromise may be recognized by the Court. Though the legal defects are obvious, the remedy is one involving complicated points of law. A nominal order of discharge after a charge has been framed has been held to operate as an order of acquittal: vide *Taba* v. *Hira Singh* (1), *T. Sriramulu* v. *K. Veerasalingam* (2) and *Crown* v. *Nathu* (3) if therefore there is an order amounting to an acquittal, I, as Sessions Judge, have no power under 436. But in all cases I have power to refer to the High Court under S. 438. In my own view the order of discharge, whether deemed to be one of acquittal or not, was passed in contravention of the law which lays down that an offence under S. 394 is not compoundable, and it is therefore a nullity, and hence the case really stands as though the accused had been charged and no further proceedings had been taken. However the trial Magistrate cannot himself proceed with this case from that stage; for to do so would involve a review of his own order, which is impossible in Criminal Procedure. Nor can I direct him to do so under any provision of the Criminal law. I therefore refer this case to the High Court under the provisions of S. 438, I am aware that the High Court have no power to reverse an order of acquittal under S. 439 and that in the case of a valid but erroneous order of acquittal, the only course is for the Government to present an appeal. But as I have already stated I regard the order of discharge amounting to acquittal as though it had never been passed. One more point also arises which is as to the effect of the order in respect of accused who is only charged under S. 323 which is a compoundable offence. In, my view as the order covered the cases of both the accused, the whole of it is nullity though this is a question for argument.

Order. — The application forwarded by the learned Sessions Judge is virtually an appeal against an acquittal preferred by Dogar Singh, the petitioner, and not supported by the Crown. The petitioner, who was the complainant in the case concerned applied to the trial Court asking for the proceedings to be dropped as he had compromised the case with both the accused, one of whom was his father-in-law. The Court acted on this application. The learned Sessions Judge was no doubt technically correct in pointing out that the Magistrate ought not thereupon to have proceeded as he did. There is however also no doubt that the Crown could have withdrawn the proceeding. As the Crown has not filed an appeal and has not appeared to support the petitioner, it may reasonably be presumed that it has ratified the withdrawal effected at the complainant's instance. In any case, I am not prepared to interfere now in revision for the benefit of the petitioner with an order which was passed upon the petitioner's own request by the trial Court.

K.S. *Application dismissed.*

A. I. R. 1933 Lahore 324

BHIDE, J.

Nanak Chand — Judgment-debtor — Petitioner.

v.

Raja Singh and *another* — Decree-holder and Auction-purchaser—Opposite Parties.

Civil Revn. No. 432 of 1932, Decided on 16th November 1932, from order of Senior Sub-Judge, Gujrat, D/- 22nd February 1932.

Civil P. C. (1908), O. 21, R. 90—Auction purchaser is necessary party to appeal.

In an appeal from an order confirming the sale the purchaser is the principal person interested in appeal and is a necessary party: *A I R* 1919 *Lah* 3, *Rel on*; and *A I R* 1928 *Lah* 418, *Dist.* [P 325 C 1]

Bodh Raj Sawhney—for Petitioner.

Mukund Lal Puri—for Opposite Parties.

Judgment.— In the course of execution proceedings a house was put to

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1. (1883) 29 P R 1883 Cr.
2. A I R 1915 Mad 23=25 I C 1001=38 Mad 585.
3. (1903) 175 P L R 1903.

sale and was purchased by one Ladha Singh. The judgment-debtor raised certain objections to the sale but these were dismissed. An appeal was preferred by the judgment-debtor to the Senior Subordinate Judge, but the learned Judge dismissed the appeal, holding that Ladha Singh was a necessary party to the appeal and had not been impleaded within the period of limitation.

A petition for revision of this order has been presented to this Court and it is urged on behalf of the petitioner that the learned Senior Subordinate Judge has acted with material irregularity in exercise of his jurisdiction in holding that Ladha Singh was a necessary party to the appeal before him. The learned counsel has referred to *Sain Das* v. *Punjab National Bank Ltd.* (1) in support of his contention but that ruling does not appear to be in point inasmuch as it deals with the proceedings before the executing Court. According to the provisions of O. 21, R. 92, Civil P. C., all that is necessary is that notice should be given to all persons affected thereby, but in the present instance the sale had been confirmed and an appeal had been preferred from the order confirming the sale. Ladha Singh purchaser was obviously the principal person interested in the appeal and was a necessary party. If any authority were needed in support of this proposition, I may refer to *Khaira* v. *Salem Raj* (2). There is no force in this petition and I must dismiss it with costs.

M.N. *Application dismissed.*

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1. A I R 1928 Lah 418=111 I C 506.
2. A I R 1919 Lah 3=51 I C 935=1 Lah 21.

A. I. R. 1933 Lahore 325

SHADI LAL, C. J. AND BROADWAY, J.

Barkat Ali—Defendant—Appellant.

v.

Karim Bakhsh and *others*—Plaintiff and Defendants—Respondents.

Letters Patent Appeal No. 47 of 1928, Decided on 9th February 1933, from decree of Zafar Ali, J., in Civil Appeal No. 1337 of 1927, D/- 22nd December 1927.

(a) Civil P. C. (1908), S. 11—Co-defendants—When decision acts as res judicata explained.

A matter may be res judicata as between co-defendants, if there is a conflict of interests between them inter se and it is necessary to adjudicate upon that conflict in order to give the plaintiff appropriate relief, and the Court determines the question between the co-defendants. [P 326 C 1]

(b) Civil P. C. (1908), S. 11, Expl. 6—Expl. 6 applies to persons constructively held to be parties.

Explanation 6 applies to the persons who are not actually parties to the previous suit but are constructively held to be parties because they were interested in the right which was claimed in that suit in common for all the persons interested therein. [P 326 C 1]

(c) Civil P. C. (1908), S. 11—Even wrong decision of law acts as res judicata.

Even an issue of law wrongly decided does operate as res judicata, as S. 11 makes no distinction between an issue of fact and an issue of law, specially when there is identity of the matter in issue, and also the identity of the causes of action. [P 326 C 1]

Fakir Chand—for Appellant.

J. L. Kapur and *Badri Das*—for Respondents.

Shadi Lal, C. J.—On 7th April 1888, one Hadi gifted an occupancy holding to Nur Ilahi, the father of the contesting defendant, Barkat Ali. It is common ground that one-half of the holding which belonged originally to Hadi's brother Shadi, was inherited by him on the latter's death. Hadi was a sonless proprietor, and he gifted the estate to Nur Ilahi, because the latter had married Mt. Jhando, the daughter of his brother Shadi. It appears that Mt. Jhando and her sons died in the lifetime of Nur Ilahi, and the defendant Barkat Ali is his son by his second wife. In 1915, Nur Ilahi died, leaving him surviving Barkat Ali, who succeeded to the occupancy holding. In April 1923, Umra, a collateral of Hadi, brought an action for the recovery of the entire holding, and impleaded as defendants in that suit, not only Barkat Ali, but also the present plaintiffs who were also reversioners of the deceased Hadi. These reversioners as well as the then plaintiff contested the right of Barkat Ali to succeed to the occupancy holding on the ground that the gift by Hadi in favour of Nur Ilahi was for the benefit of Shadi's daughter, Mt. Jhando and her sons, and that on their death the property reverted to Hadi's collaterals. There was an issue on the subject, and it was decided against Barkat Ali, with the result that Umra's suit was decreed to the extent of one-fourth share of the holding, the remaining three-fourths being the share of the other collaterals. The present action was brought in 1924 by two collaterals of Hadi, and the question arises whether the decision in the former suit that on the death of Nur Ilahi the property reverted to the donor's heirs operates as res judicata. It is to be observed that the present plaintiffs were defendants in the previous suit, but it cannot be seriously disputed that a matter may be res judicata as between co-defendants, if there is a conflict of interests between them inter se and it is necessary to adjudicate upon that conflict in order to give the plaintiff appropriate relief, and the Court determines the question between the co-defendants. All these conditions have been satisfied in the present case and the decision in the previous case should operate as res judicata. The learned single Judge has referred to Expl. 6, S. 11, Civil P. C., but that explanation applies to the persons who are not actually parties to the previous suit but are constructively held to be parties because they were interested in the right which was claimed in that suit in common for all the persons interested therein. As pointed out above, the present plaintiffs were actually defendants in the previous suit, and it is therefore unnecessary to invoke the explanation.

The learned counsel for Barkat Ali however contends that the decision in the former suit was wrong in law, and that an issue of law wrongly decided does not operate as res judicata. A perusal of the language of S. 11, Civil P. C., shows that there is no distinction between an issue of fact and an issue of law, but it must be conceded that there are some judgments to the effect that if the causes of action in the two suits are different, an erroneous decision on a question of law may not operate as res judicata. There are however judgments which take a contrary view: vide inter alia *Tarini Charan* v. *Kedar Nath* (1). It was pointed out in that judgment that it was the identity of the matter directly and substantially in issue that was the test of res judicata and not the identity of the causes of action. In the present case we have not only the identity of the matter in issue, but also the identity of the causes of action; and there is no reason for excluding the operations of the rule of res judicata. Nor is there any valid ground for holding that the decision in the previous suit was erroneous in law. For the foregoing reasons I would affirm the judgment of the Single Bench and dismiss the appeal with costs.

Broadway, J.—I concur.

R.K. *Appeal dismissed.*

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1. A I R 1928 Cal 777=115 I C 593=56 Cal 723 (F B).

A. I. R. 1933 Lahore 326

ADDISON AND BHIDE, JJ.

Ahmad Yar and *others*—Plaintiffs—Appellants.

v.

Mt. Fateh Bibi—Defendant—Respondent.

Second Appeal No. 2774 of 1926, Decided on 20th February 1933, from decree of Dist. Judge, Shahpur, D/- 12th June 1926.

Custom (Punjab)—Succession—Tiwanas of Shahpur District — Unmarried sister excludes collaterals.

It is a general rule that an unmarried sister among Tiwans in the Shahpur District excludes collaterals till marriage or death. To this rule there is an exception which is to the effect that in some families of Tiwanas and Sayyads, sisters do not inherit but are only entitled to maintenance. And those that claim the benefit of this exception must show that they are amongst the few families of Tiwanas which come within the exception, and which are outside the general rule. [P 326 C 2; P 327 C 1]

Shambu Lal Puri for *M. L. Puri*—for Appellants.

M. L. Batra—for Respondent.

Addison, J:—Mohammad Sher, a Tiwana of Khushab tahsil in the Shahpur district, died without issue and without leaving a widow in December 1923. His land was mutated in favour of his unmarried sister, Mt. Fateh Bibi, and his collaterals thereupon instituted a suit for a declaration that they were entitled to inherit the land by the custom of their tribe to the exclusion of his unmarried sister. The lower appellate Court has held that an unmarried sister among Tiwanas in the Shahpur district excludes collaterals till marriage or death. The plaintiffs' suit was therefore dismissed and they have preferred this second appeal after having obtained the usual certificate.

The question appears to me to be simple. In the Customary Law of this district prepared by Sir James Wilson it is stated, in reply to Question 26, at p. 53, that all Musalmans said that, if the deceased left no father, mother, widow or daughter and no male lineal descendants through males of his father nor the widow of such lineal descendant of his father, then his unmarried sisters succeed to the whole of his property to the exclusion of his uncles. It was added that the sisters' powers were equal to those of a daughter, and that, on her death or marriage, the estate reverted to the collaterals. Sisters' sons and married sisters do not inherit. An exception is appended to this reply, which is to the effect that in some families of Tiwanas and Sayyads, sisters do not inherit but are only entitled to maintenance. It seems to me that it was for the plaintiffs to show that they were amongst the few families of Tiwanas which came within the exception, and which were outside the general rule, which obviously means that amongst all Musalman tribes, including Tiwanas, unmarried sisters succeed in the circumstances mentioned.

Besides the evidence afforded by the Customary Law of the district four instances have been proved in which unmarried sisters have excluded collaterals: two amongst Tiwanas and two amongst other tribes. There is one instance to the contrary also proved. Nor can it be said that the iqrarnama malikan (Ex. P. 3), included in an early wajib-ul-arz of the district, is in favour of the plaintiffs. That refers only to gifts to a daughter, etc., during the lifetime of the father and not to succession. On the evidence I have no doubt that the plaintiffs' claim was properly dismissed and I would dismiss this appeal with costs.

Bhide, J.—I agree.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 327

TAPP, J.

Lalta Devi and *others*—Defendants—Petitioners.

v.

Balkishan Chopra — Plaintiff—Opposite Party.

Civil Revn. Petn. No. 540 of 1932, Decided on 22nd December 1932, from order of Sub-Judge, First Class, Lahore, D/- 15th August 1932.

(a) Civil P. C. (1908), S. 115—Application is not necessary—Court can act if order is unappealable.

Section 115 does not require that there should be an application or that such application need necessarily be made by an aggrieved party. The only limitation against the exercise of the power of this Court under S. 115 is that the case should be one in which no appeal lies. [P 327 C 2]

(b) Civil P. C. (1908), S. 115—Order of ejectment against occupant of suit properties in receiver's possession improper, but with jurisdiction—High Court can interfere not under S. 115, but under Government of India Act (1915), S. 107.

A Court had appointed a receiver of suit properties. It passed an order of ejectment against an occupant of the premises though neither party had a present right to remove him. It was advisable in the circumstances of the case not to eject him:

Held: that the order of ejectment having been passed with jurisdiction, though wrongly, was not open to revision under S. 115, but could be interfered with under S. 107, Government of India Act. [P 328 C 1]

Dev Raj Sawhney and *Panna Lal Bahl*—for Petitioners.

Jai Gopal Sethi—for Opposite Party.

Judgment.—In connexion with certain trust properties including Mul Chands' temple a suit has been brought by Balkishan Chopra a nephew against Lalta Devi and Shanti Devi the two widows of Khairati Ram the deceased son and Sardari Lal the daughter's son of the late Lala Mul Chand, the alleged founder of the temple and creator of the trust properties. The proceedings in the suit have been stayed under S. 10, Civil P. C., and the Court has appointed Lala Parkash Chandra Mahajan as a receiver to collect the rents and perform certain other duties. The Court has also constituted a Board of Receivers consisting of the plaintiff, Lalta Devi and Sardari Lal defendants and Pandit Rikhi Ram, for the management of the temple. On the application of the plaintiff and in agreement apparently with Lala Parkash Chandra Mahajan and a representative of Pandit Rikhi Ram, the lower Court has ordered the receiver to eject one Murli Dhar, who is occupying a kotha in the temple, from the premises. Against this order the present application for revision has been preferred by the defendants in the suit.

A preliminary objection was raised that the proper and necessary parties had not been impleaded in the application and that neither a revision nor an appeal was competent. I do not think that the two receivers Lala Parkash Chandra and Pandit Rikhi Ram are necessary parties to the application as neither of them is affected in any way by the order of the Court. It is no doubt correct as urged by Mr. Sethi that the defendants have no right of appeal as such right would only lie with Murli Dhar whose ejectment has been ordered by the Court if he is such a person whom neither the plaintiff nor the defendants have a present right to remove. It does not follow however that because the defendants have no right of appeal against the order they cannot come up to this Court in revision as S. 115, Civil P. C., does not require that there should be an application or that such application need necessarily be made by an aggrieved party. The only limitation against the exercise of the power of this Court under S. 115 is that the case should be one in which no appeal lies. It appears from what has been said during the course of arguments and from certain facts emerging from the record that Murli Dhar is not such a person whom either party to the suit has not a present right to remove and consequently the order of the Court would not be open to appeal. It now remains to be seen whether as contended on behalf of the petitioners the order in question was made without jurisdiction or that having jurisdiction to make the order the Court acted illegally or with material irregularity. In my opinion the Court had jurisdiction to make the order in question as the property in dispute was in the possession and under the control of the Court through its duly appointed receiver. It was admitted that Murli Dhar was not an employee of any of the trustees nor was he on the temple establishment and therefore if the Court was satisfied that his residence in a kotha of the temple was improper the Court in ordering his ejectment from the said kotha though it may have been done wrongly cannot be said to have acted illegally or with material irregularity.

In view of the above observations I must hold that the order of the Court below is not open to revision under S. 115, Civil P. C. The circumstances however are such that in my opinion interference with the order is justified under the provisions of S. 107, Government Act. It appears that Murli Dhar has been living on the temple premises for the last 16 or 17 years having been permitted to do so by the founder. He is reported by Lala Parkash Chandra to be a very useful person and wielding a good deal of influence which he always exercises in the interests of the temple. In para. 1 of the application for revision it is alleged that Murli Dhar renders invaluable service to the temple and assistance in the management and is of special help to the defendant trustee Lalta Devi in helping her in the administration of the trust. Murli Dhar is thus obviously not a person whose residence on the temple premises can be regarded as objectionable. He does not appear to have obstructed the receiver Lala Parkash Chandra in the exercise of his duties nor in any way interfered with his control and management. The plaintiff apparently seeks the ejectment of Murli Dhar because he is possibly ill-disposed towards the plaintiff but however this may be I do not think it affords a sufficient reason for his ejectment. I further think that the Court should have allowed the matters to remain in status quo during the pendency of the suit. For the reasons given above I set aside the order of the Court below directing the ejectment of Murli Dhar from a kotha on the temple premises, leaving the parties to bear their own costs in this Court.

M.N. *Order set aside.*

A. I. R. 1933 Lahore 328

TAPP, J.

Atma Ram—Defendant—Appellant.

v.

Badhwa Mal-Shambhu Lal—Plaintiffs—Respondents.

Second Appeal No. 991 of 1932, Decided on 10th December 1932, from decree of Addl. Dist. Judge, Karnal, D/- 31st March 1932.

(a) Civil P. C. (1908), O. 41, R. 27—Additional evidence taken on apparently obscure point not affecting finding in case—Reason need not be given.

The mere examination of the defendant by the appellate Court on certain points which are apparently obscure as regards the execution of a receipt does not amount to taking additional evidence specially when the judgment of the lower Court is not influenced by such statement; and hence finding arrived at by the lower Court is not vitiated even though no reasons are recorded for taking the additional evidence. [P 329 C 1]

(b) Civil P. C. (1908), S. 100—Finding of fact.

A finding of fact by a lower appellate Court is not open to second appeal. [P 329 C 1]

Balwant Rai—for Appellant.

Shamair Chand—for Respondents.

Judgment.—The plaintiff firm Badhwa Mal-Shambu Lal brought a suit for recovery of Rs. 635 due on a book account against the defendant-appellant Atma Ram. The defendant pleaded payment of a sum of Rs. 500 in settlement of the amount claimed and relied on a receipt, dated 5th April, Ex. D-1. The plaintiff firm denied receipt of this amount and the execution of D-1. The trial Court found in favour of the defendant as regards the payment of Rs. 500 and decreed the suit for Rs. 135 and proportionate costs only. On appeal however the learned Additional District Judge differed from the view taken by the trial Court as to the payment of Rs. 500 and the genuineness of the receipt and granted the plaintiff firm a decree for the full amount claimed.

It is conceded that the finding of the lower appellate Court is a finding of fact but it is urged that the finding is vitiated by the learned Additional District Judge having taken additional evidence without recording any reason for doing so as required by R. 27, O. 41. All that the lower appellate Court did was to examine the defendant on certain points which were apparently obscure as regards the execution of the recepit. I do not consider that this amounted to taking additional evidence and it is obvious from the perusal of the judgment of the lower appellate Court that the statement of the defendant did not entirely influence its finding, which was based to a large extent on the facts and circumstances emerging from the evidence on the record of the trial Court. In view of the above observation it is unnecessary to cite the authorities relied on by the learned counsel for the appellant as to when additional evidence may be admitted and the necessity of recording reasons for doing so. The simple fact namely the payment of Rs. 500 was believed by the trial Court and disbelieved by the appellate Court and it seems therefore perfectly clear that the matter is concluded by a finding of fact. The appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 329

TEK CHAND AND MONROE, JJ.

Ishar Das—Plaintiff—Appellant.

v.

Maya Mal and *others*—Defendants—Respondents.

First Appeal No. 233 of 1927, Decided on 15th December 1932, from preliminary decree of Senior Sub-Judge, Amritsar, D/- 18th October 1926.

(a) Limitation Act (1908), Art. 116—Mortgagor given right to redeem only after four years from date of mortgage—Limitation for personal relief against mortgagor is six years from date when money becomes payable.

A mortgage-deed provided that the mortgage money will be paid in four years and that the mortgaged property will be redeemed and that the mortgagee will be entitled to recover the amount after four years.

Held: that limitation for personal relief against mortgagor is six years from date when mortgage money becomes payable and not six years from date of mortgage. [P 330 C 1]

(b) Civil P. C. (1908), O. 34, R. 6—Sale of right of redemption and successful pre-emption suit—Pre-emptors are not personally liable in absence of contract to that effect.

Where the mortgagor sells the equity of redemption of a mortgage and a pre-emption suit ensues in respect of the sale, the pre-emptors, in the absence of contract to that effect, are not personally liable for the mortgage money. [P 330 C 1]

(c) Civil P. C. (1908), O. 34, R. 6—Mortgagee asking for personal relief in mortgage suit cannot raise objection subsequently that the relief asked for was premature.

Though the personal relief against the mortgagor can be asked generally only when the proceeds of the sale prove insufficient, still where the mortgagee himself in the mortgage suit asks for such relief and the same is decided against him owing to his negligence in not letting in evidence he cannot raise the objection that the question ought not to have been decided as being premature. [P 330 C 1, 2]

(d) Civil P. C. (1908), S. 35—Costs.

In the absence of any reasons to the contrary a successful party must be allowed costs. [P 330 C 2]

(e) Civil P. C. (1908), S. 35—Costs—Mortgage suit—Defendant raising false pleas should be made personally liable for costs.

In a mortgage suit where one of the defendants raises several pleas with no foundation he ought to be made personally liable for the costs. [P 330 C 2]

Ram Lal Anand, *R. C. Soni* and *Tufail Muhammad*—for Appellant.

Dev Raj Sawhney and *Yash Pal*—for Respondents.

Monroe, J.—This suit was brought to recover the sum of Rs. 10,500, alleged to be due for principal and interest on foot of a registered mortgage-deed dated 20th November 1918, made by Maya Mal in favour of Ishar Das as mortgagee. After the mortgage the owner of the equity of redemption, Maya Mal, sold his interests to defendants 2 and 3 and thereon there was a claim by Gobind Ram, father of defendants 4 to 7, to pre-empt the property by reason of the sale. On 30th August 1931, Govind Ram having died in the meantime, defendants 4 to 7 were declared entitled to pre-empt. The mortgage-deed provides as to repayment that the entire mortgage money, principal and remaining interest, will be paid by the mortgagor in four years "from today" and the mortgaged property will be redeemed and further

> " four years hence from to-day the mortgagee shall have every right to recover at any time he likes the amount due to him under the mortgage-deed."

The plaintiff in his petition of plaint asked for a decree for Rs. 10,500 principal and interest, by sale, i. e., auction of the mortgaged house, and if the whole amount of decree with costs etc., should not be recovered from the mortgaged property, that deficiency might be made up from the person or other property of the defendant. The issues which were settled in the case so far as we are now concerned with them were: Whether the plaintiff is entitled to a personal decree against the pre-emptors ? and If so, whether the suit for a personal decree is within time ? The

Senior Subordinate Judge of Amritsar on 18th October 1926, gave a decree for the mortgage money in the usual form except that in his judgment he directed that the parties should bear their own costs. He did not in his judgment give any express finding on the question whether the plaintiff was entitled to a personal decree against the pre-emptors, but he decided that the suit for a personal decree was barred by time holding that the cause of action arose on 20th November 1918 the date of the mortgage. The plaintiff has now appealed to this Court alleging that the decision of the learned Subordinate Judge is wrong in holding that the claim for the personal decree was barred by time, in that the procedure laid down by the Civil Procedure Code under O. 34 was not followed and the decision of the question of personal liability was premature, and further in refusing the costs of the suit to the plaintiff.

There can be no doubt that the learned Judge's decision that the personal claim, if it exists, is time barred, is wrong. On the express words of the mortgage already quoted no cause of action could arise until the lapse of four years after the execution of the mortgage, and therefore a suit brought within six years from 20th November 1922, the mortgage being a registered document, would be in time. The form of the decree is not that provided by the rules, nor is the decree in strict terms of O. 34, R. 6. I am however of opinion that the plaintiff is debarred from making any objection on this ground. He himself in his petition has only asked for a single relief in the terms quoted above and he was responsible for having an issue settled to decide the question, namely, the issue "whether the plaintiff is entitled to a personal decree against the pre-emptors." If after having got the issue settled in that form he has neglected to bring any evidence which might have been available to sustain his claim he must abide by the result of his own negligence. I may add that there is not even tittle of evidence on the record to show how the pre-emptors could be made personally liable for the amount of the mortgage money, and the only ground that the learned counsel for the plaintiff can suggest on which such a liability might be based is an oral contract which might have been made at the time of the award in the pre-emption proceedings. But as I have stated there is no evidence whatever to support any such suggestion. As against Maya Mal, the original mortgagor, so far as the facts are disclosed by the present record the plaintiff may hereafter be entitled to a personal decree if the proceeds of the sale of the property should prove insufficient to discharge the claim.

The learned Judge has given no reason whatever for depriving the plaintiff of his costs of the suit and we have been unable to discover any reason why the ordinary rule should not apply. I think therefore that the plaintiff is entitled to his costs and I would go further and say that in view of the conduct of Salig Ram, defendant 4, who raised several pleas for which there was no foundation whatever he ought to be made personally liable for the plaintiffs' costs of the suit in exoneration of the property and the persons now in possession of it. The result is therefore that in my view this appeal fails to personal claim against the pre-emptors but is successful on the question of the costs of the suit. The decree of the lower Court will be modified, accordingly by a declaration that the plaintiff shall be at liberty to apply for a personal decree against Maya Mal if the proceeds of the sale of the mortgage property are found to be insufficient, and by decreeing costs of the suit in favour of the plaintiff against Salig Ram personally. Under all the circumstances I think the parties ought to bear their own costs of this appeal.

Tek Chand, J.—I agree.

K.S. *Decree modified.*

A. I. R. 1933 Lahore 330

TAPP, J.

Sohna Mal—Debtor—Appellant.

v.

Jewan Dass and *others*—Creditors—Respondents.

Misc. First Appeal No. 1084 of 1932, Decided on 20th December 1932, from order of Dist. Judge, Attock, D/- 20th June 1932.

Provincial Insolvency Act (5 of 1920), S. 24—Questions arising under—Concealment of accounts is no ground for dismissal.

On a debtor's application to be adjudicated insolvent only two questions arise, namely, whether his debts amount to Rs. 500 or over and whether he is unable to pay his debts. Concealment of accounts is no ground for which the application can be dismissed. [P 331 C 1]

Shamair Chand—for Appellant.

Judgment.—The application of the debtor-appellant Sohna Mal has been dismissed by the learned District Judge by a brief order to the effect that the statement of the debtor is incredible—he is obviously lying and the learned Judge entertains no doubt that he is concealing the account which he must have kept during the course of his business.

On a debtor's application to be adjudicated insolvent only two questions arise, namely, whether his debts amount to Rs. 500 or over and whether he is unable to pay his debts. These two questions arise under S. 24 and it is on consideration and determination of these two points that the application of a debtor secceeds or fails. The learned District Judge has not addressed himself to the consideration and determination of the above two matters. The ground on which he has apparently dismissed the application, namely, concealment of accounts is not one for which the application can be dismissed. I accordingly accept the appeal which has been heard ex parte, set aside the order of the Court below and remit the case for disposal in accordance with law and the above observations. No order as to costs.

M.N. *Appeal allowed.*

A. I. R. 1933 Lahore 331

ADDISON AND BHIDE, JJ.

Mt. Jiwan—Defendant—Appellant.

v.

Ali Mohammad and *another*—Plaintiffs and Defendants—Respondents.

First Appeal No. 2120 of 1927, Decided on 16th February 1933, from decree of Senior Sub-Judge, Gujranwala, D/- 31st March 1927.

(a) Custom (Punjab)—Custom of khanadamadi.

The custom of khanadamadi only exists when there is no son. [P 331 C 2]

(b) Custom (Punjab)—Gift—Arains of Gujranwala tahsil—Custom of gift to daughter or khanadamad does not exist.

It is not proved that among the Arains of village Kalsiyan in the Gujranwala tahsil of the Gujranwala District there exists a custom of gift to the daughters or khanadamads. Therefore a gift by such an Arain of the ancestral property to his daughter whose husband is a khanadamad is invalid and does not affect the reversionary right. [P 332 C 1]

Mohammad Hussain—for Appellant.

Din Mohammad and *S. K. Ahmad*—for Respondents.

Addison, J. — The plaintiffs are nephews of Badha who gifted his land to his daughter Mt. Jiwan, and on 25th January 1925, had it mutated in her name. The parties are Arains of village Kalsiyan in the Gujranwala Tahsil of the Gujranwala District. The suit was for declaration that the gift of ancestral land by Budha to his daughter was invalid and should be held not to affect the reversionary rights of plaintiffs after Budha's death. It was denied that the land was ancestral and it was pleaded that, in any case, the gift was good by custom as the husband of Budha's daughter lived with Budha as his Khanadamad. The trial Judge held that the parties followed custom but that it had not been proved that there was any custom of khanadamadi amongst Arains of this Tahsil. He also held that the land was ancestral. Accordingly he granted the plaintiffs a declaratory decree to the effect that the gift in question being invalid would not affect their reversionary rights. Against this decision Mt. Jiwan, daughter of Budha, has appealed. It was first argued that the land had not been proved to be ancestral. There is good evidence on the record that Chogatta, father of Budha, was owner of the land. The finding of the trial Court therefore that the land is ancestral *qua* the plaintiffs is correct.

The only evidence relied upon as regards the alleged custom before the trial Judge was statements of certain witnesses on both sides. The evidence of the defendants was very poor. The first three witnesses were respectively a Qasab, a Sandhu Jat and a Gujar of a village in the neighbourhood. Their statements are obviously of little or no value as to custom prevailing amongst Arains. The next two witnesses D. Ws. 4 and 5, are Arains but they do not own land in village Kalsiyan. They are tenants who were imported into this village a few years before they gave evidence. This shows that the defendants had difficulty in obtaining evidence. The sixth witness Chiragh was an Arain of Kalsiyan who stated that amongst Arains a khanadamad can be appointed. He referred as an instance to the case of his brother Hayat who gifted some land to his minor daughter aged 10 years though he had a son alive. This however was not a case of gift to khanadamad as he had a son and the custom of khanadamadi only exists when there is no son. The seventh witness Faqir was a Jat of village Kalsiyan while the eighth witness Kalu was a Tarkhan of a neighbouring village. Such evidence has been properly rejected. On the other hand, the plaintiffs examined certain Machhis to show that they carried the doli of Mt. Jiwan to her husband's village. This would not be done if the husband of the daughter was to be made khanadamad. The other witnesses who are Arains of the village have deposed that the daughter and her husband only came to live with Budha some years after their marriage. In particular Sohna, Maula Dad and Hassan are Arain proprietors of the village who depose that Arains cannot appoint a khanadamad or make a gift of ancestral land to a daughter. The seventh witness Bura Lambardar of a neighbouring village has given similar evidence.

There is no doubt that on this evidence it was properly held that the custom of khanadamadi had not been established. Parties relied upon this evidence only before the trial Judge. They did not put in a copy of the Riwajiam of the Tahsil, which is in vernacular, nor did they cite the Customary law of the District prepared in 1914. The answer to question 48 of the second compilation was however referred to before us. Paras. 2, 3 and 4, of the answer have to be seen. As I read it para. 2 means that a daughter has no claim upon her father's estate even if she and her husband live with her father till his death. A khanadamad is a resident son-in-law. Paras. 3 and 4 appear to me to apply to Tahsil Wazirabad tribes and Arains of Sharakpur amongst whom, according to para. 4, a resident son-in-law is entitled to inherit if there is no son provided the father of the daughter has gifted or bequeathed to either his daughter or her husband his property *by a written deed*. In the present case there was only an oral gift followed by a mutation so that in any case this volume of Customary law does not help the defendants. I have no doubt however that this para. 4 refers only to the tribes of Tahsil Wazirabad and the Arains of Sharakpur. This is made still clearer if the answers to questions 47 and 51 are seen. The answer to question 47 is that in no case can daughters inherit except amongst the tribes of Tahsil Wazirabad and the Arains of Tahsil Sharakpur. The tribes of Tahsil Wazirabad and the Arains of Sharakpur are again exceptions to the general rule laid down in answer 51. Lastly, the illustrations to question 48 are instances of daughters and khanadamads succeeding in Tahsil Wazirabad. For the reasons given I would hold that the custom of gift to daughters or khanadamads has not been proved in the present case. I would therefore dismiss the appeal with costs.

Bhide, J.—I agree.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 332

TAPP, J.

Tota Singh—Defendant—Appellant.

v.

Labhoo Singh and *another*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1702 of 1931, Decided on 2nd November 1932, from decree of Dist. Judge, Ferozepore, D/- 22nd June 1931.

(a) Pre-emption—Finding that price is not fixed in good faith—Court should consider market value—Court-fees Act (1870), S. 7 (vi).

Where the Court finds that the price has not been paid or fixed in good faith, it should proceed to consider the market value of the property in dispute. [P 332 C 2]

(b) Civil P. C. (1908), O. 41, R. 31—Non-compliance with provision of O. 41, R. 31.

A judgment in which the provisions of O. 41, R. 31 have not been complied with is no judgment in law. [P 333 C 1]

Shamair Chand—for Appellant.

Jiwan Lal Kapur—for Respondents.

Judgment.— Labhu Singh plaintiff-respondent brought a suit for pre-emption of a house against the defendant-appellant Tota Singh and Babu Singh. He was granted a decree on payment of Rs. 522 by the Court of the Subordinate Judge, Fourth Class, at Moga in the Ferozepore District. He appealed against this decree to the Court of the District Judge, alleging that the price had not been paid or fixed in good faith and claiming possession on payment of the sum of Rs. 292. The learned District Judge passed the following order in appeal:

> "The appeal is accepted ex parte with costs. Only two items of (1) Rs. 200 and (2) Rs. 25 are contested by the appellant. These items are disallowed. The decree of the lower Court is modified. The possession of the land will be given on payment of Rs. 297 only. The appellant's Mukhtar says that he has deposited the money in the lower Court. The judgment is announced."

Now it is obvious that the judgment of the learned District Judge does not comply with the provisions of R. 31, O. 41 of the Code. Further on finding that the price had not been paid or fixed in good faith, the lower appellate Court should have proceeded to consider the market value of the property in dispute and if there was evidence on the record in this connexion, it should have decided what was the market value and passed a decree accordingly. If there is no evidence on the record as to market value, then the suit should have been remanded for evidence to be taken in this connexion. It is conceded by the learned counsel for the plaintiff-respondent that the judgment of the lower appellate Court is no judgment in law, and for the above reasons I accept the appeal and setting aside the decree of the lower appellate Court send back the appeal for re-decision in accordance with law. Stamp on appeal to be refunded; other costs to be costs in the cause.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 333

TEK CHAND, J.

Karnailu—Defendant—Appellant.

v.

Bhagwan Singh — Plaintiff—Respondent.

Second Appeal No. 2356 of 1929, Decided on 12th July 1932, from decree of Dist. Judge, Amritsar, D/- 13th May 1929.

Custom (Punjab)—Alienation—Before challenging validity reversioner must prove that land is ancestral.

Where a will executed by a deceased proprietor is challenged by a reversioner on the ground that the proprietor had no right to will away the property the Court must first come to a finding as regards the nature of the property whether it is ancestral or self acquired. For if it is found that it is self acquired, the reversioner has no locus standi to contest the alienation.

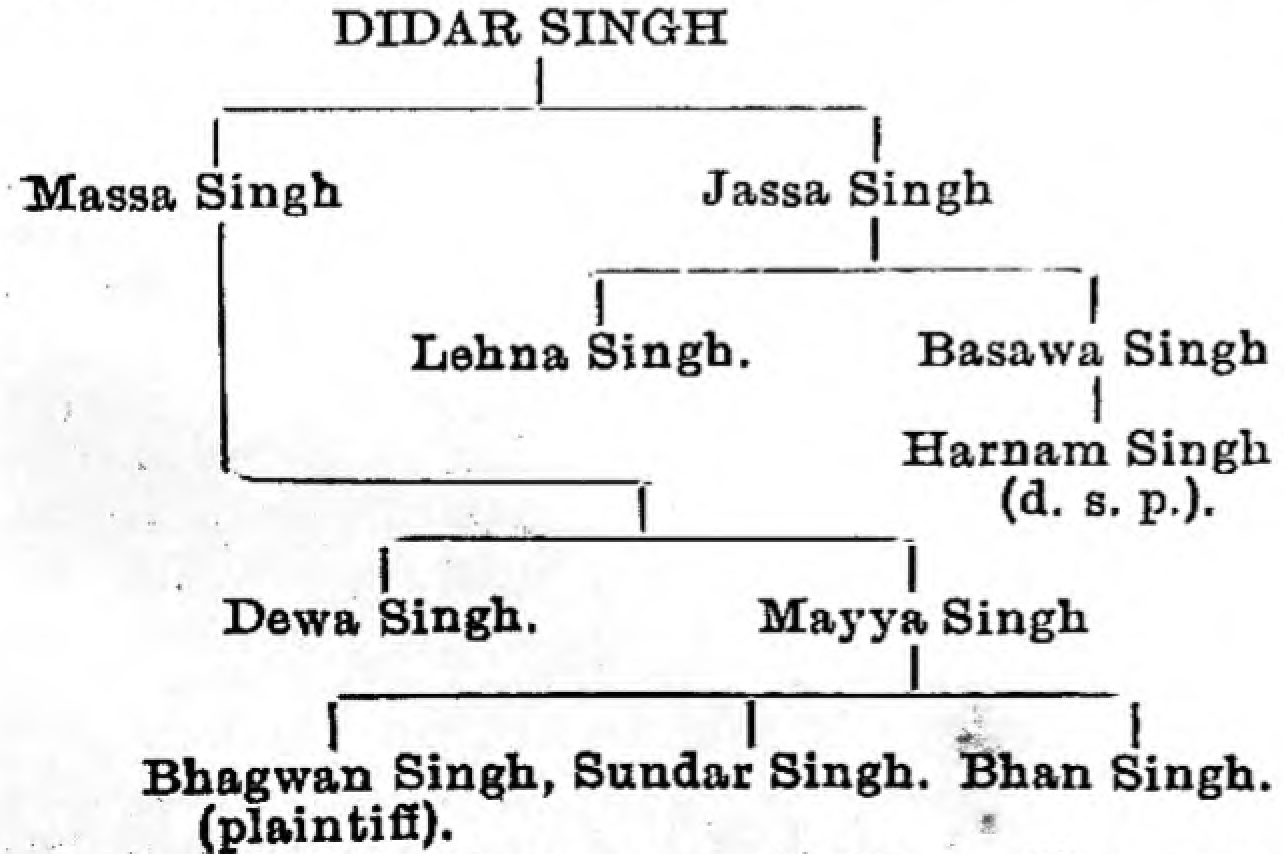
In order that land may be proved to be ancestral it must be shown that the land was held at one time or other by their common ancestor and that it had devolved from him.

[P 332 C 2; P 334 C 1]

S. L. Puri—for Appellant.

Shamair Chand—for Respondent.

Judgment.—The following pedigree table will be helpful in understanding the facts of this case:



On 19th January 1917, Harnam Singh executed a will bequeathing his property to Karnelu, defendant-appellant. In this document, Karnelu was described as the legitimate son of the testator Harnam Singh, having been born of him to Mt. Lachhmi. This Mt. Lachhmi was originally married to Bhagwan Singh, plaintiff, who left India before the marriage was consummated and remained in foreign territory for twenty-five or thirty years. In his absence Mt. Lachhmi lived with Harnam Singh for some years. She then went over to live with one Mangal Singh. Harnam Singh died in 1925, and on his death the revenue authorities mutated the land in the name of Karnelu, defendant, in accordance with the terms of Harnam Singh's will. In 1928 Bhagwan Singh brought the present suit against Karnelu for possession of the land left by Harnam Singh, alleging that Karnelu was not the legitimate son of Harnam Singh and that on Harnam Singh's death Bhagwan Singh was entitled to succeed. The defendant pleaded that the land was not ancestral and that, in any case, he was the legitimate son of Harnam Singh. The trial Court dismissed the suit, but the learned District Judge has decreed it finding that though Mt. Lachhmi must be taken to have been deserted by Bhagwan Singh and was free to re-marry according to Jat custom, and though she had been proved to have lived with Harnam Singh for sometime, no valid marriage between her and Harnam Singh had been proved and it had not been established that Karnelu was the offspring of this union. He has recorded no finding on the question as to whether the land in the hands of Harnam Singh was ancestral qua the plaintiff.

The defendant has preferred a second appeal to this Court and the first contention raised on his behalf is that the District Judge ought not to have decreed the suit, without finding that the land was ancestral. This contention is obviously correct and must prevail. As the parties had placed on the record all available evidence as to the ancestral nature of the property, both counsel prayed that this Court, instead of ordering a remand to the District Judge to record a finding on this point might allow them to read the evidence and come to a decision itself. I acceded to this prayer and have heard counsel at length. The oral testimony of witnesses is mainly hearsay and is obviously worthless. The extracts from the revenue records do not show that the land was held by the common ancestor Didar Singh. All that Mr. Shamair Chand has been able to point out is that in 1852, a portion of the land in dispute was jointly owned by (1) Dewa Singh and Maya Singh having a one-half share, and (2) Lehna Singh and Basawa Singh having the other half share. This circumstance by itself is clearly insufficient to show that the land was held at one time by their grand-father Didar Singh and had devolved on them from him. There is no other evidence on the record bearing on the point, and I must hold that it has not been proved that the land is ancestral. Harnam Singh therefore had unrestricted power of disposition over it, and the plaintiff Bhagwan Singh has no locus standi to contest his will in favour of Karneli appellant. I accept the appeal, set aside the judgment and decree of the learned District Judge and dismiss the plaintiff's suit with costs throughout.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 334

BROADWAY, C. J. AND MONROE, J.

Har Parshad—Appellant.

v.

Committee of Management, Gurdwara Heran and *another*—Respondents.

First Appeal No. 618 of 1929, Decided on 24th January 1933, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 18th February 1929.

(a) Sikh Gurdwaras Act (1925), S. 3—High Court cannot go behind Government declaration.

It is not open to the High Court to consider whether the Government's declaration is justified by the circumstances. [P 334 C 2]

(b) Sikh Gurdwaras Act (1925), S. 18 (1) and (g)—Presumption.

Where it is found and admitted that the property descended from a mahant, an office holder, to his chela, the successor in-office, a rebuttable presumption is created under S. 18 (1) (g). [P 334 C 2]

J. N. Aggarwal, Mehr Chand (Diwan) and *S. L. Puri*—for Appellant.

Bhagat Singh—for Respondents.

Monroe, J.—This is an appeal from an order of the Sikh Gurdwara Tribunal dismissing the appellant's claim that certain specified parts of the property described in Notification No. 182-G, dated 1st August 1927, belongs to him and not to Gurdwara No. 168, situate at Heran. Coldstream, J., has set out all the evidence presented to the Tribunal and it would serve no useful purpose to recapitulate it. It is admitted by the appellant that the property in dispute descended from one Mukat Ram, Mahant, to his chela Sarup Das, and from him, as Mahant, to Har Parshad, the appellant. The presumption created by the Sikh Gurdwaras Act 18 (1) (g) therefore applies. To rebut the presumption it is argued that in this case we are not concerned with a single institution only but with two, one the Gurdwara declared so to be under the provisions of the Act, the second an institution having no connexion with Sikhism to which the statutory presumption is inapplicable. This theory is not supported by any evidence —the line of Mahants goes back through ten generations and the various properties have all descended together, and in all the documents there is nothing whatever to suggest that there were at any time separate institutions in existence.

The second line of attack taken by the appellant was that he had acquired a title by limitation: again, there is no evidence to support him and before us, the claim that the possession of the appellant has been adverse was not pressed. The claim of the appellant was in this case concluded by the Government's declaration that the institution with which we are concerned was a Sikh Gurdwara. It is not open to us to consider whether that declaration is justified by the circumstances. We must accept it and give to it its full effect. Accordingly I would dismiss this appeal with costs.

Broadway, C. J.—Admittedly the property now in question was at one time in possession of Mukt Ram. Some of the property devolved upon Mukt Ram as a successor to his Guru Mahant Gursarn Das. The remainder of the property he himself acquired. It has been further admitted that this property devolved first upon Mukt Ram's chela Sarup Das and then on the death of Sarup Das on his chela Har Parshad the present appellant. That these devolutions of the succession to the property in question were from office holder to the successor-in-office as such has not been seriously contested. In fact the appellant himself practically admits this in his statement at p. 19 of the printed book where he says that had his rival chela Gopal Das become Mahant he would have got the land. In these circumstances the presumption created by S. 18, sub-Cl. (1) (g), Sikh Gurdwaras Act of 1925, applies and it must be presumed that this land belongs to the Gurdwara. This presumption is no doubt a rebuttable one but the evidence on the record cannot be said to rebut it. Indeed the learned counsel for the appellant did not claim that this presumption had as a matter of fact been rebutted. I therefore concur in the order proposed.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 335

BROADWAY, J.

Dhanpat Mal-Dewan Chand—Plaintiffs—Petitioner.

v.

Niamat Rai-Kundan Lal—Defendants—Opposite Parties.

Civil Revn Petn. No. 590 of 1932, Decided on 28th February 1933, from decree of Senior Sub-Judge, Lyallpur, D/- 28th April 1932.

(a) Civil P. C. (1908), S. 115—Wrong application of section by lower Court—Revision was allowed.

Where a lower Court having jurisdiction to decide the case wrongly applied a section of an Act whereby injustice was perpetrated, the High Court allowed the petition for revision: 11 *Cal* 6 (*P C*); 13 *Cal* 225 and 15 *Cal* 47, *Ref.* [P 336 C 1]

(b) Contract Act (1872), S. 41—Held under given facts that S. 41 did not apply and that there was no novation within meaning of Contract Act (1872), S. 62.

A instituted a suit against *B* and *C*. The plaint averred that the amount in suit was due to *A* by *B* and that *C* was liable for the reason that he had undertaken to make the payment. It was alleged that *C* had intimated this fact to *A* whereupon the debit and credit entries had been made in accounts but subsequently *C* informed in writing that inasmuch as *B* had failed to pay him he withdrew his undertaking to pay to *A*. Subsequently *A* withdrew his case against *C* and proceeded only againrt *B*. The lower appellate Court applied S. 41 to the case and dismissed the suit. On appeal:

Held: that there was no novation within the meaning of S. 62 and that S. 41 did not apply to the case. [P 335 C 2]

M. L. Puri—for Petitioners.

Ram Lal Anand—for Opposite Parties.

Judgment.—The firm of Dhanpat Mal Diwan Chand instituted a suit against the firm of Niamat Rai-Kundan Lal and Khem Chand Devi Ditta Mal claiming Rs. 449-11-3. The averments in the plaint were that the amount was due to the plaintiffs by the firm of Niamat Rai-Kundan Lal and that the firm of Khem Chand-Devi Ditta Mal were liable for the reason that they had undertaken to make the payment. In fact it was alleged that they had actually intimated this fact to the plaintiffs and that debit credit entries had been made in the accounts but that subsequently the firm of Khem Chand Devi-Ditta Mal had informed the plaintiffs in writing that inasmuch as the firm of Niamat Rai-Kundan Lal had failed to pay them they withdrew their undertaking to make this payment on their behalf. Subsequently the plaintiffs withdrew the case so far as the firm of Khem Chand Devi-Ditta Mal was concerned and the case proceeded against the first defendant Niamat Rai-Kundan Lal. A plea was raised that inasmuch as the provisions of S. 41, Contract Act, applied the suit should be dismissed. The matter was gone into very carefully by the trial Judge who came to the conclusion that S. 41, Contract Act, was not applicable to the facts of the present case and after going into the accounts a decree for Rs. 426-6-0 was passed in favour of the plaintiffs against Niamat Rai-Kundan Lal and Niamat Rai himself with proportionate costs. The defendants thereupon preferred an appeal to the Senior Subordinate Judge who examined the question as to the applicability of S. 41. Contract Act, and having entirely misunderstood the object and scope of that section, held that it was applicable and thereupon dismissed the plaintiffs' suit but left the parties to bear their own costs throughout.

Against this dismissal of their suit the plaintiffs have come up to this Court in revision and it has been urged by Mr. M. L. Puri on their behalf that the view taken by the trial Court was correct and that taken by the appellate Court was wholly unjustified. Mr. Ram Lal Anand on behalf of the respondent has urged that no revision was competent inasmuch as the Senior Subordinate Judge had jurisdiction to decide the case before him and that the wrong application of a section of an Act was not an illegal exercise of his jurisdiction. He further urged that although S. 41 had been misunderstood and that it related to the actual performance of a contract and not to a promise to perform, S. 62, Contract Act, applied. A refreence to that section however shows that it has no bearing on the case before me. There is nothing on the record to show that there was any such novation as is contemplated by that section and the findings of the Courts below are perfectly clear and are to the effect that all that the firm of Khem Chand Devi-Ditta Mal did was to assume responsibility to the plaintiffs on behalf of defendant 1 and that later on they resiled from their undertaking and informed the plaintiffs of this fact: There being no novation and S. 41, Contract Act, not being applicable it is perfectly clear that in dismissing the plaintiffs' suit the Senior Subordinate Judge has perpetrated injustice. After a consideration of the authorities cited by the coun, sel, namely, *Amir Hossain* v. *Sheobaksh* (1), by Mr. Ram Lal Anand, and *Sew Bux* v. *Shib Chunder* (2) and *Jugubundhoo* v. *Jadu* (3), by Mr. Puri I consider that this is a case in which my revisional powers should be exercised. I accordingly accept this petition, set aside the order of the Senior Subordinate Judge and restore the decree of the trial Court. In the circumstances I leave the parties to bear their own costs in this Court and in the Court immediately below.

V.S. *Petition accepted.*

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1. (1885) 11 Cal 6=11 I A 237 (P C).
2. (1886) 13 Cal 225.
3. (1888) 15 Cal 47.

A. I. R. 1933 Lahore 336

JAI LAL, J.

Durga Das—Plaintiff—Petitioner.

v.

Gurdas and *others*—Defendants—Opposite Parties.

Civil Revn. Petn. No. 71 of 1932, Decided on 8th July 1932, against decree of Senior Sub-Judge, Shahpur, D/- 29th October 1931.

(a) Pensions Act (1871), S. 6—Certificate must be obtained for institution of every suit.

Under S. 6 for every case to be tried by the civil Court, a certificate from the Collector must be obtained. Therefore where the plaintiff has brought a suit on the basis of a certificate previously obtained, the certificate ceases to have any force after the decision of the suit, and a second suit is incompetent without obtaining a fresh certificate 28 *Bom* 241, *Dist.*; 2 *P R* 1900, *Ref.* [P 337 C 1]

(b) Pensions Act (1871), S. 6—Novation of grant in defendant's favour—Suit on certificate granted against father of defendant is incompetent.

Where a certificate was granted against the father of the defendant to institute a suit and there was a novation of grant in the defendant's favour the suit cannot be instituted on the same certificate as different considerations may weigh with the Collector in granting or refusing permission to institute a suit against him. [P 336 C 2]

Nanak Chand and *Amar Nath Chona*—for Petitioner.

Vishnu Dutt—for Opposite Parties.

Judgment.—The suit is for recovery of the plaintiff's share in a maufi granted by the Government to the defendant Gurdas who is according to the plaintiff, the nominal holder of the muafi, the plaintiff being entitled to get a share out of it. It has been dismissed by the Courts below on the ground that it is incompetent in the absence of a certificate by the Collector under S. 6, Pensions Act, 1871, and the plaintiff has presented this petition for revision. A preliminary objection has been raised that the petition is not competent because a second appeal lay from the decree of the lower appellate Court, and reliance is placed on *Husain Khan* v. *Saadat Khan* (1). The learned counsel for the petitioner however is not in a position to argue this point and I have therefore refrained from deciding it and also because in my opinion this petition must fail on the merits.

The case has been argued on the assumption that the suit is covered by the provisions of the Pensions Act, 1871. It is contended that no certificate is necessary because in the year 1883 the plaintiff or his predecessors-in-interest of the defendants, obtained a certificate from the Collector and instituted a suit against the predecessors-in-interest of the defendants, which was decreed. It is therefore urged that that certificate is sufficient to enable the plaintiffs to maintain the present suit. The suit was instituted in 1931. Reliance in support of this contention is placed on *Krishnaji* v. *Anant* (2). That case however is clearly distinguishable from the facts of this case. In that case a certificate was granted by the Collector to the plaintiff to institute a suit in respect of the amount due to him in respect of a certain number of years and it appears that at the time of the institution of the suit there was due to the plaintiff some amount for one subsequent year also and the plaintiff included the claim in respect of that year also in the same claim in which he claimed the amount in respect of the years which had been specifically mentioned in the certificate granted by the Collector. The learned Judges held that whereas that right of the plaintiff to institute a suit had been recognized, he had a right to include the claim in respect of the year not mentioned in the certificate in the claim or the suit instituted on the authority of that certificate. In the present case the plaintiff had instituted a suit on the basis of the certificate the certificate therefore ceased to have any force after the decision of the suit. Moreover, as I have already stated, Gurdas, the defendant in the present case, is not the same person against whom the previous permission was granted though he is the

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1. (1900) 2 P R 1900.
2. (1904) 28 Bom 241=5 Bom L R 950.

son of that person. There has been a novation of a grant in his favour and different considerations may weigh with the Collector in granting or refusing permission to institute a suit against him. The phraseology of S. 6, Pensions Act, makes it clear that for every case to be tried by the civil Court a certificate from the Collector must be obtained. The view of the Courts below therefore is correct on the merits and I dismiss this petition with costs.

P.N./R.K. *Petition dismissed.*

A. I. R. 1933 Lahore 337

DALIP SINGH, J.

Hans Raj—Plaintiff—Appellant.

v

Manak Chand and *others*—Defendants—Respondents.

Second Appeal No. 917 of 1932, Decided on 6th January 1933.

(a) Civil P. C. (1908), O. 32, R. 3 (6)—Appointment of guardian under.

It is not necessary for an appointment of a guardian under O. 32, R. 3 (6) that the list of relatives mentioned in sub-R. (3) should be exhausted. [P 338 C 1]

(b) Civil P. C. (1908), S. 100—Finding of lower appellate Court that negligence of guardian of minor appointed by Court is not proved is one of fact.

The question whether a guardian appointed by the Court has been negligent may or may not be a question of fact. But where the lower appellate Court after considering all the relevant facts comes to the conclusion that negligence is not proved there is a finding of fact which cannot be challenged in second appeal. [P 338 C 2]

Badri Das and *Mehar Chand*—for Appellant.

Shamair Chand—for Respondents.

Judgment.—On 5th June 1923, one Gopal Das mortgaged half of his house for Rs. 2,500 at 12 anaas per cent per mensem to Bhagwan Singh. The money was used for the purchase of the remaining half house which was actually purchased on 6th June 1923, for Rs. 2,200. Gopal Das died and, on 9th February 1926, his son Jai Ram, executed a second mortgage for the whole house on behalf of himself and his minor brother Hans Raj for Rupees 2,000 at Re. 1 per cent per mensem. The money was used to pay off the prior mortgage to Bhagwan Singh. The second mortgage was in favour of Bishen Singh. Bishen Singh sold his mortgagee rights to Manak Chand and Manak Chand brought a suit against Jai Ram and Hans Raj. Jai Ram was originally made guardian of his minor brother Hans Raj but he refused to act for him and the mother of the minor was then sought to be made guardian but she also declined. The plaintiff Manak Chand in that case then put in a list for other relatives showing the maternal uncle of the minor, one Sadhu Singh, and the maternal grandfather of the minor as proper persons to be appointed guardians. The Court passed an order stating that it proposed to appoint the Civil Nazir as guardiar and directed notice to issue to the mother and the maternal uncle of the minor and to Jai Ram his brother. It is not clear on the record whether the maternal uncle was ever served but the mother and brother were served by substituted service. They did not appear and the Civil Nazir was appointed guardian. The Civil Nazir then put in a written statement on behalf of the minor pleading ignorance of the facts of the mortgage and putting the plaintiff to proof both of the mortgage and of the consideration and its validity as against the minor. On 3rd February 1929, a compromise deed was drawn up which was signed by Manak Chand, the then plaintiff, and Jai Ram then defendant, acting on behalf of himself as well as for his minor brother Hans Raj. By this compromise the whole suit was compromised for Rupees 3,500. No further interest was to run and two months' period was allowed for the payment of Rs. 3,500, after which the property could be sold for the mortgage debt. The suit itself was for Rs. 3,147-4-0. On the date of the compromise further interest amounted to Rs. 75-8-0, and the stamp and counsel's fee amounted to Rs. 435. Hence the total sum due on that date was Rs. 3,657-12-0, on the mortgage-deed. Rs. 157-12-0 was thus remitted and the running of interest also ceased. An application for sanction of the compromise was put in in which it was mentioned that the compromise was for Rs. 3,500 in all. This was signed by the Civil Nazir. The Court considered the application for sanction on 4th February 1929, and recorded an order saying that it had considered the statements of the parties and the documents put in and the compromise did not appear to be prejudicial to the minor and allowed it. Accordingly a preliminary decree was passed on that date and sometime afterwards a final decree was passed.

In the course of this another maternal uncle of the minor Hans Raj, Jaswant Singh, applied to the Court that the final decree should not be passed stating that the minor had been prejudiced by the negligence of the guardian but the Court passed the final decree. The present suit has been brought by the minor Hans Raj and the questions in this second appeal to be decided are whether the compromise is binding on the minor, whether the Civil Nazir was duly appointed guardian and whether the Civil Nazir, if duly appointed guardian, was grossly negligent in the discharge of his duties and therefore the decree can be avoided by the minor. The first question is, whether the Civil Nazir was duly appointed. On this point the learned counsel for the appellant refers to O. 32, R. 3, Civil P. C., and he contends that under sub-R. (6) no body could have been appointed as a guardian before the list of relatives mentioned in sub-R. (3) had been exhausted. I do not see any force in this contention which is unsupported by any authority. I therefore hold that the Civil Nazir was properly appointed guardian. The next question is, whether the fact that the guardian, the Civil Nazir, did not actually sign the compromise, shows that there was no compromise between the parties at all. In the circumstances of this case I do not think so. The application for sanction for the compromise did mention the fact that the matter was being compromised for Rs. 3,500. Certain other terms in the actual compromise, which were not mentioned, were terms which were obviously beneficial to the minor, e. g., the allowing of two months for paying off this sum and the term that, if the property was insufficient to pay the mortgage debt, then only the person and property of Jai Ram, the major, would be liable.

The next point raised is that the Court was misled by the heading of the compromise in which Jai Ram appeared as the guardian of the minor but I see no reason to suppose that the Court was misled at all. It is true that the Civil Nazir was not called upon to make a statement but he knew hothing of the facts of the case and his statement would merely have been to that effect, and this statement was already on the record in the form of a written statement. It was the same Court which had previously passed the order appointing the Civil Nazir as guardian and the Court appears to have carefully considered the matter of the terms of the compromise and found that they were not prejudicial.

On the merits, too, it seems to me clear that the minor would have been bound by his fether's mortgage. The mortgage executed by his brother no doubt included the whole house instead of half the house and the rate of interest was raised from annas 12 per cent to Re. 1 per cent, but there is nothing to show that a mortgage could have been obtained on any better terms and it is probable, as the learned counsel for the respondents suggests, that the original mortgagor Bhagwan Singh was pressing for his money, and in order to save the forced sale, Jai Ram executed a mortgage on behalf of himself and his minor brother for the amount due under the previous mortgage which was duly discharged. In the circumstances I do not see therefore what plea was available to the minor or how the Civil Nazir was negligent in the discharge of his duties. He has deposed that he could not get any information about the facts of the case from the mother of the minor to whom he went personally for information. By the compromise a sum of Rs. 157-12-0 was remitted and interest also stoped running. It is also contended that the question of negligence is a question of fact. Negligence may or may not be a question of fact, according to the circumstances of each case, but, in the circumstances of this case, I am of opinion that the learned District Judge has considered all the relevant facts and has come to the conclusion that negligence is not proved and this would, in the circumstances, be a finding of fact. I therefore dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 338

TEK CHAND AND MONROE, JJ.

Nur Din and *another*—Appellants.

v.

Fazal Din and *others*—Respondents.

Second Appeal No. 313 of 1927, Decided on 23rd November 1932.

Custom (Punjab) — Alienation—Ancestral property — Held on facts alienation was valid.

Normally speaking the selling of ancestral land for the purpose of investing the purchase money in mortgages would not be justifiable, but where the parties had given up their residence in the village and the ancestral house which was already mortgaged for more than half the value was sold and the balance of purchase money was invested in morgages:

Held: the alienation was valid. [P 339 C 1]

Mohammad Amin—for Appellants.

Malick Mohammad Amin—for Respdts.

Monroe, J.—This suit was instituted by Nur Din and Suba against Fazl

S. N. DAR, M.A., LL.B.

Din and others for the purpose of obtaining a declaration that the sale-deed of certain land situate at Mauza Jogiana in the Ludhiana District by Fazal Din in favour of certain of the other defendants was without consideration and legal necessity and should not affect the plaintiff's reversionary rights after the death of Fazal Din. The decision of the Senior Subordinate Judge in the trial Court was that, of the total consideration of Rs. 3,000 only Rupees 1,475 were shown to have been raised under legal necessity. On appeal the learned District Judge found that necessity for all but a trifling sum had been established. The only contest in the case turns on the balance of Rs. 1,100 which was paid to Fazal Din in cash before the Sub-Registrar, and it has been proved by the evidence that this amount was invested by Fazal Din in taking lands in mortgage. Normally speaking the selling of ancestral land for the purpose of investing the purchase money in mortgages would not be justifiable but, in the present case, all the parties, not only Fazal Din but the plaintiffs reversioners, had given up their residence in the village Jogiana where the ancestral land was situate and Fazal Din had taken up his residence in the Ferozepore District. The learned District Judge has come to the conclusion that the sale by Fazl Din was rendered necessary by his change of residence: it is not shown for what reason Fazal Din did leave Jogiana, but the fact being that he has left it, the reason why he has done so does not appear to be a vital matter. There is nothing to suggest that he did not leave the village for a proper purpose and if he did so, there was no reasonable course open to him but to get rid of the property there, especially because that property was mortgaged for more than half its value. I can see no reason for differing from the view of the District Judge that, in these circumstances, Fazal Din was justified in using the balance of the purchase money in the way in which he did. The very fact that he has invested the money in mortgage securities shows that he is a prudent man of business and that he did not, as he might have done, mean to squander the sale money. Accordingly I think that this appeal ought to be dismissed with costs.

Tek Chand, J.—I agree in the order proposed by my learned brother.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 339

ADDISON AND BHIDE, JJ.

Behari and *others*—Plaintiffs—Appellants.

v.

Bhola and *others*— Defendants—Respondents.

First Appeal No. 1229 of 1927, Decided on 15th February 1933, from decree of Senior Sub-Judge, Rohtak, D/- 7th January 1927.

Custom (Punjab)—Jats of Rohtak—Alienation.

Alienations by Hindu proprietors (Jats in Rohtak District) can be challenged only on grounds valid under Hindu law. [P 340 C 2]

Shamair Chand—for Appellants.

Amar Nath Chona and *Nihal Singh*—for Respondents.

Addison, J. — The plaintiffs are the sons of one Chandgi Ram who effected seven mortgages of portions of his property. The sons sued for the usual declaration that these mortgages were not binding on them as their father had no power of alienation under Customary law as regards ancestral property while it was asserted that he was of immoral character. The suit failed as regards one of the seven mortgages on the ground that the mortgagee in question had died before the suit was brought. His name was accordingly struck out and the suit proceeded as regards the other six mortgages (a) to (f) mentioned in para. 2 of the plaint at pp. 3 and 4 of the paper book. The defendants denied that the land was ancestral, pleaded necessity and consideration and claimed that the mortgagor had unrestricted power of alienation. The mortgagor was a Hindu Jat of the Gohana tahsil of the Rohtak District. The trial Judge held the land to be ancestral, and further held that the alienations by Hindu proprietors (Jats) in Rohtak District could be challenged only on grounds valid under Hindu law, and that immorality had not been proved. As regards alienation (a) he held that consideration had been established only to the extent of Rs. 320 and he disallowed the balance of Rs. 1,120. As regards alienation (b) he held that consideration was proved to the extent of Rs. 1,197 but not for the sum of Rs. 338 which was disallowed. Alienation (c) was allowed to the extent of Rs. 5,394 and disallowed to the extent of Rs. 1,106. Alienation (d) was completely set aside on the ground that consideration was not proved at all. As regards alienation (e), it was held that consideration was proved for the sum of Rs. 615 but the balance of Rs. 235 was disallowed as not having been proved to have been paid. Alienation (f) was completely set aside on the ground that no consideration was proved. The plaintiffs have appealed with regard to alienations (b), (c) and (e) claiming that certain sums were allowed by the trial Court which had not been established. This is Appeal No. 1229 of 1927. Hoshiar Singh etc., appealed as regards alienation (c) claiming that the sum of Rs. 1,106 disallowed should have been allowed. This is Appeal No. 956 of 1927. Nathu has appealed as regards alienation (a) claiming that consideration was established fully. (No. 1230 of 1927).

It was not disputed that the land was ancestral. The evidence as regards immorality is of a very general nature and I am in entire agreement with the trial Court that immorality of the mortgagor has not been established. He was a well-to-do man who built an expensive residence and his indebtedness cannot be held to be excessive in view of the large estate he possesses. It was however contended by the learned counsel appearing for the plaintiffs that it had been proved that the custom as regards alienation was not so wide amongst these Jats as held by the trial Court. There are many authorities to the effect that there is a much wider power of alienation in Rohtak District which does not actually form a part of the Punjab proper where custom applies in full force. This was the view taken in Civil Appeal No. 267 of 1899 decided by a Division Bench of the Punjab Chief Court. Again it was held in *Telu* v. *Chuni* (1) that in the Rohtak District the burden of proving that a reversioner was competent to contest an alienation of ancestral property made by a sonless male proprietor lay on the reversioner except when it was challenged on the ground that it was made for immoral purposes. To a similar effect is *Giani* v. *Tek Chand* (2) where it was held that among Jats in the Rohtak tahsil an alienation by a sonless proprietor can be challenged by a reversioner only on grounds valid under Hindu law. This merely puts into different words the decision in the preceding ruling. In *Uggar Sain* v. *Telu* (3) it was held that amongst proprietors of the Rohtak tahsil collateral heirs of a sonless proprietor could not control alienations by him but possessed merely the right to pre-empt while a Division Bench in *Kala* v. *Mam Chand* (4) held that by custom Gujjars of the Rohtak tahsil had unrestricted powers of alienation in respect of ancestral land.

The first proper inquiry into this question was made by Mr. Clifford, Divisional Judge, in *Original Suit No.* 34 *of* 1896 (*Hardial* v. *Sheonath*). The note to the answer to question 102 of Joseph's Customary Law of the Rohtak District, 1911, is that a sonless proprietor has full power to alienate his property by sale or mortgage even if there is no necessity, the only ground on which the heir can impugn his action being that the alienation was due to debauchery, which is not the case here. The riwajiam of the Gohana tahsil has been carefully considered by the trial Judge who has come to the conclusion that it does permit an heir to challenge alienations not made for necessity but this necessity must be interpreted as being what an ordinary Hindu understood by it. The judicial instances quoted are relevant under S. 13, Evidence Act, and go a considerable way to help in the interpretation of the riwajiam of the tahsil. Of the witnesses examined only three have deposed as to the custom. The first is Dharam Chand, D. W. 13, who said that amongst Jats mortgages could be made even without necessity, but a sale could not be made without the consent of the reversioners. Siri Ram Zaildar, D. W. 20, deposed that in Gohana tahsil mortgages could be effected even without necessity while the seventh witness for the plaintiff, Dile Ram, Jat, stated that amongst Jats mortgages were sometimes made without necessity though they could be set aside at the instance of reversioners. In my judgment the decision of the trial Judge is right that alienations by Hindu proprietors can be challenged only on grounds valid under Hindu law. There have been very few contests in the past by sons and reversioners in this district as distinguished from the Punjab proper where they are very considerable in number. (His Lordship then discussed the appeals on merits and dismissed them).

Bhide, J.—I agree.

R.K. *Appeal dismissed.*

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1. (1913) 20 I C 373
2. A I R 1922 Lah 69=64 I C 549=4 Lah 111.
3. A I R 1923 Lah 193=71 I C 829=4 Lah 113.
4. A I R 1924 Lah 102=73 I C 988=4 Lah 282

[illegible] 1933 [illegible]

[illegible] that [illegible]

[illegible] of the [illegible] that [illegible]

[illegible] Civil Court [illegible]

[illegible] Limitation Act (1908) [illegible]

[illegible] Limitation Act [illegible]

[illegible] of the [illegible]

[illegible] the [illegible]

[illegible] Adebt [illegible]

The question is, whether this amendment has narrowed down the scope of the proviso as it originally existed, so far as the part payment of principal is concerned. In my opinion the amendment of the proviso to S. 20, Limitation Act, has been made in favour of the creditor who is not able to prove the writing of the debtor not only relating to the fact of the payment but also to the acknowledgment of the fact of payment. In view of what I have stated above this appeal must be accepted and decree of the District Judge set aside. I order accordingly and send the case back to the District Judge with the direction to proceed with the appeal as provided by law. The costs of the appeal will abide the result.

K.S. *Appeal accepted.*

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* A. I. R. 1933 Lahore 342

TEK CHAND, J.

Ghulam Ali—Defendant —Appellant.

v.

Mohammad Ali— Plaintiff— Respdt.

Second Appeal No. 425 of 1932, Decided on 20th February 1933, from decree of Senior Sub-Judge, Lahore, D/- 5th December 1931.

(a) Civil P. C. (1908), S. 100—Whether entire house made wakf is question of fact.

The finding that the entire house had been made wakf is one of fact and if based upon legal evidence on the record, cannot be questioned in second appeal. [P 342 C 2]

(b) Practice—New case—Parties aware of case they had to meet and leading evidence to rebut same—No new case can be said to have been made.

Where the defendants are fully aware from the very beginning of the trial as to the case which they have to meet and the defendants have tried to rebut that very case in their evidence, it cannot be said that the defendants are taken by surprise or that the Courts have set up a new case which the defendant had no opportunity of meeting. [P 343 C 1]

*** (c) Mahomedan Law—Wakf—Shia Law—Omission to appoint muttawali is not fatal—Wakf takes effect—Wakif cannot subsequently settle scheme.**

According to the Shia law, when a wakf is purported to be created but no muttawali is appointed or nominated, the wakf takes effect and from the moment of the dedication, the wakf or the subsequent appropriation is transferred so as to become property of the beneficiaries and the wakif as such ceases to have any right in it and the founder has then no power to settle any scheme. [P 343 C 1]

M. C. Mahajan, Barkat Ali and *Asghar Beg*—for Appellant.

Akbar Ali—for Respondent.

Judgment.—On 25th March 1928, Ghulam Ali, defendant 1, describing himself as the owner of a house in kucha Chehl Bibian, inside Mochi Gate, Lahore, executed a deed, making the house wakf for the benefit of the community of Shia Sheikhs of Narowal residing at Lahore, known as "Quam Khawajgan Narowalian, Lahore," and appointing a committee of fourteen named persons to administer the wakf as mutwalli. The plaintiff, who is admittedly a member of the "Qaum Khawajgan Narowalian, Lahore," brought a suit for a declaration that the house in question was an imambara, known as imambara Quam Khawajgan Narowalian, that it had been made wakf by the quam for a long time past, that defendant 1 had no interest in it in 1928, and consequently the wakfnama executed by him in that year was null and void and that it be cancelled. The trial Judge found that Ghulam Ali had purchased the house in question in 1909, that it was a one,storeyed building at the time, that he constructed the second and third storeys soon after, and in 1911 he made the property wakf as an imambara for the benefit of Quam Khawa Jgan Narowalian, and that he had no right to make a fresh disposition of it in 1928. He accordingly passed a decree in favour of the plaintiff against Ghulam Ali, declaring that the imambara in question had been made wakf by him a long time past, that the registered wakf-deed dated 25th March 1928, executed by the said Ghulam Ali under which he had dedicated the imambara afresh was ineffective, and that the said registered deed should not be acted upon. On appeal the learned Senior Subordinate Judge has affirmed this decree. Defendant 1 has preferred a second appeal to this Court, and I have heard counsel at very great length. Before me an attempt was made to challenge the finding that the entire house had been made wakf by Ghulam Ali, defendant 1 some time about 1911. This finding is however one of fact and is based upon legal evidence on the record and cannot be questioned in second appeal.

It is conceded that on this finding the property has ceased to belong to Ghulam Ali and he had no right to re-dedicate it once again sixteen or seventeen years later, and that so-called wakf cannot take effect as such. Counsel however contends that the learned Judges of the Courts below have set up an entirely new case on behalf of the plaintiff. He points out that in the heading of the plaint and the prayer clause, it was alleged that the house had been dedicated by (minjab) Quam Khawajgan Narowalian in 1910 or 1911, whereas the Courts below have held that the dedication was by defendant 1. This is no doubt true, but it appears from the record that as soon as the trial began, it was made clear in the plaintiff's evidence that the wakf had been created by the defendant for the benefit of the quam and not by the qaum itself. All the witnesses for the plaintiff and the plaintiff himself put their case in these terms, and there can be no doubt that the defendants were fully aware from the very beginning of the trial that this was the case which they had to meet, and it was this case which the defendants tried to rebut in their evidence. In the circumstances it cannot be said that the defendant was taken by surprise or the Courts below have set up a new case which the defendant had no opportunity of meeting. In my opinion, this contention has no force and I have no hesitation in rejecting it.

The next point urged is that it being admitted that no definite scheme for the administration of the wakf had been laid down at the time of the creation of the wakf, the defendant as the founder had the power to settle a scheme at any time before his death, and that the deed of 1928, though not effective as creating a fresh wakf must be held operative in so far as it appointed a committee to act as mutwali. This argument is manifestly fallacious and ignores the distinction between the Hindu law and the Shia law on the point. According to the Shia law, which governs the case, when a wakf is purported to be created but no muttawali is appointed or nominated, the wakf takes effect; and the beneficiaries are authorized to administer it (Tyabji's Mohamedan Law. p. 610, S. 490, and Baillie's Digest, Vol. 11, p. 214). This would seem to follow from the basic principle of the Shia law of wakf that from the moment of the dedication, the wakf or the subsequent appropriation is transferred so as to become the property of the mowkoof alehi (beneficiaries) and the wakif as such ceases to have any right in it. No other question of law arises on the findings and the second appeal must therefore fail. I dismiss the appeal with costs.

R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 343

BHIDE, J.

Ralla Ram and *others*—Defendants—Appellants.

v.

Atma Ram and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 1284 of 1932, Decided on 11th January 1933.

(a) Civil P. C. (1908), S. 100—Alienation challenged on ground of want of necessity—Finding on question of necessity though one of fact can be challenged in second appeals in certain cases.

Where an alienation is challenged as not being effected for any legal necessity, a finding on question of necessity is one of fact but can be challenged in second appeal when there is no evidence to support it or when it proceeds on erroneous principles of law. Where it is not vitiated by any error of law it cannot be challenged. [P 343 C 2]

(b) Hindu Law—Joint family—Alienation—One coparcener cannot alienate his undivided share in Punjab without consent of other coparceners.

In the Punjab it is not open to a coparcener to alienate his undivided share in joint family property under Hindu law, without the consent of other coparceners and if he alienates joint family property, the alienation is liable to be set aside as a whole: *A I R* 1917 *P C* 41; *A I R* 1926 *Oudh* 470 and *A I R* 1925 *Lah* 130, *Rel on* ; 20 *W R* 192 and 6 *PR* 1893, *held* **Overruled.** [P 344 C 1,2]

Nand Lal—for Appellants.

Ram Lal Anand and *Mehr Chand Mahajan*—for Respondents.

Judgment.—The plaintiff Atma Ram and his elder brother Puran Chand were members of a joint Hindu family. The plaintiff sued for a declaration that a mortgage of the joint family property effected by Puran Chand during plaintiff's minority was without any legal necessity and should not affect the property. The suit was dismissed by the trial Court but was decreed on appeal by the learned District Judge. From this decision the present appeal has been preferred.

The learned counsel for the appellants has sought to challenge the learned District Judge's finding that the alienation in question was without any valid necessity. The finding is one of fact. It is true that even a finding of fact on the question of necessity may be challenged in certain circumstances, for example, when there is no evidence to support it or when it proceeds on erroneous principles of law; but the finding in the present case does not appear to me to be vitiated by any error of law. The learned counsel for the appellants has urged that the learned District Judge has not specifically referred to certain witnesses produced by his clients; but it does not appear whether any particular reliance was placed on those witnesses before the learned District Judge. I have referred to the evidence of the witnesses on whom the learned counsel for the appellants sought to rely and after considering the same I do not see any adequate ground for dissenting from the conclusion arrived at by the learned District Judge. There is in fact no definite evidence as regards the existence of any ancestral debts which were to be discharged by Puran Chand at the time when the alienation in question was effected. The learned counsel for the appellants admitted that his clients' witnesses had not referred to any specific debts. There was a reference to a debt of Rs. 1,500, but it appears from the evidence that that debt was discharged soon after the death of plaintiff's father and long before the execution of the mortgage in dispute. The allegation that the money was required for a new business started by Puran Chand also has not been substantiated by any reliable evidence. The learned District Judge has pointed out that the plaintiff was a minor and could not be made liable for any new business, if any, started by Puran Chand. The learned counsel for the appellants has urged that this view of the learned District Judge is not sound and has cited *Chala Ram* v. *Kishen Chand,* (*A. I. R.* 1923 *Lah.* 462) in support of this contention, but in that case it was held that the new business was for the benefit of the family. In the present instance there is no evidence to support any such finding. In fact the learned District Judge has pointed out that it is extremely doubtful whether any business worth the name was carried on by Puran Chand who was apparently a man of immoral character and was wasting his property. I therefore see no ground to interfere with the finding of the learned District Judge.

The only other point urged by the learned counsel for the appellants was that, at any rate, the share of Puran Chand in the family property should have been held to be liable. The learned District Judge has considered this point also and has held the whole mortgage to be void in view of *Choranji Lal* v. *Kartar Singh,* (*A. I. R.* 1925 *Lah.* 130) which was based on a Privy Council ruling reported as *Lachhman Prasad* v. *Sarnam Singh* (1). In the Punjab it is not open to a co-parcener to alienate his undivided share in joint family property under Hindu law, without the consent of other co-parceners and if he alienates joint family property, the alienation is liable to be set aside as a whole (e. f., Mulla's Principles of Hindu Law, paras. 258 and 269). The learned counsel for the appellants referred to *Mohabeer Pershad* v. *Ramyad Singh* (2) and *Dharam Chand* v. *Karam Devi* (3), but these rulings have been considered in *Choranji Lal* v. *Kartar Singh* (*A. I. R.* 1925 *Lah.* 130) and it is pointed out therein that they cannot be considered to be good law now in view of the later decision of their Lordships of the Privy Council in *Lachhman Prasad* v. *Sarnam Singh* (1), *Jai Narain* v. *Mahabir Prasad* (4), a more recent ruling, on which the learned counsel for the respondents relies, also supports the view taken by the learned District Judge. I dismiss the appeal with costs.

K.S. *Appeal dismissed.*

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1. A I R 1917 P C 41=40 I C 284=44 I A 163=39 All 500.
2. (1873) 20 W R 192=13 Beng L R 90.
3. (1893) 6 P R 1893.
4. A I R 1926 Oudh 470=95 I C 857=2 Luck 226.

A. I. R. 1933 Lahore 344

BROADWAY, J.

Chandan and *others*—Appellants.

v.

Ghulam Rasul Shah— Respondent.

Second Appeal No. 1727 of 1932, Decided on 2nd March 1933.

Specific Relief Act (1877), S. 54—Public generally has right to use public thoroughfare—Court is not justified on restricting this right by issue of permanent injunction—Highway.

The public generally has the right to use a public thoroughfare and a Court is not justified in restricting that general right by the issue of any permanent injunction to any particular individual. And where religious processions are taken out under license from the authorities it is for the authorities to impose such conditions as may be deemed necessary for the safeguarding of the public peace and the freedom of every individual to use the public thoroughfares without any improper obstruction: *A I R* 1931 *All* 341, *Ref.* [P 345 C 2]

Ajit Prasada for *M. L. Puri*—for Appellants.

Jalaluddin—for Respondent.

Judgment.—This second appeal has arisen out of a suit brought by certain Sunnis of Taunsa against Ghulam Rasul Shah, a Shia of the same place, for a perpetual injunction restraining him from the use of the public thoroughfare demarcated on a plan attached

settlement records signed by the agent of the mortgagee in which the name of the mortgagee is expressly mentioned as the mortgagee is an acknowledgment of the mortgagor's right to redeem within the meaning of Art. 148, Lim. Act: 1 *All.* 117 (*F B*) and 145 *P R* 1889, *Rel on.*; *A I R* 1920 *All* 92 (*F B*), *Expl* and *Dist.*
[P 346 C 1, 2]

Achhru Ram—for Appellant.

Jagan Nath Aggarwal and *Asa Ram Aggarwal*—for Respondents.

Judgment.—The facts leading up to this second appeal so far as they need be stated are as follows: In 1856 the predecessors-in-title of Sardar Khan defendant mortgaged their one-fourth share in a certain khata with Diwan Allah Jawaya, the predecessor-in-title of the other defendant Diwan Said Mohammad, the consideration for the mortgage being Rs. 13-14-0. In the settlement record of 1872 the one-fourth share of Jalal Din, the father of Sardar Khan defendant, is still shown as under mortgage with Diwan Allah Jawaya for the same consideration. In September 1929, Jalal Din effected a second mortgage of this land and other land in favour of Dogar Mal, who sold his rights to Bhagwan Das plaintiff-appellant. Bhagwan Das thereupon sued for redemption of payment of Rupees 13-14-0. He was successful in the trial Court in obtaining the usual preliminary decree, but his suit was dismissed on appeal by the learned District Judge of Montgomery on the ground that it was barred by time. Against this decision Bhagwan Das has preferred this second appeal. The only question is that of limitation. The mortgage was more than 60 years old when the suit was brought, and it has to be decided whether it was still subsisting then by virtue of an acknowledgment contained in the settlement record of 1872 which was signed by the recognized agent of the mortgagee. The learned District Judge has held that there was no acknodledgment of liability. Usually this would be a finding of fact, but in the present case the learned District Judge failed to notice a third attestation in the Naql Intiqal Muntakhib Ma' Khewat Mashmula Bandobast 1872. This entry shows Jalal Din as owner of a one-fourth share and it shows this one-fourth share as under mortgage with Diwan Allah Jawaya, who was also Muafidar, for a sum of Rs. 13-14-0. I do not think it necessary to discuss attestations which have been held by the District Judge not to amount to acknowledgment of liability. But there is a third attestation against this entry in the following terms:

> "We the owners and Farid Bakhsh, Mukhtar of the Muafidar, who have signed underneath, hereby attest that the numbers of fields, the description of the soil, number of trees, instalments to be paid, the rate of the batai payable by the tenant to the Muafidar, the dues payable by the proprietors to the Muafidar, and all the other entries in this khata have been read out to us, been understood by us and are admitted to be correct."

This entry is signed by Farid Bakhsh, who has been held as a fact to be the Mukhtar of the Muafidar Dawan Allah Jawaya who was also the mortgagee named. It is also signed by the owners, though this does not matter. The last portion of the above entry to the effect that "all the other entries in this khata have been read out to us, been understood by us and are admitted to be correct" obviously amounts to a signed acknowledgment of the right to redeem the mortgage, which was then subsisting. It is not necessary to discuss the rulings in this connection at any length as I am accepting this appeal on the ground that the learned District Judge has failed to notice this third attestation which clearly amounts to a signed acknowledgment of liability. The first case which may be cited is ***Daia Chand* v. *Sarfraz*** (1), where the defendants attested as correct the record of rights prepared at a settlement of an estate in which they were described as mortgagees of the estate but which did not mention the name of the mortgagor. It was held that this was an acknowledgment of the mortgagor's right to redeem within the meaning of Art. 148, Limitation Act. Another Full Bench of the Allahabad Court on this question is reported in ***Anup Singh* v. *Fateh Chand*** (2). In this case there was a similar acknowledgment in the settlement records. There was no evidence from which the date of the mortgage could be inferred with any certainty, and it was held by a majority of the Full Bench

> "that no substantial inference could be drawn from the acknowledgment in question that the mortgage was at the time of the acknowledgment a subsisting mortgage not barred by limitation, and it was on the plaintiff relying on the acknowledgment to show that it was made before the period of limitation had expired."

This consideration however does not enter into the case before me, as the date of the mortgage is known to be 1856, and the acknowledgment in the Muntakhab Mae Khewal was made on 14th

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1. (1875) 1 All 117 (F B).
2. A I R 1920 All 92=56 I C 986=42 All 575 (F B).

June 1873, that is within 60 years. The decision of the Punjab Chief Court in *Gul Mahomad* v. *Akbar* (3) is also in point, though not quite as strong a case as the present one. For the reasons given I accept the appeal with cost of this Court to be recovered from the mortgagee, set aside the decree of the District Judge and restore that of the trial Court. If the sum of Rupees 13-14-0, declared to be due has not been paid into Court, the plaintiff can do so within two months from today. In all other respects the preliminary decree of the trial Court is restored, except that parties will bear their own costs in the lower Courts.

K.S. *Appeal accepted.*

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3. (1889) 145 P R 1889.

A. I. R. 1933 Lahore 347

ADDISON AND AGHA HAIDAR, JJ.

Khazan Singh and *another*—Plaintiffs—Appellants.

v.

Mt. Lachhmi and *others*—Defendants—Respondents.

First Appeal No. 1467 of 1927, Decided on 26th January 1933, from decree of Senior Sub-Judge, Sialkot, D/- 16th March 1927.

(a) Evidence Act (1872), S. 90—Document admitted by trial Court under S. 90—Appellate Court is slow to interfere with such discretion unless its exercise is perverse.

When a document has once been admitted in evidence under S. 90 by the trial Court, the appellate Court is, as a rule, slow in interfering with the discretion exercised by the trial Judge in admitting the document and it is only in those rare cases when that discretion has been, on the face of it, perversely exercised that an appellate Court would set aside the finding of the Judge of the trial Court and eliminate the document from consideration in the stage of appeal. [P 348 C 2]

(b) Evidence Act (1872), S. 18—*S* scribing and he with *R* attesting will which recited that *L* was wedded wife of *G*—In a suit *S* and *R* contesting lawful marriage of *L* with *G*—Held that *S* and *R* had practically admitted lawful marriage—Husband and Wife.

G executed a will in favour of *L*. *L* had been described therein as living in the house of the testator as his wedded wife for a long time and that provision had been made for her. This document was scribed by *S* who along with *R* had signed it as an attesting witness. In a suit wherein *S* and *R* contended that *L* was not the lawful wife of *S*:

Held: that as *R* and *S* were personally present when the document was executed and attested the document they practically admitted the status of *L* as the wife of *G*. [P 349 C 1]

(c) Hindu Law—Sikh—Mussalman woman can embrace Sikhism by mere declaration to that effect.

A Mussalman woman could become a Sikhni by a mere declaration of faith and in the case of a woman embracing Sikhism no other ceremony is necessary: 99 *P. R.* 1913, *Foll.* [P349 C2]

(d) Husband and Wife—Contention that *A* was not lawful wife of *B*—Held on evidence that this contention should be overruled.

In a suit it was contended that *A* was not the lawfully wedded wife of *B*. It was found: (1) that *A* who was a Mussalman woman was successfully divorced before her marriage with *B*; (2) that in a memorandum of family settlement *A* was referred to as junior wife of *B*; (3) that *B* in one of his wills had described *A* as his wedded wife living with him from a long time and that this will was scribed by one and signed as attesting witness by another of his brothers; (4) that *A* had embraced the religion of Sikhs; and (5) that *A* was moving in the Sikh society freely and was treated by the Sikh brotherhood as the wife of *B*.

Held: on the above mentioned evidence that *A* was validly married with *B* and was his lawful and wedded wife. [P 350 C 1]

Jagan Nath Aggarwal, J. L. Kapur and *Gurcharan Singh*—for Appellants.

Mehr Chand Mahajan and *Mohammad Amin*—for Respondents.

Agha Haidar, J.—This appeal arises out of a suit for a declaration that the will dated 26th October 1925, and registered on 30th October 1925, executed by one Gurdit Singh, in favour of Mt. Lachhmi, would not affect the rights of succession of the plaintiffs and defendants 2 and 3, and that the said will may be cancelled by the Court and a decree granted in favour of the plaintiffs against defendant 1, Mt. Lachhmi, declaring that the plaintiffs and defendants 2 and 3 are heirs to, and owners of all the lands and houses left by the said Gurdit Singh on his demise. The Senior Subordinate Judge, Sialkot, dismissed the plaintiffs' suit. The plaintiffs have now come up to this Court in appeal.

The case for the plaintiffs may be briefly summarised as follows: Gurdit Singh was one of five brothers, the others being Khazan Singh, plaintiff 1, Ram Singh, defendant 2, and Mit Singh, defendant 3. Shiv Dev Singh, plaintiff 2, is the son of Sahib Singh, deceased, the fourth brother of Gurdit Singh. Gurdit Singh, whose property is the subject-matter of dispute in the present case, died on 11th January 1926. On 26th October 1925, he executed a will in respect of his ancestral as well as self-acquired property in favour of Mt. Lachhmi, defendant 1, whom he described in the will as his lawful wife. The plaintiffs alleged that Mt. Lachhmi was a mirasan woman and, being still a Mahomedan, Gurdit Singh could not have legally married her, and that, according to the custom prevailing among the Sikh Jats, the socalled marriage between Gurdit Singh and Mt. Lachhmi, was not a legal union. On these allegations they prayed that the will may be declared null and void and other reliefs asked by them may be granted. Mt. Lachhmi, defendant 1, pleaded that she was a Mahomedan by birth but that she embraced Sikhism 32 or 34 years ago, when Gurdit Singh married her, that the will dated 26th October 1925, executed by him in her favour was in every respect a valid document and that, according to law, Gurdit Singh could marry her on her abjuring the Mahomedan religion and embracing Sikhism. A number of issues were struck by the Senior Subordinate Judge, but the case has really been decided on issue 4 which runs as follows: "Was Mt. Lachhmi the valid wife of Gurdit Singh deceased ?"

A number of witnesses were examined in the case on behalf of the parties and I shall discuss their evidence presently; but, in my judgment, it would be proper if I refer to certain documents which are to be found on the printed record. The earliest document which has been relied upon by the trial Judge, is the deed of divorce dated 27th June 1894, executed by Thutha mirasi, the former husband of Mt. Lachhmi. It is clearly recited in this document that Mt. Lachhmi was the daughter of one Rala mirasi, that she was married to Thutha who divorced her according to the Mahomedan law on receiving a sum of Rs. 80, from her father by way of compensation for the expenses which he had incurred at the time of Mt. Lachhmi's marriage. An objection was taken by the counsel for the appellants that this document was not admissible in evidence as it did not satisfy the requirements of S. 90, Evidence Act. It was further urged that this document was not mentioned at the proper time and saw the light of the day only at a late stage in the case. I may point out that these objections had not been taken in the grounds of appeal filed in this Court, although they are fairly full and exhaustive. As a matter of fact, the document was mentioned in the earlier stages of the case by the counsel representing Mt. Lachhmi in the lower Court where, on 18th November 1926, he stated that:

> "Lachhmi was married to Thutha but was divorced on 27th June 1894, as the deed of divorce shews."

There cannot be any doubt therefore that this document had been seen by the counsel appearing for Mt. Lachhmi in the trial Court and was not improvised about the time of its actual production. We have further the evidence of Inayat Ullah, D. W. 10, the brother of Mt. Lachhmi who produced the deed of divorce in Court and stated that he had brought it from his house. In cross-examination it has been made clear that he lived in the same house with Mt. Lachhmi, his sister, since the death of Gurdit Singh. On a perusal of this evidence and having regard to the statement made by the counsel for Mt. Lachhmi, there cannot be any doubt that this document was properly admitted in evidence by the Senior Subordinate Judge, under the provisions of S. 90, Evidence Act. It was open to the counsel for the plaintiffs in the lower Court to cross-examine Inayat Ullah on the points which usually arise in cases where the benefit of S. 90, Evidence Act, is claimed, but the cross-examination is absolutely silent on these matters and, in fact, the point, which was left somewhat obscure in the examination-in-chief, was clarified in cross-examination by the counsel who represented the plaintiffs. Furthermore, it must be borne in mind that, when a document has once been admitted in evidence under S. 90, Evidence Act, by the trial Court, the appellate Court is, as a rule, slow in interfering with the discretion exercised by the trial Judge in admitting the document and it is only in those rare cases when that discretion has been, on the face of it, perversely exercised that an appellate Court would set aside the finding of the Judge of the trial Court and eliminate the document from consideration in the stage of appeal.

The next document is the memorandum of settlement, Ex. D-18, dated 29th October 1907, executed by the four brothers, namely, Gurdit Singh, Mit Singh, Ram Singh and Khazan Singh, on the death of their fifth brother Sahib Singh when there was a dispute amongst them as regards the succession to his property. The dispute seems to have been settled by means of this document and the property was allotted to various members of the family. It is important to note that provision had been made under this document for the ladies of the family and Mt. Lachhmi was referred to as the junior wife of Gurdit Singh. Now, if Mt. Lachhmi had been a mere concubine, as the plaintiffs alleged that she was, it is not

moving in the local Sikh society and had been treated by the members of the brotherhood as the wife of Gurdit Singh. Now, if Mt. Lachhmi had been a mere concubine, it is extremely unlikely that respectable people of the brotherhood would allow her to associate with their womanfolk on terms of social equility. There is evidence on the record that Mt. Lachhmi had officiated on ceremonial occasions in distributing the food among the guests and members of the brotherhood. All these circumstances strongly indicate that Mt. Lachhmi had become a Sikhni and, on being married to Gurdit Singh, was treated throughout the period she had been living with him as his lawfully wedded wife. The conclusion therefore is obvious that Mt. Lachhmi started life as a Mussalman, that she was married to Thutha who divorced her in 1894, and that on being converted to Sikhism she was married to Gurdit Singh, according to Sikh rites, and ever since lived with him as his wife. In my judgment the decision of the Senior Subordinate Judge dismissing the plaintiffs' suit is correct, and I would dismiss with costs the appeal preferred by the plaintiffs.

Addison, J.—I agree.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 350

JAI LAL, J.

Mt. Bansan—Defendant— Appellant.

v.

Ishar Singh and *another*—Plaintiffs—Respondents.

Second Appeal No. 1405 of 1928, Decided on 9th February 1933, from decree of Dist. Judge, Ambala, D/- 14th April 1928.

(a) Civil P. C. (1908), S. 100—Ancestral land.

The question whether the land was ancestral is one of fact. [P 350 C 2]

(b) Custom (Punjab)—Succession—Widow —Burden of proof is on person challenging.

The burden of proving that the widow of the collateral is not entitled to succeed to the estate of the last holder, is on the person challenging alienation, in view of the mutation in her favour and of her undoubted possession of the land in suit. [P 350 C 2]

(c) Custom (Punjab)— Succession—Widow —Ambala District.

According to the custom in Ambala District widows are entitled to succeed collaterally in the same manner in which their husbands would have succeeded. [P 351 C 1]

N. C. Pandit—for Appellant.

Nawal Kishore—for Respondents.

Judgment.—The suit in this second appeal related to land which originally belonged to Kharak Singh, a Jat of the Ambala District. He adopted Mangal Singh who died childless. The adoption, it may be mentioned, was not a formal one, but it is conceded by counsel on both sides that it was an appointment of an heir under the Customary law of the province. On the death of Mangal Singh the land was mutated in favour of Mt. Bansan, the widow of Nihal Singh, a collateral of Kharak Singh in the fourth degree, and it appears that this lady is in possession of the land. The natural brothers of Mangal Singh instituted the suit out of which this second appeal has arisen for possession of the land. The trial Court dismissed the suit but the District Judge on appeal has decreed it. The main issue which arose in the case was whether according to custom Mt. Bansan, the widow of a collateral in the fourth degree was entitled to inherit the land of Kharak Singh which her husband would have inherited. Incidentally a question also arose as to the ancestral nature of the land. The District Judge has found that out of the land in suit 3 bighas 15 biswas comprising fields Nos. 76 and 83, have not been proved to be ancestral and that the rest of the land has been so proved. This conclusion the learned District Judge reached on a consideration of two facts: (1) that the name of Dhanna, the common ancestor of Kharak Singh and Nihal Singh, appears in the settlement pedigree table of 1887 and (2) that in 1852 the land in suit, excepting what has been held to be self-acquired, was a joint holding in which Khazan Singh, father of Nihal Singh, held a half share and Kharak Singh held the other half share.

It is contended on behalf of the respondents that the District Judge was not legally entitled to hold on these facts that the land was ancestral. I am unable to accept this contention. The conclusion of the District Judge on this question must be held to be a finding of fact, and no authority has been cited that the conclusion was not legally possible on the facts found by the District Judge. This brings me to the main contention in the case on which the District Judge has granted a certificate. It is conceded by the respondents' counsel and it is obviously a fact that the burden of proving that the widow of the collateral was not entitled to succeed to the estate of Kharak Singh was on the plaintiff in view of the mutation in her favour and of her undoubted possession of the land in suit. The District Judge relied upon *Khem Bai* v.

Bhowani Das (1) and *Mt. Aso* v. *Mt. Tabi* (2), in support of his conclusion that the widows in this province do not succeed collaterally. The view taken in these cases however has not been accepted to be correct in subsequent judgments of the Chief Court of the Punjab, see, for instance, *Sultan Bibi* v. *Ghulam Haidar* (3), in which most of the previous cases have been mentioned and the rule laid down in *Mt. Aso* v. *Mt. Tabi* (2), has been expressly dissented from. Moreover, in answer to question 39 (a) of the Customary Law of the Ambala District it is recorded that the widows are entitled to succeed collaterally in the same manner in which their husbands would have succeeded. Therefore there is not only a presumption in favour of the appellant by virtue of her possession and the mutation in her favour but also according to the custom which has generally been recognized to prevail in this province and also by virtue of the answer to the question in the Customary Law of the Ambala District.

So far as the oral evidence led in the case is concerned it is worthless. Ten witnesses were produced by the plaintiffs. They make general statements to the effect that widows do not succeed collaterally but are not able to cite a single instance in support of their allegation. Similarly the defendant produced six witnesses who gave evidence in her favour but they were unable to cite a single instance in point as the only instance cited relates to collateral succession by males. The question therefore has to be determined on a consideration of matters which have first been discussed in this judgment, and the view taken by the learned District Judge cannot therefore be sustained. I accept this appeal so far as to grant the plaintiffs a decree for possession of 3 bighas and 15 biswas of the land in suit, fields Nos. 76 and 83, and dismiss the suit with regard to the rest of the land. I leave the parties to bear their own costs throughout.

R.K. *Appeal accepted.*

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1. (1896) 69 P R 1896.
2. (1893) 77 P R 1893.
3. A I R 1914 Lah 473=24 I C 358=32 P R 1915.

A. I. R. 1933 Lahore 351

HARRISON AND DALIP SINGH, JJ.

Jawala Singh and *others*—Appellants.

v.

Ghulam and *others*—Respondents.

Civil Appeal No. 1506 of 1932, Decided on 5th December 1932.

Civil P. C. (1908), S. 151—Refund of excess court-fee can be ordered—Court-fees, refund.

The Court has inherent powers to grant a certificate to a party who has bona fide paid excess court-fee so as to enable him to get a refund from revenue authorities. [P 351 C 2]

Ram Lal Anand—for Appellants

Carden Noad—for the Crown.

Harrison, J.—In this appeal Mr. Ram Lal Anand represents that the court-fee stamp of Rs. 173-8-0 has been used instead of one of Rs. 4 and this being a bona fide mistake he applied for a refund of the balance. Before taking action we served the Crown, and the Government Advocate represents that no action can be taken in this Court and that the proper course is to grant a certificate, which will enable the appellant to obtain a refund from the revenue authorities. Mr. Ram Lal agrees that this is the proper procedure, and he relies on the following authorities in support of this view: *Hari Har Guru* v. *Ananda Mahanty* (1), *Girish Chandra Mali* v. *Girish Chandra Dutta* (2) and *Chandra Hari Singh* v. *Tipan Prosad Singh* (3) in which S. 151, Civil. P. C., is definitely invoked. This ruling has been followed in the subsequent rulings [*Hirabai Burjorji Cowasji* v. *Fakir Mahomed Vali Mahomed* (4), *Munna Lal* v. *Ram Chandra* (5) and *Thanmaya Naidu* v. *Venkata Ramanamma* (6)].

Mr. Ram Lal states that he will put in a fresh stamp of the value of Rupees 4 and on his doing so the two sheets bearing stamps of the value of Rupees 173-8-0 will be returned to him together with a copy of this order, which he will present to the revenue authorities as tantamount to a certificate that there has been a bona fide mistake and that the proper court-fee was only Rs. 4. This will enable him to obtain a refund under the rules passed under Government of India Notification No. 132, dated 11th January 1888. Before making over the two sheets to Mr. Ram Lal Anand a copy should be made and put on the record of any relevant order or endorsement.

M.N. *Order accordingly.*

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1. (1913) 40 Cal 365=20 I C 498.
2. A I R 1932 Cal 450=137 I C 791.
3. (1918) 3 Pat L J 452=46 I C 271.
4. A I R 1927 Sind 192=102 I C 193.
5. A I R 1930 All 471=122 I C 188=52 All 546.
6. A I R 1932 Mad 438=139 I C 131=55 Mad 641.

S. N. DAR, B. A. LL. B.,
Vakil High Court,

A. I. R. 1933 Lahore 352

BHIDE, J.

(*Mian*) *Abdul Aziz*—Appellant.

v.

Alliance Bank of Simla, Ltd. and *others*—Respondents.

Misc. First Appeal No. 1291 of 1932, Decided on 17th January 1933, from order of Senior Sub-Judge, Lahore, D/- 27th June 1932.

(a) Civil P. C. (1908), S. 47—Representative—Meaning explained—Tests for determining whether person is representative mentioned.

The expression "representative" in S. 47, Civil P. C., has been construed in a wider sense than the expression "legal representative" and includes also representative-in-interest. The two tests to be applied in determining whether a person is a "representative" within the meaning of S. 47, Civil P. C., are: (1) whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit has by act of the parties or by operation of law vested in the person who is sought to be areated as representative; and (2) if there has been devolution of interest whether so far as such interest is concerned that person is bound by the decree: *A I R* 1926 *Lah* 134 1 *I C* 213, *Rel on.* [P 353 C 1]

(b) Civil P. C. (1908), S. 11—Interpretation of some words in original decree—Original decree merged in appellate decree—Execution of appellate decree—Interpretation of same words is not barred by res judicata.

A Sub-Judge who passed a decree interpreted certain words in the decree in a particular way. This decree was merged in an appellate decree and in execution of the appellate decree the question of interpretation of the same words arose:

Held: that it was not barred by the decision of the Sub-Judge in the prior proceedings: *A I R* 1932 *All* 288, *Rel on.* [P 353 C 2]

(c) Civil P. C. (1908), S. 34—Award of future interest in money decree is discretionary.

The awarding of future interest in a money decree is purely discretionary. It is in the nature of damages granted by the Court for plaintiff being kept out of the money due to him after the date of decree. Hence where a person who has got promissory notes in his favour and also an equitable mortgage of the property of the debtor, sues only on the promissory notes, and the Court in its discretion allows him future interest in the decree, he cannot hold such future interest to be a charge on the property. [P 353 C 2; P 354 C 1]

Badri Das—for Appellant.

Kishen Dial and *H. C. Kumar*—for Respondents.

Judgment.—The material facts of the case for the purposes of this appeal may be briefly stated as follows: The Alliance Bank of Simla, the plaintiffs in this case, sued on the basis of a promissory note for Rs. 20,000, executed by two brothers named Lala Kanshi Parshad Thakral and Rai Sahib Mool Chand and obtained a simple money decree for Rs. 19,041-6-6, on 22nd January 1925. The decree was as follows:

> "I therefore pass a decree for Rs. 19,041-6-6 and costs in favour of plaintiff and against defendant. Interest on the decretal amount at 9 per cent per annum with half-yearly rests is to run in future further from date of suit till date of realization."

Five days after the execution of the promissory note the debtor had created an equitable mortgage of certain property known as the "Aville" estate in favour of the plaintiffs. For some reason or other the plaintiffs had not chosen to institute a suit on the basis of this mortgage, though the factum of the mortgage was mentioned in the plaint. The result was that the decree was a simple money decree as stated above. In execution of this money decree the plaintiffs sought to sell the Aville Estate upon which, Mian Abdul Aziz (the appellant in the present case) objected, claiming that the property was sold to him on 10th November 1924, and that he was in possession in his own right. This objection was allowed and the property was released from attachment. The plaintiffs thereupon instituted a suit under O. 21, R. 63, Civil P. C., for a declaration of this charge on the property on the footing of the equitable mortgage. This suit resulted in a decree on 31st August 1927, in their favour which was as follows:

> "It is ordered that a decree for declaration to the effect that the plaintiffs have a lien on the estate in dispute to the extent of the principal amount of their decree dated 22nd January 1925, excluding costs of it, and that they are entitled to have the estate sold in execution of the decree to that extent, free of all encumbrances, be passed, etc. etc."

This decree was affirmed in appeal by this Court, with a slight variation only in respect of the pleader's fees awarded. The question of the interpretation of the expression "the principal amount of the decree dated 22nd January 1925," was raised in cross-objections by the plaintiffs-respondents. The relevant portion of the judgment of this Court bearing on the point ran as follows:

> "As regards the cross-objections of the respondents the only point urged was that the learned Senior Subordinate Judge should have held that the plaintiffs had a lien on the property in dispute as regards the principal as well as the interest and costs in the money suit. The learned Senior Subordinate Judge has used the expression "principal amount of the decree" dated 22nd January 1925. This seems to me to include obviously the principal as well as the interest which

was decreed in plaintiffs' favour. As regards the costs of the money suit I am unable to see why those should be held to be a charge on the mortgaged property. The equitable mortgage was only in respect of the principal and interest due on the promissory note and it was subject to this lien only that the property was apparently transferred to defendant 1."

An application for review of the judgment was presented to this Court, but was rejected on the ground that there was no good ground for review. In the course of the subsequent execution proceedings the question of the interpretation of the above mentioned expression "principal amount of the decree" was again agitated and it has been held by the learned Senior Subordinate Judge that the expression includes the future interest awarded by the decree dated 22nd January 1925, as was contended by the plaintiffs. It is from this order that the present appeal has been preferred by Mian Abdul Aziz. A preliminary objection is raised that no appeal is competent. The appeal has been preferred under S. 47, Civil P. C., but it is contended on behalf of the plaintiffs-respondents that Mian Abdul Aziz, not being a party to the decree under execution or a representative of any of the parties to that decree, is not entitled to prefer this appeal. The contention of the learned counsel for the appellant on the other hand is that Mian Abdul Aziz, being a purchaser of the equity of redemption from the judgment-debtors, is their "representative" within the meaning of S. 47, Civil P. C.

The expression "representative" in S. 47, Civil P. C., has been construed in a wider sense than the expression "legal representative," and includes also representative-in-interest: cf. *Ishar Das* v. *Parma Nand* (1). In *Ajodhya* v. *Hardwar Roy* (2), it was held by a Division Bench of the Calcutta High Court, that the two tests to be applied in determining whether a person is a "representative" within the meaning of S. 47, Civil P. C., are: (1) whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit has by act of the parties or by operation of law vested in the person, who is sought to be treated as representative and (2) if there has been devolution of interest whether so far as such interest is concerned that person is bound by the decree. The first condition is obviously satisfied owing to the sale of the equity of redemption to the appellant. As regards the second condition, it is true that the appellant was not a party to the original money decree, but owing to the declaratory decree subsequently obtained by the plaintiffs-respondents, he must now be considered to be bound by that decree "to the extent of the principal amount of that decree." The appellant claimed at first in the execution proceedings that he was not bound by the decree but his position must now be considered in the light of the declaratory decree obtained by the plaintiffs. In view of that decree, it seems to me that the tests laid down in *Ajodhya* v. *Hardwar Roy* (2) are fulfilled and the appellant is therefore a representative of the judgment-debtors within the meaning of S. 47, Civil P. C. I accordingly overrule the preliminary objection.

As regards merits, the learned counsel for the appellant has urged that the learned Subordinate Judge who passed the money decree (M. Mohammad Sultan Mirza) had himself once decided that the expression "principal" amount of the decree" did not include future interest and the matter being thus res judicata, it was not competent to his successor (Lala Purshotam Lal) to reopen the question and come to a contrary finding as he has done. In reply, the learned counsel for the respondents contends that the decree of M. Mohammad Sultan Mirza has now merged in the appellate decree of this Court and consequently the interpretation placed by M. Mohammad Sultan Mirza on his own decree, whether it is right or wrong cannot now operate as res judicata. This contention seems to me to be sound and is supported by the view taken by the Allahabad High Court in a recent decision reported as *A. I. R.* 1932 *All.* 288. There is, I think, no doubt that the decree now to be executed is the appellate decree of this Court and though the High Court did not vary the decree of the Court below in respect of the subject-matter of the present appeal, the technical objection as regards the rule of res judicata cannot, in my opinion, be upheld. I must therefore proceed to consider the interpretation now placed upon the expression "the principal amount of the decree" by the learned Senior Subordinate Judge. (After considering this point, the judgment proceeded). It must be borne in mind in this connexion that future interest which was awarded by the money decree under S. 34, Civil

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1. A I R 1926 Lah 184=93 I C 80=6 Lah 544.
2. (1909) 1 I C 213.

P. C., was purely discretionary and was not a part of the original claim on the basis of the promissory note. It is really in the nature of damages granted by the Court for the plaintiffs being kept out of the money due to them, after the date of the decree. It could not therefore be claimed as of right to be a charge on the property. It was urged that, if the plaintiffs had sued on the basis of the mortgage, the whole amount payable upto the date of realization would have been a charge on the property. But the award of interest subsequent to the date fixed for payment would also in that event have been discretionary. Apart from this, the fact remains that the plaintiffs did not sue on the footing of the equitable mortgage. They chose to obtain a money decree instead and this has led to this unfortunate and protracted litigation. The money decree and the declaratory decree must now be taken and interpreted as they stand. In my opinion there are no good grounds for holding the future interest to be a charge on the property in the circumstances of the case. I accordingly accept the appeal and set aside the order of the learned Senior Subordinate Judge in so far as it holds the future interest to be a charge on the property in dispute. In view of all the circumstances I leave the parties to bear their costs in this Court.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 354

TEK CHAND, J.

Sundar Singh Sachar Pleader (Representative, adopted son of Mt. Bhagwanti) —Appellant.

v.

Bakhshi Shiv Ram and *another*—Respondents.

Misc. Second Appeal No. 1232 of 1932, Decided on 8th February 1933, from order of Dist. Judge, Rawalpindi, D/- 17th June 1932.

(a) Evidence Act (1872), S. 115—Application by some of creditors for adjudication—Mortgage effected by debtor alleged to be one of acts of insolvency— Creditors withdrawing this allegation and relying on other acts of insolvency—Adjudication—Subsequent application by Official Receiver under S. 54, Insolvency Act, to annul mortgage on ground of being effected to give fraudulent preference—Official Receiver is not estopped—Provincial Insolvency Act (1920), S. 54.

In an application by some of the creditors for adjudication, one of the acts of insolvency alleged in the petition was a mortgage effected by the debtor. The creditors withdrew the allegation and relied only on the other acts of insolvency and an order of adjudication was passed. Subsequently the Official Receiver put in an application under S. 54 to annul the mortgage on the ground that it was effected with a view to give fraudulent preference over other creditors:

Held: that the Official Receiver was not bound by the statement of the petitioning creditors who had withdrawn the allegation, as they were only some of the creditors, that the Official Receiver represented the entire body of creditors and as such was not estopped from challenging the mortgage. [P 355 C 1]

(b) Provincial Insolvency Act (1920), S. 54 —Application by Official Receiver to annul mortgage effected by debtor—Onus lies on Official Receiver and not mortgagee to prove transfer as fraudulent.

In cases falling under S. 54, Provincial Insolvency Act, the onus lies upon the Official Receiver to establish the necessary elements which would make that section applicable and it is not for the mortgagee to prove that the mortgage in his favour executed by the debtor is not fraudulent: *A I R* 1928 *P C* 77 and *A I R* 1928 *Lah* 744, *Ref.* [P 355 C 1, 2]

(c) Provincial Insolvency Act (1920), S. 54 —Intention to give 'fraudulent preference' imports free choice—Transfer under threat or pressure is not preference.

A transfer by the debtor in favour of a creditor under pressure and threat even though when he is in imminent expectation of bankruptcy is not a transfer giving preference to one creditor over others. The word "preference" imports a free choice and it is necessary for the Official Receiver to prove that the debtors' act was voluntary and not due to extraneous influence such as pressure or threat: 43 *Cal* 640, *Rel on.* [P 355 C 2]

M. C. Mahajan, Achhru Ram and *Badri Das*—for Appellant.

J. N. Aggarwal—for Respondents.

Judgment.—On 27th May 1927, a mortgage was effected by the firm Thakar Singh-Sewa Singh, in favour of Mt. Bhagwanti, appellant for Rupees 23,000, the consideration being prior debts due by the mortgagor to the mortgagee. Within three months of the date of the mortgage, i. e., on 23rd August 1927, an application by certain other creditors for adjudication of firm Thakar Singh-Sewa Singh, as insolvents was presented before the Insolvency Judge at Rawalpindi. The petition was based on various alleged acts of insolvency having been committed by the debtors, one such act being the mortgage in favour of Mt. Bhagwanti, which was described as having been made with a view to giving her fraudulent preference over other creditors. On 15th October 1923, the petitioning creditors, made a statement withdrawing the allegation that the mortgage in favour of Mt. Bhagwanti, had been made with a view to giving her fraudulent preference, and praying that the application be tried on the strength of the other alleged acts of insolvency. This was allowed, the inquiry proceeded on the other allegations; and eventually an adjudication order was passed. More than two years later, on 21st November 1930, the Official Receiver presented an application under S. 54, Provincial Insolvency Act, urging that the aforesaid mortgage in favour of Mt. Bhagwanti was void as against him and that it be annulled by the Insolvency Court, inasmuch as it had been effected with a view to giving her fraudulent preference over the other creditors. After inquiry the Insolvency Judge dismissed the petition, but on appeal by the Official Receiver the learned District Judge has annulled the mortgage.

The mortgagee Mt. Bhagwanti has preferred a second appeal and the first contention raised on her behalf is that the petitioning creditors having stated on 15th October 1928, that the mortgagor in question did not "fraudulently prefer" the appellant and that it did not amount to "an act of insolvency," the Official Receiver was "estopped" from repeating the same allegation and applying under S. 54. In my opinion, this contention is without substance, and I have no hesitation in over-ruling it. In the first place, the statement referred to was made by the petitioning creditors only and is not binding upon the Official Receiver who represents the entire body of creditors. Secondly, as stated already, the petitioning creditors had originally applied for the adjudication of the debtors as insolvents on the strength of numerous alleged acts of insolvency, but in order to obtain a speedy decision they thought it advisable to limit their case to the less contentious allegations, and dropped those inquiry into which would have delayed the passing of the adjudication order. Further, it has not been shown that Mt. Bhagwanti was misled to act to her detriment by reason of the aforesaid statement made by the petitioning creditors on 15th October 1928, and for this reason also the plea of estoppel cannot be sustained. The next contention, that the learned District Judge has approached the case from a wholly erroneous legal stand point, is however well-founded and in my opinion must succeed. A perusal of his judgment shows that the learned District Judge has dealt with the case as if the onus lay upon the mortgagee to prove that the transfer in question was not fraudulent. It is however well-settled that in cases falling under S. 54, Provincial Insolvency Act, the onus lies upon the Official Receiver to establish the necessary elements which would make that section applicable: *Sime Darby & Co.* v. *Official Assignee* (1) and *A. I. R.* 1928 *Lah.* 744.

Now the only substantial fact found against the appellant is that the transaction in her favour was effected by the debotrs when they were in imminent expectation of bankruptcy. But this by itself is not sufficient to prove the intention to give fraudulent preference. The word "preference" imports a free choice, and it is necessary for the Receiver to prove that the debtor's act was voluntary and not due to extraneous influence such as pressure or threat from the creditor. It is admitted that the transferee is not related to the debtors and it has not been shown that there were any special reasons for them to give preference to her over the other creditors. On the other hand, the facts found are that the debt due by the debtors to the appellant was unsecured, that she was anxious to have it repaid and she made a demand. The debtors did not have sufficient cash to pay and a meeting was held at the house of a mutual friend, and was attended by the debtors and a number of persons on behalf of the appellant. In this meeting the debtors were threatened with a suit, in case the amount due to the appellant was not paid or got secured forthwith. The appellant's son is admittedly a practising lawyer and her husband is a petition-writer, and there can be no doubt that the threat of legal proceeding was not a mere brutum fulmen but was real and effective and must have been taken seriously by the debtors who agreed to secure the debt by entering into the mortgage transaction in question. These facts clearly show that the transfer was not made voluntarily, but was made under pressure and the case falls within the rule laid down in *Nripendra Nath* v. *Ashutosh Ghose* (2).

The learned District Judge appears to have been largely influenced by the argument that the debtors made "numerous" alienations, and he has observed that they had adopted a "reckless course of paying off" some of their creditors in spite of the fact that it was patent to them that by so doing they would be unable to pay others. But as admitted by Mr. Jagan Nath Aggarwal, counsel for the Receiver all the other alienations were made subsequent to the transaction in question and it has not been shown that the debtors had acted "recklessly" before

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1. A I R 1928 P C 77=107 I C 233 (P C).
2. (1916) 43 Cal 640=33 I C 548.

the mortgage in favour of the appellant. It is further significant that there is no finding by the District Judge, nor is there any evidence on the record that at the time of the mortgage in question the appellant was aware that the mortgagors were practically insolvents and the transaction in their favour would result in giving them undue preference to other creditors. In my opinion the Official Receiver has failed to bring the case within S. 54, Provincial Insolvency Act, and the judgment of the learned District Judge cannot be sustained. I accordingly accept the appeal, set aside the order of the learned District Judge and restore that of the Insolvency Judge. The appellant shall get her costs from the Official Receiver in all Courts.

K.S. *Appeal accepted.*

* A. I. R. 1933 Lahore 356 (1)

Special Bench

ADDISON, ABDUL QADIR AND MONROE, JJ.

(*Robert John*) *Twiss*—Petitioner.

v.

(*Lily Mary*) *Twiss*—Opposite Party.

Matrimonial Ref. No. 22 of 1931 and C. M. No. 593 of 1932, Decided on 24th March 1933, from decision of Dist. Judge, Ferozepore, D/- 29th October 1931.

*** Divorce Act (1869), S. 14—Decree for dissolution of marriage cannot be made without recording evidence.**

Under the provisions of S. 14, Divorce Act, the Court has to be satisfied on evidence that the case of the petitioner has been proved and a decree for dissolution of marriage cannot be made merely on admissions without recording evidence. There should also be evidence of domicile without which a District Judge cannot proceed to hear the petition for dissolution: *A I R* 1930 *Lah* 771 (*S B*); *A I R* 1931 *Lah* 1 (*S B*), *Ref.* [P 356 C 1, 2]

Kanhaya Lal Gauba—for Petitioner.

Order. — Robert John Twiss, presented to the District Judge of Ferozepure, praying that his marriage with Lily Mary Twiss be dissolved on the ground of her adultery with a person unknown. The respondent put in pleas through counsel admitting her adultery. Thereupon, the District Judge without taking evidence granted the petitioner a decree for dissolution of his marriage subject to confirmation by this Court.

It is obvious that there has been no trial of the petition. There is no marriage certificate or other proof of the marriage on the record. Under the provisions of S. 14, Divorce Act, the Court has to be satisfied on evidence that the case of the petitioner has been proved. As pointed out in *Allah Rakha* v. *Mt. Barkat Bibi* (1) and *Barkat* v. *Mt. Hukam Bibi* (2), a decree for dissolution of marriage cannot be made merely on admissions without recording evidence. Lastly, there is no evidence of domicile without which the District Judge could not proceed to hear the petition. For these reasons we set aside the order of the District Judge and return the petition to be tried by him de novo in accordance with the provisions of the Divorce Act. He should read the cases mentioned as well as the appropriate sections of the Act before he commences to do so. There will be no order as to costs.

K.S. *Order set aside.*

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1. A I R 1930 Lah 771=126 I C 68=12 Lah 22 (S B).
2. A I R 1931 Lah 1=130 I C 402=12 Lah 266 (S B).

A. I. R. 1933 Lahore 356 (2)

ADDISON AND AGHA HAIDAR, JJ.

Chuni Lal Tulsiram — Plaintiff—Appellant.

v.

Amin Chand and *another*—Defendants —Respondents.

First Appeal No. 1517 of 1928, Decided on 1st December 1932.

(a) Civil P. C. (1908), O. 22, R. 9—Legal representative of deceased respondent not brought on record—Abatement though not declared not sought to be set aside—No reason for delay offered—Delay cannot be condoned—Limitation Act (1908), S. 5.

If within 90 days from the death of a respondent no application has been made to implead his legal representative, the appeal against him abates automatically, and unless that abatement is set aside on an application under O. 22, R. 9, Civil P. C., within 60 days from the date of abatement or a period further extended in virtue of S. 5, Lim. Act, the appeal is dead and it is not necessary that an order should have been passed declaring that an abatement has in fact taken place. [P 358 C 1]

Where much more than 150 days elapsed before the application was made and there was no explanation for the delay the appeal abates and S. 5, Lim. Act, cannot be made use of: *A I R* 1926 *Lah* 234 and *A I R* 1927 *Lah* 717, *Rel on.* [P 358 C 1]

(b) Civil P. C. (1908), O. 22, R. 9—Ignorance of law or death of respondent is not sufficient cause.

Mere ignorance of law that an application is necessary or mere ignorance of the death of a respondent is not sufficient cause within the meaning of O. 22, R. 9: *Case law referred.* [P 358 C 1]

(c) Civil P. C. (1908), O. 22, R. 4—Suit not against defendants as partners dismissed—One respondent dying during appeal—Appeal abating against him — Joint decree—Abatement of whole appeal must be

decided by reference to decree—Civil P. C. (1908), O. 30, R. 4.

Where a suit is brought against two defendants individually and not in the name of the firm and the decree of the lower Court was in favour of the defendants jointly and there was nothing to show the interest of each of the defendants in it and during the pendency of the appeal one of the respondents died and the appeal against him abated for not bringing his representatives on record the entire appeal abated. The question of abatement must be decided by reference to the decree and it cannot be allowed to be urged that the two defendants in reality comprised a firm who were in partnership with the plaintiff firm and also acted as their agents: 135 *I C* 245 and *A I R* 1930 *Lah* 651, *Rel on.* [P 359 C 1]

(d) Civil P. C. (1908), O. 22, R. 4—Legal representatives mean person or persons who represent whole interest of deceased.

The expression "legal representative" means and includes one person as well as several persons according as they represent the whole interest of the deceased person. Where the one person on record through the legal representative does not represent the whole interest of the deceased and it is necessary to bring all the persons representing the interest on to the record the appeal abates as against the deceased person. *A I R* 1927 *Lah* 94, *Rel on.* [P 359 C 2]

Mehr Chand Mahajan and *Nawal Kishore*—for Appellant.

Kishan Dayal and *Bhagwat Dayal*—for Respondents.

Addison, J.—On 30th June 1925, the firm Chuni Lal-Tulsi Ram of Garli in the Kangra District instituted a suit against two individuals, namely, Amin Chand and his father Mast Ram, who were carrying on business at Mandi in Mandi State. It was alleged that part of the business, which was principally in timber, was carried on by the defendants as agents while part of it was carried on as partners of the plaintiff firm. Agency was denied by the defendants but the partnership admitted. It was found that the business was purely partnership business and ultimately on 31st January 1928, the two defendants Amin Chand and Mast Ram obtained after the accounts were taken a final decree for Rs. 16,835 against the plaintiff firm. Against this decision the plaintiffs preferred First Appeal No. 1517 of 1928, to this Court and it was admitted on 9th October 1928. On 13th June 1929, Mast Ram died at his home Lamlera in the Una Tahsil of the adjoining district of Hoshiarpur, leaving Amin Chand and three other sons as well as grandsons as his representatives. It was not however, till 11th March 1931 that an application was made to bring upon the record the other legal representatives of Mast Ram. An affidavit was put in to the effect that the deponent Tulsi Ram lived in Garli in Kangra District while Mast Ram lived in Una Tahsil of the Hoshiarpur District and that for this reason he only came to know of the death of the deceased 15 days before. When the legal representatives other than Amin Chand and Amin Chand came to know that this petition had been granted subject to all just exceptions, they applied on 19th December 1931, to the effect that the appeal had abated so far as Mast Ram was concerned and that as it was a joint and indivisible decree, the appeal could not proceed against Amin Chand also. It was asked that it be held that the whole appeal had abated and was liable to dismissal. Accompanying this objection was an affidavit to the effect that the appellants and their general attorney Gosain knew of Mast Ram's death at or about the time he died and that Gosain in a suit pending in the Mandi State had on 30th June 1929, and on 3rd July 1929, asked for an adjournment because of the death of Mast Ram. It was further stated that relations between the parties were friendly, that Lamlera was only 35 miles from Garli and that the firm Chuni Lal-Tulsi Ram which is composed of two members, Tulsi Ram and Dhani Ram, knew of the death of Mast Ram.

Tulsi Ram replied to this affidavit with a counter-affidavit to the effect that though he was a resident of Garli, he usually resided at Hardwar where he carried on business and that he only came to know of the death of Mast Ram 15 days before he applied for his legal representatives other than Amin Chand to be brought on the record. It has been established that Gosain, who was the general attorney of the plaintiff firm and whose power-of-attorney is on the record of the present suit, did get an adjournment at the time stated in the Mandi Courts because of Mast Ram's death. There is no affidavit on the part of Dhani Ram, the other member of the plaintiff firm, to the effect that he had no knowledge of Mast Ram's death. Further Tulsi Ram in his affidavit has carefully not disclosed who told him 15 days prior to his application that Mast Ram was dead. In these circumstances I would hold that there is no sufficient cause established on this record which prevented the plaintiff firm from continuing the appeal by bringing the legal representatives of Mast Ram on the record within the prescribed time.

Further, as laid down in *Qaim* v. *Nura* (1), if within 90 days from the death of a respondent no application has been made to implead his legal representative, the appeal against him abates automatically, and unless that abatement is set aside on an application under O. 22, R. 9 of the Code, within 60 days from the date of abatement or a period further extended in virtue of S. 5, Limitation Act, the appeal is dead and it is not necessary that an order should have been passed declaring that an abatement has in fact taken place. In the present case, much more than 150 days elapsed before the application was made so that it behoved the appellant to ask for the application of S. 5, Limitation Act. In a decision dealing with that section a Division Bench of this Court has held in *George Gowshale* v. *Balak Ram* (2), that it is the duty of the appellant to explain the delay for every day that elapses beyond the period allowed by the Limitation Act for filing an appeal. Even therefore if it was held that the plaintiff firm only came to know of the death of Mast Ram 15 days before the application was put in, it would have to explain why it was necessary to wait for 15 days before putting in the application. It follows that the application under O. 22, R. 9, Civil P. C., was barred by time; for little attempt was made to argue before us that the application could not have been made sooner than 15 days from the date alleged that Tulsi Ram came to know of the death of Mast Ram. I may again add however that it cannot be held that the firm did not know of the death until 15 days before the application was put in. There is ample authority to the effect that mere ignorance of the law that an application is necessary or mere ignorance of the death of a respondent is not sufficient cause within the meaning of O. 22, R. 9, Civil P. C. Some of the authorities are as follows: *Mir Nawab* v. *Hardeo* (3), *Hadu* v. *Lala* (4), *Inayat* v. *Ganga* (5), *Daya Singh* v. *Buta Singh* (6), *Jamna* v. *Sarjit* (7), *Chunni Lal* v. *Kala Khan*, (*A. I. R.* 1922 *Lah.* 61), *Ramperkash Dass* v. *Kunj Lal*, (*A. I. R.* 1924 *Pat.* 126), *Mohamad Askari* v. *Lalu* (8) and many others. In the last three authorities it was said that a mere plea of ignorance of the death of an opposite party which took place months or years before was not a sufficient ground for setting aside an abatement and that the person prosecuting a suit or appeal is bound to keep himself informed of the existence of his adversary. For all these reasons the application to bring the legal representatives of Mast Ram other than Amin Chand on the record must fail.

It was contended however that as Amin Chand, one of the representatives of the deceased, was already on the record and as he became the manager of the joint Hindu family, of which his father Mast Ram was the manager before him and of which the other sons were members therefore there was no necessity to bring the other legal representatives on to the record as he is sufficiently represented by his father Mast Ram and his brothers and nephews. There is no doubt that if a suit is brought against the manager of a joint Hindu family, he sufficiently represents all the other members of the joint family, but this was not a suit against Mast Ram as manager of a joint Hindu family by which it was sought to make the property of that family liable. It was a suit merely against Amin Chand and Mast Ram as two individuals. Had the plaintiff firm succeeded in getting a decree against them, they could only have proceeded against the property of Amin Chand and Mast Ram and if they constituted a joint Hindu family along with other persons only the shares of Amin Chand and Mast Ram in the property of that family could have been attached and sold. Besides, if the suit was against the manager or against the manager and the other members of an alleged joint Hindu family, many defences would be open to them which are not open to individuals, such as inter alia joint family necessity, and the fact that the family was not joint. It cannot now be alleged at this stage that there is a joint family, for that would mean that an opportunity would have to be given to deny this fact. The suit has been tried and finished and it is not open to this Court to conduct an inquiry into anything not raised in the suit. That would be an intolerable state of affairs tending to make litigation end-

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1. A I R 1926 Lah 234=94 I C 422=7 Lah 73.
2. A I R 1927 Lah 717=103 I C 498.
3. (1911) 60 P R 1916=12 I C 871.
4. A I R 1914 Lah 123=21 I C 951=41 P R 1915.
5. (1916) 3 P R 1911=32 I C 829.
6. (1916) 118 P R 1916=38 I C 7.
7. A I R 1919 Lah 390=52 I C 510=67 P R 1919.
8. (1918) 21 O C 68=45 I C 594.

less. The plaint and the pleadings would have to be amended and the suit retried and the appeal heard on a new allegation. This proposition has only to be stated to be rejected.

It was next contended that though Amin Chand and Mast Ram were sued as individuals, they were in reality a firm and could have been sued under O. 30, R. 1, Civil P. C., in the name of the firm and if that had been done under O. 30, R. 4, Civil P. C., it would not have been necessary to join the legal representatives of Mast Ram as parties to the suit. This is correct, but the fact remains that the defendants wrere sued as two individuals and not as a firm, the allegation being that they were two agents and two partners of the plaintiff firm. A similar case is reported in *Shri Chand* v. *Bansidhar* (9). In it the plaintiffs, who were the owners of a firm sued in their individual names to recover money due to the firm and obtained a decree. During the pendency of an appeal by the defendants one of the plaintiffs-respondents died and the appeal abated so far as his heirs were concerned. It was held that as the suit was not brought in the name of the firm and the decree of the lower Court was in favour of the plaintiffs jointly and there was nothing to show the interest of each of the plaintiffs in it, the entire appeal abated. With all respect I agree with the principle underlying this decision. O. 30, R. 1, is merely permissive. If it is followed then O. 30, R. 4 applies but not otherwise. As the two defendants were not sued as a firm therefore it was necessary to bring the representatives of the deceased Mast Ram upon the record. An analogous case, namely, *Chandulal* v. *Khushali Ram*, (*A. I. R.* 1930 *Lah.* 174) has also been referred to. A Single Judge of this Court in *Umrao Singh* v. *Kapuria*, (*A. I. R.* 1930 *Lah.* 651), held that when the question arose whether an appeal abates in toto, the matter must be decided by reference to the decree from which the appeal is taken just as in suits this matter is decided with reference to the plaint. The decree in the case before us was a money decree in favour of Mast Ram and Amin Chand as individuals. It follows that the question of abatement in this case must be decided by reference to the decree and and it cannot be allowed to be urged that the two defendants in reality comprised a firm who were in partnership with the plaintiff firm and also acted as their agents.

Lastly, it was contended that it was sufficient that one of the legal representatives of Mast Ram, namely, Amin Chand was already on the record. It was however been held in *Muhammad Hassan* v. *Inayat Hussain*, (*A. I. R.* 1927 *Lah.* 94) by a Division Bench of this Court consisting of Hon'ble the Cheif Justice, and my learned brother Agha Haidar that the expression "legal representative" means and includes one person as well as several persons according as they represent the whole interest of the deceased person. Clearly in the present case Amin Chand does not represent the whole interest of the deceased Mast Ram and it was necessary to bring all the persons representing that interest on to the record. For the reasons given I would hold that the appeal has abated so far as Mast Ram is concerned. It was conceded that this meant that the appeal must be held to have abated in toto. I would accordingly dismiss it with costs. This order disposes of the appeal and of the miscellaneous petition.

Agha Haidar, J.—I agree.

M.N. *Appeal dismissed.*

A. I. R. 1933 Lahore 359

HARRISON AND AGHA HAIDAR, JJ.

Mukand Singh—Plaintiff—Appellant.

v.

Waziruddin — Deft — Respondent.

First Appeal No. 1157 of 1927, Decided on 8th February 1933.

(a) Custom (Punjab)— Alienation—Setting aside—Gaps between son in existence and subsequently born sons—Gaps not bridged by begetting of subsequently born son or existence of reversioner—Subsequent son cannot challenge alienation—Hindu Law.

Where there are gaps between the death of the son, who was in existence at the time of the alienation and the birth of the subsequently born son challenging that alienation and the gaps are not bridged over either by the fact that the subsequently born son had been begotten or any reversioner had been in existence, the subsequently born son cannot challenge the alienation merely in virtue of his elder brother having been in existence at the time of the alienation. [P 360 C 2]

(b) Custom (Punjab)—Alienation—Burden of proof—Vendee previous mortgagee—Rule that vendee must prove necessity applies only if plaintiff is entitled to challenge—Hindu Law.

The rule that a vendee who was also the previous mortgagee so far as certain items are concerned, is seized with peculiar knowledge, and it is for him to show that necessity existed for those items applies only if the plaintiff is entitled to challenge the alienations. [P 361 C 1]

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9. (1931) 135 I C 245.

(c) Custom (Punjab)—Alienation — Failure of consideration in part—Hindu Law.

Where only Rs. 1,722 out of Rs. 11,000 are not proved to have been for necessity, the sale must stand. [P 361 C 2]

Nand Lal and *Nihal Singh*—for Appellant.

Azimullah—for Respondent.

Harrison, J.—The plaintiff, Mukand Singh, is the only surviving son of the late Sardar Kartar Singh. He brought this suit challenging two alienations made by his father in 1915, the first dated 9th January 1915, being for Rs. 200 ,only and the latter dated 15th June 1915 being for Rs. 11,000. The defendant vendee is Hakim Waziruddin. The suit has been decreed regarding the first alienation for Rs. 200 and has been dismissed regarding the second. The plaintiff has appealed and the defendant has presented a cross-appeal. The plaintiff unfortunately has made his task very much more difficult by failing to have many relevant documents printed. The details of the consideration for the larger sale are given at pp. 27 and 28 of the paper book. Out of these it has been held that necessity has not been proved for Rs. 1,072, or roughly 1/10th of the total consideration. It has now to be seen whether counsel has succeeded in showing that any further items should be disallowed and, if so, whether the total of these items when added to Rs. 1,072, forms such a fraction of the total as to justify the nature of the deed being changed, that is to say, the sale being converted into a mortgage. At the very outset a point of importance arises regarding the previous mortgages. The learned Subordinate Judge has held as regards the first deed dated 16th May 1899 for Rs. 1,400 that at the time the alienation was effected no son of the late Sardar was in existence, and as it has not been shown that there was any other person alive who was capable of challenging the alienations, they became absolute and could not be challenged in this suit. Counsel has pointed out that there is a mistake regarding the dates of birth of the sons of Sardar Kartar Singh. The correct dates are as follows:

Mohindar Singh	born on	10th September	1898,
	died	28th October	1900.
Amar Singh	born on	27th September	1900,
	died	28th November	1901.
Bakhtawar Singh	born on	14th May	1903.
	died	13th January	1904.

The present plaintiff was born on 7th August 1905, and two younger sons born in 1912 and 1914 respectively have both died. One of these Harchand Singh was impleaded as a plaintiff at the time the suit was instituted but died while the case was proceeding. The plaintiff son Mukand Singh was not alive at the time of this alienation. The eldest son Mohindar Singh was. There being two definite gaps between the death of, Amar Singh and the birth of, Bakhtawar Singh, and the death of Bakhtawar Singh and the birth of Mukand Singh, and those gaps not being bridged over by the fact that the subsequently born son had been begotten or any reversioner, being shown to have been in existence, the question is whether the plaintiff can challenge the alienation merely in virtue of his elder brother having been in existence at the time of the alienation though he died in the following year. It appears to us quite clear that he cannot. Allowing the usual nine months, there was an interval of eight or nine months between the death of Amar Singh and the date on which Bakhtawar Singh was begotten; and similarly, there was an interval of eight or nine months between the death of Bakhtawar Singh and the begetting of Mukand Singh. It not being shown that there was a reversioner in existence during these intervals, the alienations could not be challenged during such intervals, and therefore no subsequently born person could possibly do so as the alienations had become indefeasible and absolute. For different reasons therefore from those given by the learned trial Judge we come to the same conclusion as regards item (a), that the present plaintiff cannot challenge it and this in spite of the fact that it was in vendee's own favour. Counsel relies on a Full Bench ruling *Jowala* v. *Hira Singh* (1). This ruling has nothing to do with the question and merely lays down that it is necessary that a reversioner in a position to challenge alienations should be in existence in order that a son begotten by the owner after the date of the alienations can contest the alienations.

Out of the total of Rs. 11,000, Rs. 7,000 represent prior mortgages. Two items representing cash payments have been disallowed in full and one item (n) has been allowed in part, the portion allowed being an old mortgage of the year 1896. Counsel contends that, as laid down in *Jhandu* v. *Niamat Khan* (2), the present vendee being also the previous mortgagee so far as

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1. (1903) 55 P R 1903=117 P L R 1903 (FB).
2. A I R 1920 Lah 279=54 I C 842=1 Lah. 472.

certain items are concerned, he is seized with peculiar knowledge, and that is is for him to show that necessity existed for these items. This will only be the case if the plaintiff is entitled to challenge the alienations, and as regards the alienation of 16th May 1899, he is not, for the reasons set out above. For the rest it is quite clear that a vast majority of the mortgages were in favour of other persons. Counsel also cited *Hari Singh* v. *Harnam Singh* (3). As this laid down it was the duty of the subsequent vendee to prove necessity for the previous mortgages in his own favour. The only such mortgage in this case was item (c) for Rs. 650. Counsel wishes us to hold that item (d) a mortgage-deed dated 9th October 1914, was also in favour of the vendee, and as showing this he relies on the evidence of Sundar Singh, D. W. 17. It is impossible for us to say whether this is correct as the document is not before us, and the statement of this witness merely deals with its contents. The record is by no means clear, and at an earlier stage of the argument it was contended that this document was in favour of one Badar Din, D. W. 8, who says that the land was mortgaged to him for Rs. 1,200, and that there were two mortgages for Rs. 800 and Rs. 400 respectively. The lower Court has held that this item represented a mortgage in favour of Badar Din, see p. 28 of the paper book. The reasons for holding that the balance of Rupees 250 was for necessity convinced the trial Judge and were not challenged in the course of arguments. The only possible item, therefore regarding which it can be said that there was no satisfactory evidence of necessity, is item (c) in favour of the vendee himself, Ex. D-5, for Rs. 650, and if this item be disallowed, it swells the total to Rs. 1,722 out of Rs. 11,000. The remaining items are, in our opinion, fully established both as to the passing of consideration and as to necessity for the same, they being just antecedent debts in favour of third parties. Taking the most favourable view possible to the plaintiff the total of Rs. 1,722 out of Rs. 11,000 are not proved to have been for necessity, and the sale must stand, and the appeal be dismissed with costs and I would order accordingly.

Agha Haidar, J.—I agree.

R.K. *Appeal dismissed.*

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3. A I R 1927 Lah 113=100 I C 269.

A. I. R. 1933 Lahore 361

BHIDE, J.

Malawa Mal—Decree-holder—Appellant.

v.

Sunder Singh — Judgment-debtor — Respondent.

Misc. First Appeal No. 697 of 1932. Decided on 17th January 1933.

(a) Civil P. C. (1908), S. 47—Order determining substantial question in regard to satisfaction of decree is appealable.

An assignee of a mortgage-decree sought to sell the land covered by the mortgage in execution of his decree. The judgment-debtor contended that the mortgagee had been in possession of the land and had realized more than the amount under the decree. The objection was upheld by the executing Court:

Held: the order was one which determined a substantial question affecting the rights of the parties in regard to the satisfaction of the decree and that it was appealable under S. 47, Civil P. C. [P 362 C 1]

(b) Civil P. C. (1908), O. 34, R. 5—Mortgagor can redeem before property is actually sold.

Even after the passing of the final decree, it is open to the mortgagor to redeem the property before it is actually sold: *A I R* 1920 *All* 136 and *A I R* 1922 *Pat* 92, *Rel on*; 31 *Cal* 863 and 25 *Mad* 244 (*F B*), *Ref.* [P 362 C 1]

(c) Civil P. C. (1908), O. 34, R. 5—Mortgagor's right to redeem after decree for sale —Amount to be paid is that mentioned in mortgage-decree.

Where a mortgagor wants to redeem the property after the decree for sale obtained by the mortgagee, he must pay the amount mentioned in the mortgage-decree for redemption. He cannot ask the mortgagee to account for the profits subsequent to the date of the decree for sale as the mortgagee is deemed to have given up all rights under mortgage after such decree. If the mortgagee has realized unlawfully anything, the mortgager may be entitled to recover the same by separate proceedings: *A I R* 1924 *P C* 206, *Ref.* [P 362 C 2]

Dev Raj Sawhney and *Balmokand Bhatia*—for Appellant.

Din Dial—for Respondent.

Judgment.—This is an appeal arising out of execution proceedings relating to a decree based on a mortgage. The material facts may be very briefly stated as follows: A preliminary decree under O. 34, R. 4, was passed in favour of one Dr. Paira Mal for Rs. 7,000, odd on 4th April 1928 and a final decree followed on 18th July 1928. The mortgage comprised certain shops and land. In execution, the shops were first sold and purchased by Malawa Mal, who had become entitled to a prior encumbrance on the shops by purchase of previous mortgagee's rights. Malawa Mal paid Rs. 5,441 to Dr. Paira Mal after deducting his prior charge of Rs. 21,000.

There was some dispute between Malawa Mal and Dr. Paira Mal as regards their respective claims, but eventually the matter was compromised and Dr. Paira Mal assigned his claim for the remaining balance of his decree (Rs. 4,143) to Malawa Mal. Malawa Mal then applied for execution of the balance of the decree thus assigned to him and sought to sell the land covered by the mortgage. The judgment-debtor raised various objections, claiming inter alia that the decree had been already satisfied (vide his application dated 6th October 1930). This application was rejected and the appeal to the High Court from that order also proved unsuccessful. The judgment-debtor thereafter raised an objection that the mortgagee had been in possession of the land and had realized more than the balance of the decree which was alleged to be still outstanding and hence the land could not be sold. The executing Court upheld this objection and directed that accounts should be taken for the purpose. From this order the present appeal has been preferred.

A preliminary objection was raised that no appeal was competent, but there does not appear to be any force in this objection. The order under appeal determined a substantial question affecting the rights of the parties in regard to the satisfaction of the decree and an appeal is, in my opinion, therefore competent under S. 47, Civil P. C. On merits, the learned counsel for the appellant has urged that the question of accounts could not be raised after the passing of the final decree and secondly that the matter was at any rate res judicata. As regards the first point, the learned counsel for the respondent made it clear that he wished to press the objection raised by his client only as regards profits enjoyed during the period subsequent to the passing of the final decree. This objection could not obviously be taken during the proceedings between the preliminary and final decrees. The learned counsel for the appellant urged that after the passing of the final decree the executing Court could not go behind the final decree and could only sell the property as directed by that decree and there could therefore be no question of going into accounts for the purpose of redemption thereafter. The learned counsel for the respondent on the other hand had contended that even after the passing of the final decree it is open to the mortgagor to redeem the mortgaged property before it is actually sold, by depositing the amount due to the mortgagee. In support of this argument the learned counsel relied upon *Mehdi Hasan* v. *Ismail Hasan* (1) and *A. I. R.* 1922 *Pat.* 92, which support his contention. Even under the corresponding old S. 89, T. P. Act, it was held that the sale of mortgaged property could be stopped by payment of the amount due with costs before the sale is actually effected: cf. *Bibijan Bibi* v. *Saghi Bewah* (2) and *Mallikarjunadu Shetti* v. *Lingamurthi* (3), but the position is clearer under O. 34, R. 5, Civil P. C., as pointed out in *Mehdi Hasan* v. *Ismail Hasan* (1), as the words "and thereafter the defendant's right to redeem and the security shall both be extinguished" occuring in S. 89 (old, T. P. Act, 1882, have been omitted in O. 34, R. 5, Civil P. C.

Taking it however that the mortgagor's right to redeem has not become extinct, the question still remains as to the amount of payment of which he is entitled to redeem the property. That amount has already been determined by the mortgage-decrees which directed a certain amount to be paid by a certain date and in default of payment by the said date, the mortgaged property to be sold. The contention of the respondent is that the mortgagee is still in possession of the mortgaged land through tenants and that he is liable to account for the profits of the land realized by him. Appellant denies that he has been in possession or has realized any such profits after the final decree. Besides this ,it seems that the appellant was not entitled at all to keep the mortgaged property or realize its profits after the decree for sale. It was held by their Lordships of the Privy Council in *Rameshwar Singh* v. *Hitendra Singh* (4) that once a holder of a mortgage-decree asks for and obtains a decree for sale, he must be deemed to have given up all rights under the mortgage. Consequently the profits of the mortgaged land could not be lawfully realized by the mortgagee after the decree for sale. The mortgagee has denied having realized any such profits and in any case the profits cannot be said to have been realized on the footing of the mortgage and the matter cannot therefore be gone into in these proceedings. If the mortgagee has unlawfully realized anything the respondent may be entitled to recover it

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1. A I R 1920 All 136=56 I C 172=42 All 517.
2. (1904) 31 Cal 863=8 C W N 684.
3. (1902) 25 Mad 244=12 M L J 279 (F B).
4. A I R 1924 P C 206=82 I C 794 (P C).

by separate proceedings and it would be open to him to take steps to do so, if so advised. I am therefore of opinion that the question of accounting for the profits of land cannot be raised at this stage in these proceedings. In view of the above finding it is unnecessary to discuss the question of res judicata. I accept the appeal and set aside the order of the learned Subordinate Judge directing inquiry into the question of the accounts of the profits of the land. In view of all the circumstances I leave the parties to bear their costs.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 363 (1)

JAI LAL, J.

Parma Nand—Plaintiff—Appellant.

v.

Notified Area Committee, Sheikhupura—Defendant—Respondent.

Second Appeal No. 1378 of 1932, Decided on 7th March 1933, from decree of Senior Sub-Judge, Sheikhupura, D/- 1st July 1933.

Civil P. C. (1908), S. 102—Suit to recover compensation for loss suffered on account of percolation of drain water is suit of small cause nature—Provincial Small Cause Courts Act (1887), Art. 35 (h) (ii).

A suit for recovery of Rs. 150, compensation for loss suffered by the plaintiff on account of negligent construction of drain by the defendant and consequent percolation of water under the foundation of the plaintiff's shop, is a suit of the nature of a small cause and hence second appeal is incompetent. Provincial Small Cause Courts Act, Art. 35 (h) (ii) does not help the plaintiff. [P 363 C 1, 2]

Mehr Chand—for Appellant.

H. C. Kumar—for Respondent.

Judgpent. — A preliminary objection that a second appeal does not lie in this case has force. The suit was for recovery of Rs. 150, compensation for loss suffered by the plaintiff on account of negligent construction of a drain by the defendant in the notified area of Sheikhupura in front of the plaintiff's shop. It was alleged that by the negligent manner in which the drain was built, the plaintiff's shop fell down. The Senior Subordinate Judge on appeal differed from the trial Court and held that the suit was barred by time, and the plaintiff has presented this second appeal.

The question is whether the suit is of the nature of a small cause or whether, as claimed by the appellant, it is an unclassed suit. The appellant contends that it is an unclassed suit because its cognizance by a Small Cause Court is barred by (h) (ii), Art. 35, Sch. 2, Provincial Small Cause Courts Act, which excepts from the jurisdiction of such Courts a suit for compensation for an act which is, or save for the provisions of Chap. 4, Penal Code, would be, an offence punishable under Chap. 17 of the said Code. No other clause is relied on by the appellant's counsel and apparently there is none. I do not think that the clause relied upon by him helps him. By no stretch of language the act of the Committee of the Notified Area in negligently constructing the drain in front of the plaintiff's house would fall within the definition of mischief as contained in the Penal Code. Damage to the plaintiff is alleged to have been caused by the negligent construction of the drain and the consequent percolation of water under the foundations of the shop. No direct authority is cited on either side, but the matter, in my opinion, admits of no doubt. I hold therefore that this second appeal is incompetent. I am not prepared to treat the memorandum of appeal as a petition for revision. The appeal is dismissed but I leave the parties to bear their own costs.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 363 (2)

TEK CHAND AND MONROE, JJ.

Mt. Chando and *another*—Appellants.

v.

Radha Sham and *others* — Respondents.

First Appeal No. 492 of 1926, Decided on 5th December 1932.

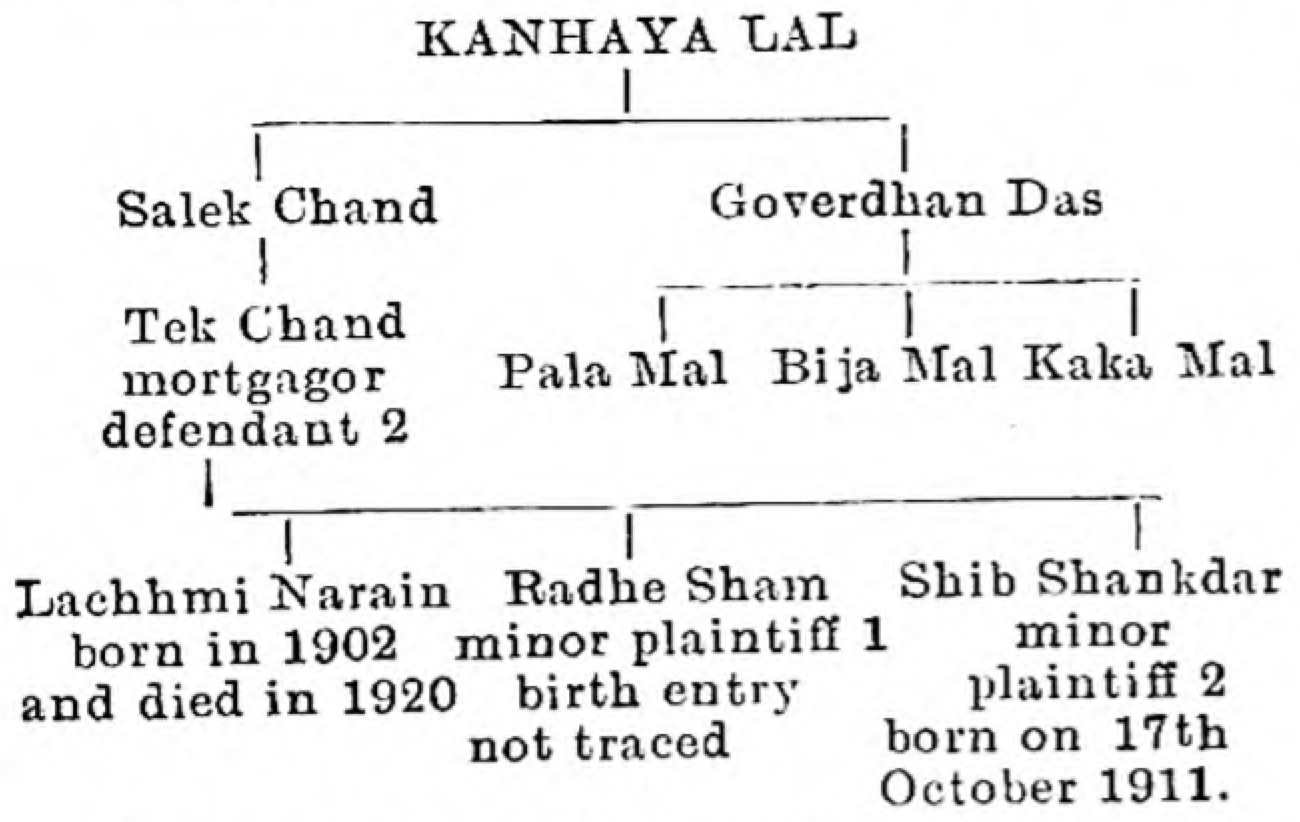
Hindu Law—Father—Alienation—Alienation of ancestral property challenged by sons on basis of immorality—Character of alienor at time of alienation only is relevant.

Where an alienation by a Hindu father of ancestral property is challenged on the basis of immorality the only point relevant to such dispute is the character of the alienor at the time when the alienation in question was made. Any evidence relating to his alleged immorality several years after that date cannot have any bearing on the issue. Every debt of an immoral person cannot be presumed to be immoral, and it is a settled proposition of Hindu law that in order to escape liability for a particular debt of the father, the son has to establish direct connexion between the debt and immorality: *A I R* 1928 *Lah* 83; *A I R* 1921 *Lah* 205 and 58 *P R* 1917, *Rel on.* [P 365 C 1, 2]

Kishan Dayal, Bishan Narain and *Ajit Prasada*—for Appellants.

J. N. Aggarwal and *S. L. Puri*—for Respondents.

Tek Chand, J. — The following pedigree table will be helpful in understanding the facts of this case:


KANHAYA LAL
Salek Chand
Goverdhan Das
Tek Chand mortgagor defendant 2
Pala Mal
Bija Mal
Kaka Mal
Lachhmi Narain born in 1902 and died in 1920
Radhe Sham minor plaintiff 1 birth entry not traced
Shib Shankdar minor plaintiff 2 born on 17th October 1911.

Salek Chand died early in the nineties of the last century leaving an infant son, Tek Chand. His cousins, Pala Mal and others, sons of Goverdhan Dass, took exclusive possession of the entire property, which consisted of several houses and shops and a flourishing drapery business at Delhi, and set themselves up as sole owners thereof. Accordingly on 15th March 1898, a suit was brought on behalf of Tek Chand, who was then a minor, against Pala Mal and his brothers, for partition of ancestral properties, dissolution of the family partnership and rendition of accounts. This suit was decreed by the chief Court on 7th December 1901; the partnership was dissolved and directions given for taking of accounts and partition of the immovable properties. Tek Chand did not however come into possession of the property for the judgment-debtors managed to keep the litigation alive in the execution department for thirteen long years, during which the case came up to the chief Court on no less than six occasions.

During the pendency of this litigation, on 15th February 1908, Tek Chand executed a deed of mortgage in favour of Jugal Kishore, husband of Mt. Raj Dulari, defendant 1, in respect of his half share in three houses, for which a decree had been passed in his favour, but of which possession had not been delivered to him. The deed was registered on 21st February 1908, when a sum of Rs. 4,807-8-0, was paid in cash by the mortgagee to the mortgagor before the Sub-Registrar and the mortgagor admitted receipt of the remaining Rs. 192-8-0. The principal sum was to carry interest at Re. 1-2-0 per cent per mensem and the term of the mortgage was fixed at six months, during which the mortgage was to be redeemed. On default the mortgagee could recover the amount due to him by sale of the mortgaged properties.

The mortgagor having failed to pay, Mt. Raj Dulari, widow of Jugal Kishore, who had died in the meantime, brought a suit on 15th March 1911, for recovery of the principal and interest due on foot of the mortgage by sale of the mortgaged properties. In this suit a preliminary decree for Rs. 8,003-4-10, was passed on 5th June 1911, it being ordered that out of the decretal amount Rs. 6,911-12-0, was to carry interest at Re. 1-2-0 per cent per mensem from the date of the suit till realization. The decree also provided that if the sale proceeds of the mortgaged properties were found insufficient to pay off the decretal amount in full, the decree-holder would be at liberty to apply for a personal decree for the balance against the judgment-debtor. Nothing having been paid during the time fixed, the decree was made final on 10th October 1912. The mortgaged properties were sold in due course but the judgment-debtor raised numerous objections, urging that the sale had not been properly published and conducted. Enquiry into this matter dragged on for several years; but eventually the objections were overruled and the sale confirmed.

This however opened another chapter in the litigation relating to these properties, for on 15th October 1922, the present action was started by Radhe Sham and Shiv Shankar minors, sons of the mortgagor, Tek Chand, for a declaration that the properties comprised in the mortgage, effected by their father in favour of Jugal Kishore, on 21st February 1908, were ancestral in his hands, that the mortgage had not been effected for full consideration and was without necessity, and was null and void against their rights. It was also alleged in the plaint that the plaintiffs' father was a person of immoral character, and that whatever consideration he had received from the mortgagee had been spent by him on immoral purposes. Tek Chand was impleaded as a defendant in the suit but he did not appear, and proceedings were ex parte against him. The suit was resisted by Mt. Raj Dulari. She denied that Tek Chand had led an immoral life or that the debt in question was tainted with immorality. She also pleaded that the mortgage had been effected for legal necessity and was binding on the plaintiffs; and that even if necessity for the mortgage could not be strictly proved, the plaintiffs' interest in the joint family properties had been validly sold in execution of a decree obtained against their father.

The learned Subordinate Judge was of opinion that there was evidence on the record that the mortgagor was a person of dissolute habits and had wasted a good deal of property in debauchery. He found however that there was no proof that the debt in question was tainted with immorality. He further held that necessity for the mortgage had not been established, and consequently he decreed the suit, granting the plaintiffs the declaration asked for. Mt. Raj Dulari, defendant, has preferred a first appeal to this Court and we have heard lengthy arguments from Mr. Kishan Dayal on behalf of the appellant and Mr. Jagan Nath Aggarwal for the plaintiffs-respondents. In the lower Court issues were raised as to the ancestral nature of the properties in dispute and the passing of the consideration. The learned Subordinate Judge decided the first point in favour of the plaintiffs and the second, of the defendant. These findings have not been challenged before us and the argument has proceeded on the assumption that the properties were ancestral and that full consideration had passed. The learned Subordinate Judge has not discussed at any length the evidence relating to the alleged immoral and dissolute habits of the mortgagor, and we find that his finding on this point is highly unsatisfactory. To begin with, he has observed that Tek Chand had apparently started litigation with his cousins, Pala Mal, etc.,

> "in order to find money from his own share of the estate for his immoral and extravagant pursuits."

There can be no doubt, that this is a gratuitous assumption, for which there is no justification whatever on the record. As stated already, the partition suit was started by Tek Chand's mother when he was an infant, and the occasion for the litigation was his wrongful exclusion from the joint family properties and the drapery business by Pala Mal and his brothers, who were denying that Tek Chand had a share in thim. Tek Chand himself was 12 or 13 years of age at the time and it is absurd to suppose that the suit had been brought with a view to find money for immorality in the future. Again, the learned Judge has not found that Tek Chand was leading an immoral life in 1908. It is hardly necessary to point out that what is relevant to the decision of the present dispute is the character of the alienor at the time when the alienation in question was made. Any evidence relating to his alleged immorality several years after that date, and when he had come into possession of his share in the joint proprcties after protracted litigation with his cousins, cannot have any bearing on the issue before us. Now, most of the witnesses produced by the plaintiffs impute immoral habits to the mortgagor in years subsequent to the mortgage. Mr. Jagan Nath Aggarwal has admitted that this is so, but he has referred us to the evidence of Mool Chand, (P. W. 10), Raghu Nath Sahai, (P. W. 12), Bansi Dhar, (P. W. 14) and Mt. Sundar Jan, (P. W. 24), who have deposed to his immorality at a time prior to 1908. Their evidence however is of the vaguest possible kind and is on the face of it unreliable. I hold therefore that it has not been proved that Tek Chand led an immoral life at or before the execution of the mortgage-deed.

It may further be pointed out that there is no proof whatever on the record, that the mortgage-debt in question was in any way tainted with immorality. Every debt of an immoral person cannot be presumed to be immoral, and it is a settled proposition of Hindu law that in order to escape liability for a particular debt of the father, the son has to establish direct connexion between the debt and immorality, *Ulfat Rai* v. *Tej Narain* (1) and *Ram Rattan* v. *Basant Rai* (2) and *Indar Narain* v. *Nanak Chand* (3), (pp. 206-7). (After weighing the evidence his Lordship held that the transaction was binding on the plaintiffs, under the circumstances and proceeded). In view of my finding on the question of necessity, it is not necessary to decide whether the suit is or is not within limitation. In my opinion, the plaintiffs have failed to establish their claim. I would accordingly accept the appeal, reverse the judgment and decree of the learned Subordinate Judge and dismiss the plaintiffs' suit with costs throughout.

Monroe, J.—I agree.

V.S. *Appeal allowed.*

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1. A I R 1928 Lah 83=106 I C 176=8 Lah 632.
2. A I R 1921 Lah 205=64 I C 121=2 Lah 263.
3. (1917) 58 P R 1917=32 I C 454.

A. I. R. 1933 Lahore 365

TEK CHAND AND MONROE, JJ.

Partap Chand and *others*—Appellants.

v.

Mt. Makhni and *others*—Respondents.

Civil Appeal No. 2983 of 1926, Decided on 7th December 1932.

(a) Hindu Law—Widow—Absolute estate conferred by will—Gift over does not curtail it.

If an estate is given in terms which confer an absolute estate on the donee and then further interests are given merely after, or on the termination of, that donee's interest, his absolute interest is not cut down and the further interests fail. [P 368 C 2]

Where the intention of the testator is manifestly to confer absolute estate on donees who were Hindu widows with full powers of alienation a gift over will not curtail it: *A I R* 1921 *Lah* 11 and *A I R* 1929 *Cal* 801, *Ref.* [P 368 C 2]

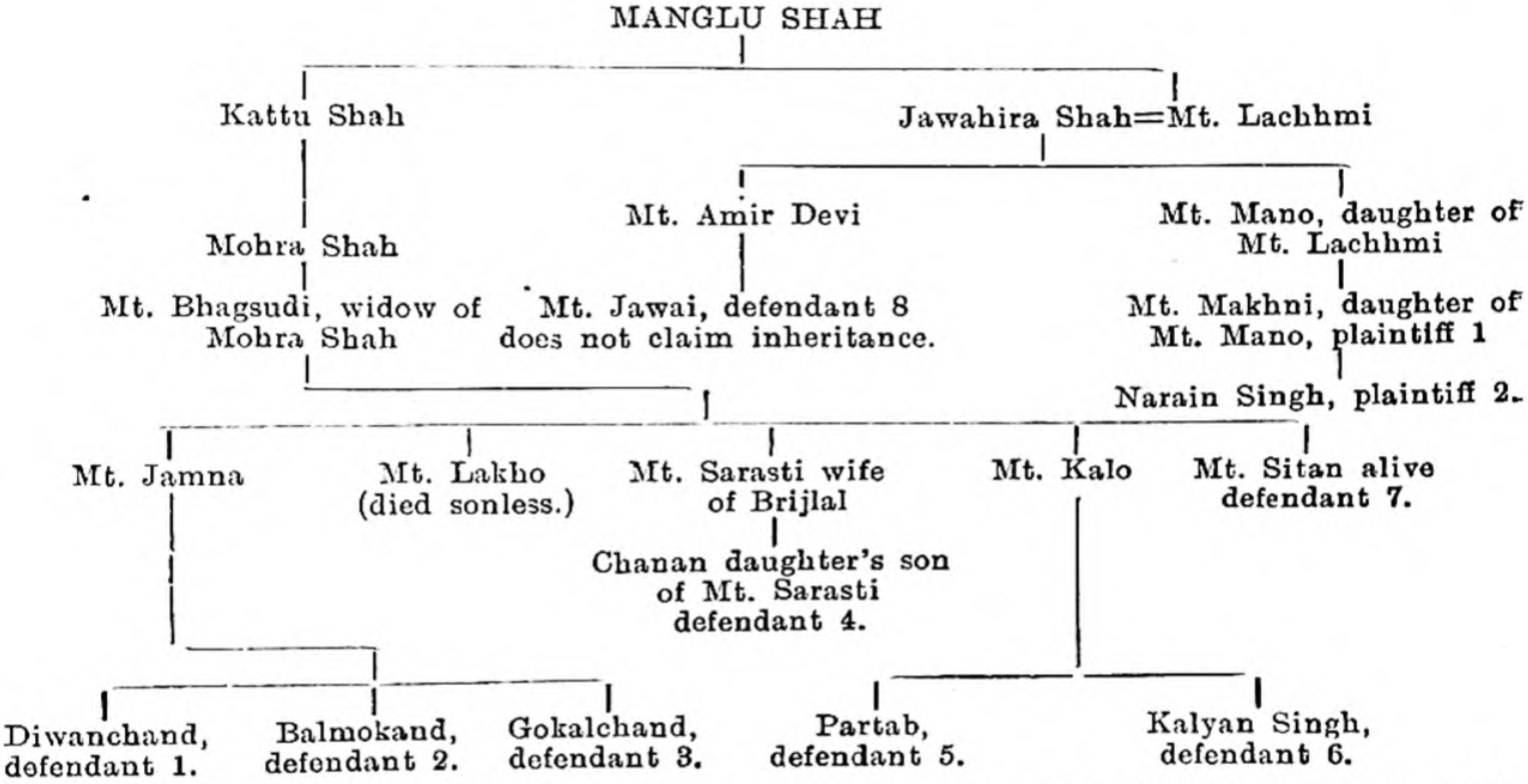
(b) Civil P. C. (1908), O. 9, R. 9—Condition of applicability.

In order to make O. 9, R. 9 applicable, it is necessary to show (1) that the subsequent suit is instituted by the same plaintiff or by person claiming under him and (2) that the cause of action is the same. [P 368 C 2]

J. N. Aggarwal and *Bhagat Govind Das*—for Appellants.

Kishan Dayal, *Bhagat Dayal*, *Bishen Narain* and *Din Dayal Kapur*—for Respondents.

Tek Chand, J.—In order to understand the facts of this case it is necessary to refer to the following pedigree-table:


MANGLU SHAH
Kattu Shah
Jawahira Shah=Mt. Lachhmi
Mt. Amir Devi
Mt. Mano, daughter of Mt. Lachhmi
Mohra Shah
Mt. Bhagsudi, widow of Mohra Shah
Mt. Jawai, defendant 8 does not claim inheritance.
Mt. Makhni, daughter of Mt. Mano, plaintiff 1
Narain Singh, plaintiff 2.
Mt. Jamna
Mt. Lakho (died sonless.)
Mt. Sarasti wife of Brijlal
Mt. Kalo
Mt. Sitan alive defendant 7.
Chanan daughter's son of Mt. Sarasti defendant 4.
Diwanchand, defendant 1.
Balmokand, defendant 2.
Gokalchand, defendant 3.
Partab, defendant 5.
Kalyan Singh, defendant 6.

Kattu Shah and Jawahira Shah, sons of Manglu Shah, were well-to-do Khatris of Thatha, tahsil Pindigheb, Attock District. Jawahira Shah was sonless but had two daughters, Mt. Mano and Mt. Amir Devi, from his wife Mt. Lachhmi, Kattu Shah had a son Mohra Shah who was married to Mt. Bhagsudi. Mohra Shah predeceased his father and uncle. The exact date of his death is not known but all parties are agreed that he had died some time before 1883. He had no son, but left him surviving five daughters, Mt. Jamna, Mt. Lakho, Mt. Sarasti, Mt. Kalo and Mt. Sitan. Of these Mt. Sitan alone is alive and is defendant 7 in the case. The other daughters are represented by their descendants, defendants 1 to 6. A few years after Mohra Shah's death, Jawahira Shah also died in 1884. His widow Mt. Lachhmi and his daughters Mts. Mano and Amir Devi continued to live amicably with Kattu Shah till his death in 1892. On 21st August 1889, Kattu Shah had executed a will (Ex. P-26) which is printed at pp. 70 to 72 of the paper-book. This will was duly registered on 22nd August 1889. I shall discuss its terms in a later part of the judgment, it will suffice to say here that under its terms the family properties were bequeathed to Mr. Lachhmi, widow of Jawahira Shah and Mt. Bhagsudi, widow of Mohra Shah in equal shares. The plaintiff's case is that under the terms of the will, each of the two widows became absolute owner of the share in the properties which was devised to her, and possessed full power of disposition over it. The defendants contend, on the other hand, that Mt. Lachhmi and Mt. Bhagsudi got life estates only.

Three years after the execution of the will, Kattu Shah died, leaving extensive moveable and immovable property and a flourishing business at Peshawar and Hassan Abdal, and on his death the two legatees, Mt. Lachhmi and Mt. Bhagsudi, entered into possession in accordance with the terms of his will. They seem to have lived amicably for some years, but later on relations between them grew somewhat strained. On 3rd February 1907, Mt. Lachhmi, purporting to act as absolute owner of her half-share in the moveable and immovable properties, under the bequest made by Kattu Shah, executed a will (Ex. P-27) by which she devised her entire share to her daughter Mt. Mano for her life without any power of alienation and after Mt. Mano's death to her daughter Mt. Makhni (plaintiff No. 1) and Mt. Makhni's son Narain Singh (plaintiff 2) as owners. This will was registered on 5th February 1907, and Mt. Lachhmi died seven years later on 17th April 1914. It is alleged by the plaintiffs that on Mt. Lachhmi's death effect was given to her will, and and Mt. Mano remained in joint possession of the properties with the other cosharer Mt. Bhagsudi till 1922 when Mt. Bhagsudi died. Mt. Mano also died a year later, and on her death the entire property was taken possession of by defendants 1 to 7, who are the descendants of Mt. Bhagsudi. Acccordingly on 18th July 1924, the plaintiffs Mt. Makhni and Narain Singh, brought the present suit against defendants 1 to 7 for joint possession as owners of ½ of the various properties mentioned in the plaint. They also sued for recovery of their ½ share of the debts which were alleged to be due by defendants 11 to 20 to Mt. Lachhmi and Mt. Bhagsudi as per details set out at length in the heading of the plaint. The plaintiffs based their claim on (1) the will of Kattu Shah, dated 21st August 1889, whereby they averred, he had bequeathed ½ of the family estate of his brother Jawahira Shah's widow, Mt. Lachhmi as absolute owner and (2) the will of Mt. Lachhmi by which she had devised her entire share to Mt. Mano for her life and on Mt. Mano's death to the plaintiffs in full ownership.

The suit was resisted by defendants 1 to 7 on various grounds, most of which are not in dispute in appeal. The main defence raised by these defendants was that Kattu Shah's will conferred only a life estate on Mt. Lachhmi in ½ of the family properties and that she had no power to make a valid bequest to the plaintiffs. It was further pleaded that the suit was barred under O. 9, R. 9, Civil P. C., by reason of the dismissal in default of a suit which Mt. Mano had instituted against Mt. Bhagsudi for a declaration in 1914. Some of the debtor-respondents denied that anything was due by them to Mt. Lachhmi and Mt. Bhagsudi; others pleaded payment in full to Mt. Bhagsudi; while some others stated that they would pay to the person declared by the Court to be the rightful successor-in-interest of the two ladies. The learned Sub-Judge held that, on a true interpretation of the will of Kattu Shah, Mt. Lachhmi had been made absolute owner of ½ of the properties and that therefore she could not make a valid bequest in favour of the plaintiffs. He further held that the present suit was not barred by reason of the dismissal of Mt. Mano's suit in 1914, the causes of action in the two suits being entirely different. He accordingly passed a decree in favour of the plaintiffs against defendants 1 to 7 for joint possession of the properties in dispute, except certain goods and ornaments which were not proved to have been in possession of defendants 1 to 7. The learned Judge also decreed the claim for Rs. 6,190 against Ram Chand, defendant 12, but dismissed the suit against the other debtor-defendants.

Against this decree two appeals have been lodged in this Court: (1) C. A. No. 2983 of 1926 by defendants 1 to 7 praying for total dismissal of the suit; and (2) C. A. No. 965 of 1927 by the plaintiffs asking for a decree against defendant 16 (Firm Mohkam Chand-Radha Kishen) and defendant 20 (Firm Mohar Chand-Daswandi) for Rs. 12,000 and Rs. 2,500 respectively. The main question for determination in the defendant's appeal is whether the will of Kattu Shah (Ex. P-26) conferred full ownership or a mere life-estate in the half-share in the properties which he had bequeathed to Mt. Lachhmi. The will is not a very artistically drawn up document but a careful perusal of its terms leaves no doubt as to its meaning. In para. 1 the testator, after stating that he was childless recited the fact that on 14 Chet 1940 (26th March 1883) he and Jawahira Shah had made a will in the presence of the brotherhood to the effect that Mts. Lachhmi and Bhagsudi were "the proprietors of our property." He then proceeded to say that as Jawahira Shah had since died and he had become the sole owner of the property he made his last will and testament that "Mts. Bhagsudi and Lachhmi shall be considered as owners "(malik)" of my entire moveable and immovable property in equal half-shares." He next referred to certain oral gifts of cash, ornaments and certain other moveables which he had already made in favour of the widows and declared as follows:

> "'The above mentioned ladies will be owners (malik) in equal shares of the rest of the property i. e., money due from others, herd of cattle, camels, etc., the immovable property which I have got at present and the amounts due from certain persons as agents regarding which bonds were secured from them. They will also enjoy full powers to alienate them.' He then made provision for certain charities and funeral expenses and wound up the document by stating that 'even if no other writing is made after the execution of this will, after the death of Mt. Bhagsudi and Lachhmi, their daughters, shall be the heirs to, and owners in equal shares of, the property of every description. No other descendant, etc., shall have any claim thereto. Mt. Bhagsudi shall exercise her rights over her half-share, while Mt. Lachhmi will live with her. After the death of Mt. Lachhmi, her daughters, Mt. Mano and Amir Devi, shall he regarded as ownwers'."

It is conceded by the learned counsel for the appellant that the only interpretation, which according to well-settled rules of construction of Hindu wills, can be placed on the clauses in the will declaring that the two ladies shall be the owners "of his properties and that they shall enjoy full power to alienate them," is that the testator conferred an absolute estate on them. He contends however that these clauses should be read along with the last clause in which the testator provided that on the death of Mt. Lachhmi and Mt. Bhagsudi their daughters shall be the heirs and owners. From this it is sought to be argued that the real intention of the testator was to give half of his property to each of the widows for her lifetime and on the death of each widow, her share was to devolve absolutely on her daughters. In my opinion this contention is without force and must be rejected. After a careful persual of the will as a whole, I have no doubt that the provision in the last clause, relating to the gifts to the daughters, is not in defeasance of the absolute estate conferred on the two widows in the earlier clauses, but is a "gift over" of the property of each widow on the termination of her right. If this is the correct interpretation of the will, there can be no doubt that the "gift over" is void and must be considered as nonexistent in the eye of the law. The proposition of law is firmly established that if an estate is given in terms which confer an absolute estate on the donee and then further interests are given merely after, or on the termination of, that donee's interest, his absolute interest is not cut down and the further interests fail: *Mohan Lal* v. *Niranjan Das* (1) and *Sures Chandra Palit* v. *Lalit Mohan* (2) and the rulings cited therein. See also to the same effect: *Bipradas Goswami* v. *Chandra Banerji* (3). I hold therefore that Mt. Lachhmi took an absolute interest in the half-share of the properties left by Kattu Shah and that she was competent to bequeath it to her daughter Mt. Mano for her life and then to the plaintiffs absolutely.

Mr. Jagu Nath concedes that on this finding the present suit is not barred under O. 9, R. 9, Civil P. C., by reason of the dismissal in default of a former suit which Mt. Mano instituted against Mt. Bhagsudi in 1914. In order to make that rule applicable, it is necessary to show (1) that the subsequent suit is instituted by the same plaintiff or person claiming under him and (2) that the cause of action is the same. In the present case neither of these essential elements exists. The previous suit was instituted by Mt. Mano. who was in possession for her life under the will of Mt. Lachhmi. The present suit is by her daughter and daughter's son, who have an independent title of their own as persons entitled to succeed on the death of Mt. Mano. The former action was one for declaration by Mt Mano who was in joint possession of the property with Mt. Bhagsudi and the alleged cause of action was a certain doubt alleged to have been cast on her title. The cause of action for the present suit arose on Mt. Mano's death when defendants 1 to 7 took exclusive possession of the entire property and resisted the plaintiffs, who are owners of half of the properties, to enter into joint possession. O. 9, R. 9, therefore does not bar the suit and the plea was rightly rejected by the learned Subordinate Judge). (The rest of the judgment is not material for this report).

K.S. *Appeal allowed.*

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1. A I R 1921 Lah 11=60 I C 619=2 Lah 175.
2. (1915) 31 I C 405.
3. A I R 1929 Cal 801=120 I C 810=56 Cal 790.

A. I. R. 1933 Lahore 369

SHADI LAL, C. J. AND BROADWAY, J.

Hazura Singh and *another*—Plaintiffs—Appellants.

v.

Kishen Singh—Defendant—Respondent.

Letters Patent Appeal No. 96 of 1928, Decided on 20th February 1933.

Punjab Limitation (Custom) Act (1 of 1920), Art. 1—Applicability—Property in suit must be ancestral qua plaintiff.

In order to make Art. 1, Punjab Limitation Act, applicable it must be shown that the property in suit was ancestral *qua* the plaintiffs, and until that has been shown the ordinary rules of limitation as laid down in the Limitation Act are not departed from. [P 369 C 2]

Mukund Lal Puri—for Appellants.

Jagan Nath Aggarwal—for Respdt.

Broadway, J.—One Man Singh, a Jat, residing in Mauza Bhiri in the Samrala tahsil of the Ludhiana District had four sons, Sundar Singh, Kishan Singh, Dewa Singh and Ganda Singh. Ganda Singh and Dewa Singh died without issue, Dewa Singh leaving a widow, Mt. Indar Kaur, who succeeded to her husband's property. She died in 1918. On 26th April 1926 Hazura Singh and Basant Singh, sons of Sundar Singh, instituted a suit against their uncle Kishan Singh for possession of half of the property left by Dewa Singh. In the plaint it was alleged that Kishan Singh was a trespasser in possession but that he alleged he was holding under a gift made to him by Mt. Indar Kaur. It was further alleged that Mt. Indar Kaur had no right whatever to make this gift. The suit was contested on various grounds, one of the pleas raised being that the claim was barred by limitation. The trial Court granted the plaintiffs a decree, holding inter alia that the suit was within limitation, inasmuch as it had been brought within 12 years of the death of Mt. Indar Kaur when the succession opened out and that Punjab Act 1 of 1920 was not applicable.

An appeal by Kishan Singh to the District Judge proved successful, the learned District Judge holding that prima facie the provisions of Punjab Act 1 of 1920 applied and that it was the duty of the plaintiffs to prove that the property in question was non-ancestral and that therefore the Punjab Act had no application. It was accordingly held that the claim was barred by limitation.

The plaintiffs thereupon preferred a second appeal to this Court, which came up before Jai Lal, J., who agreed with the learned District Judge and maintained the dismissal of the plaintiffs' suit on the ground that it was barred by limitation. At the same time he granted the plaintiffs a certificate as he considered that the meaning of the term "ancestral" as used in the Punjab Act was a debatable question. Armed with this certificate the plaintiffs have preferred this appeal under Cl. 10, Letters Patent, and the point for determination is, whether the suit is governed by the provisions of the Limitation Act or by the special provisions of the Punjab Limitation Act 1 of 1920. Admittedly if the former Act applies the suit is within time and if the latter is applicable the suit is barred.

A reference to the Punjab Act clearly shows that it relates only to ancestral immovable property and the appointment of heirs by persons who follow custom in the Punjab. In order to make it applicable it must be shown that the property in suit was ancestral qua the plaintiffs, and until that has been shown the ordinary rules of limitation as laid down in the Limitation Act are not departed from. A reference to the plaint in this case shows that no averments were made as to the property being ancestral. In the written statement no plea appears to have been taken that the property was ancestral, although there can be no doubt that at the time of arguments it was alleged that the property was of that nature inasmuch as the Punjab Act 1 of 1920 was obviously referred to. It has been held by the learned District Judge that it was for the plaintiffs to prove that the property was non-ancestral. No finding has been arrived at as to whether the property is or is not ancestral and when the learned District Judge came to the conclusion that it was for the plaintiffs-appellants to prove the non-ancestral nature of the land in question. I consider that the learned District Judge should have given the plaintiffs an opportunity of discharging that onus. I would therefore accept this appeal and remand the case to the learned District Judge with a direction that he should decide the question as to whether the property was ancestral or not taking such evidence, if necessary, as the parties may desire to produce. Parties to bear their own costs in this Court.

Shadi Lal, C. J.—I concur.

V.S. *Case remanded.*

A. I. R. 1933 Lahore 370

BHIDE, J.

Court of Wards, Bhabaur Estate—Defendant—Appellant.

v.

Bakhtawar Khan and *another*—Defendant and Plaintiff—Respondents.

Second Appeal No. 1641 of 1931, Decided on 5th December 1932, from decree of Senior Sub-Judge, Hoshiarpur, D/- 6th June 1931.

(a) Punjab Court of Wards Act (1903), S. 19—If intention to lodge suits is made clear notice is valid.

The object of a notice to Court of Wards is to give the public officer concerned an opportunity to reconsider his legal position and to settle the claim if so advised, without litigation and if the notice substantially fulfils this object it must be held to be sufficient. Hence where in a notice the intention to lodge a suit is made clear, minor defects in the form will not invalidate the notice: 24 *Mad* 279 and 27 *Bom* 189, *Ref.* [P 370 C 2]

(b) Civil P. C. (1908), S. 100—Second appeal—Finding of fact.

A finding of fact cannot be challenged in second appeal. [P 371 C 1]

(c) Limitation Act (1908), Art. 120—Suit for declaration of right—Plaintiff proving obstruction within three years before suit—Onus is on defendant to prove that suit is time barred.

Where a plaintiff, in a suit for declaration of a right to graze cattle over certain lands, proves that he was obstructed in the enjoyment of his right within three years before suit, the onus is shifted on to the defendant; and he has to show, in order that the suit may be time barred that such obstruction took place more than six years before the suit. [P 371 C 1]

(d) Custom (Punjab)—Grazing rights—Proprietor is entitled to cultivate out of banjar if sufficent area is left behind for grazing.

Grazing rights are merely in the nature of bartan or user and all that the persons having such rights can claim is a reasonable area for their requirements, so long as there is sufficient area left for the grazing requirement of persons having grazing rights the proprietors are at liberty to cultivate or enclose areas out of the banjar: 119 *P R* 1889 and 100 *P R* 1881, *Rel on.* [P 372 C 1]

Fakir Chand—for Appellant.

Bakshi Sohan Lal—for Respondents.

Judgment.—Second Appeals Nos. 1604 and 1641 of 1931 arise of suits, in which the material facts were practically the same and it will be convenient to dispose of these together. The plaintiffs in these suits are the illegitimate descendants of Rai Ratan Chand, who was the original owner of the bangarh in the Hoshiarpur District. The first suit was instituted by one of them only viz., Partapa, but two more were joined as plaintiffs during the pendency of the suit. The second suit was instituted later by some of the other illegitimates descendants of Ratan Chand. In both the suits the plaintiffs sought for a declaration as regards their right to graze cattle, to take fuel and grass etc., from certain banjar land in the village and to build houses in the abadi. The estate of Rai Ratan Chand has been under the management of the Courts of Wards for many years and the contesting defendant in both the suits was the Court of Wards. The suit was dismissed by the trial Court but on appeal the learned Senior Subordinate Judge has granted them decrees, from which the present appeals have been preferred, by the Court of Wards.

The appellant, Court of Wards, had taken a preliminary objection that the notices of suits given to the Court of Wards were defective and as this point is pressed before me also I shall deal with it. The notices are challenged on three grounds, viz., (1) that the names of two of the plaintiffs in the first suit referred to above do not appear in the notices, (2) that the names of the pro forma defendants, with whom some of the reliefs were claimed in common were not given in the notices and lastly that (3) it was not specifically mentioned in the notices that the plaintiffs were going to lodge a suit. There does not seem to be force in any of these grounds. The object of a notice in such cases is to give the public officer concerned an opportunity to reconsider his legal position and to settle the claim if so advised, without litigation; and if the notice substantially fulfils this object it must be held to be sufficient: cf. *Secy of State* v. *Perumal* (1) and *Jehangir* v. *Secy of State* (2). As to the first ground it was urged that the notice in one of the suits (Suit No. 199 of 1927) was given by Partapa only, while there were two other plaintiffs in that suit. But the suit was instituted by Partapa alone and two other persons were joined as plaintiffs later, with the permission of the Court. The plaintiff was claiming the rights only in common with certain other persons who were made pro forma defendants and out of the latter two were joined as plaintiffs. The fact that the plaintiff was claiming the rights in common with certain other persons or classes of persons was made clear in the notice, and I do not think the fact that no notice had been given by the two persons who were joined as plaintiffs in the course of the suit can in the circumstances, be treated as a ma-

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1. (1901) 24 Mad 279=11 M L J 117.
2. (1903) 27 Bom 189=5 Bom L R 30.

terial irregularity sufficient to invalidate the notice so far as these two plaintiffs are concerned. As to the second ground, the notices in both the suits stated that the rights in dispute were claimed in common with other persons as stated above and the mere fact that the names of all these persons were not mentioned also does not seem to be of any consequence. As regards the last ground, the notices purported to be given under S. 19, Punjab Court of Wards Act. This section deals with notices of intended suits. It was also stated in the notices that the manager of the Court of Wards had denied the rights in dispute and hence the notices were given. It must thus have been clear that the plaintiffs intended to lodge suits. There is thus no substance in any of the defects pointed out and they cannot therefore be considered to be sufficient to invalidate the notices.

The next point argued was that the suits were time-barred. It was urged that the initial onus was on the plaintiffs to show that cause of action arose within six years prior to the suits—the article governing the period of limitation being admittedly Art. 120, Limitation Act. The learned Senior Subordinate Judge has, in this respect, believed the plaintiffs' evidence that the plaintiffs were obstructed in the exercise of their rights only about three years before the suits. This was sufficient to shift the onus to the defendant. It has been held further that the defendant had failed to prove that such obstruction was occurred at any time more than six years before the suits. This is a finding of fact, which cannot be challenged in second appeal and in view of it, the suits cannot be held to be time-barred. On merits, the learned counsel sought to challenge the learned Senior Subordinate Judge's decree only in two respects. It was urged: (1) that the decree was vague inasmuch as it does not specify the rakh numbers, in which the plaintiffs were held to be not entitled to graze their cattle and (2) that the learned Senior Subordinate Judge's interpretation of Cl. 19 (4) of the Wajibularz of Sambat 1926 was not correct.

As to the first point, it would appear from the decree sheet that the plaintiffs claimed that only khasra Nos. 1735 to 1741 were reversed as rakh and the decree obviously refers to those as the rakh numbers. The appellant had no doubt alleged that the whole of the ban banjar was reserved but this allegation was not accepted as correct. The matter does not however seem to be of much importance. For, the mere fact that certain numbers are reserved at present does not mean that the proprietors cannot reserve or cultivate any more area. The learned Senior Subordinate Judge has made this clear by a reference to *Hira* v. *Nathu* (3), wherein it was pointed out that so long as there is sufficient area left for grazing requirements of persons having grazing rights (like those of the plaintiffs in the present case) the proprietors are at liberty to cultivate or enclose areas out of the banjar in question. The next point related to the interpretation of Cl. 19 (4) of the Wajibularz of 1926 (Sambat). The relevant portion of this clause runs as follows:

> "Out of all occupancy tenants Shiaman, Totu Pahu, Labhu and Dalipa have been given the right to store their grass and fuel in banjar adjacent to their fields. In that land they will be entitled to reserve land and to plant trees and cut them. No other tenant has any "bartan" in this "ban banjar.""

Shiaman, etc., were the illegitimate sons of Rai Ratan Chand, who as stated already was the sole proprietor of the village. These persons were made occupancy tenants in Sambat 1926 and at the same time certain rights in the "ban banjar" seem to have been conferred on them. The learned counsel for the appellant contended that a specific area of the ban banjar was allotted to these persons for the exercise of their rights referred to in Cl. 19 (4), that they were subsequently made proprietors of the area so allotted and that consequently they cannot now claim to have any such rights in the ban banjar. This contention obviously involves questions of fact and is not a mere question of interpretation of Cl. 19 (4) of the Wajibularz. The learned counsel for the appellant, though repeatedly questioned, confessed his inability to point out any clear evidence on the record to show that any specific banjar area was allotted to Shiaman etc., in Sambat 1926, for the exercise of the rights referred to in Cl. 19 (4) and that they were subsequently made proprietors of that banjar area. The evidence to which he referred only goes to show that these persons were subsequently made proprietors of the area of which they were originally occupancy tenants. It cannot therefore be said that the learned Senior Subordinate Judge has overlooked any material evi-

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3. (1889) 119 P R 1889.

dence in arriving at his finding against the appellant on this point.

The last contention of the appellant's counsel was that the rights conferred by Cl. 19 (4) are too vague and indefinite and would nullify the rights of the appellant in the ban banjar. He therefore argued that these rights should be interpreted and defined clearly and a definite area specified for the rights. As regards the nature of the rights it seems clear that the rights are merely in the nature of bartan or user and all that the plaintiffs can claim is a reasonable area for their requirements. This was conceded by the learned counsel for the plaintiffs also. Further it seems clear from Cl. 19 (4) that only those persons will be entitled to claim the privilege conferred by this clause, who have any land adjoining the banjar in question. The principles laid down in *Nagina* v. *Baggu* (4), *Hira* v. *Nathu* (3), in respect of the grazing area will, I think, govern these rights also. In para. 138 of Rattigan's Digest it is remarked that Malik Qabzas have some times the right of user or grazing, wood and grass to the extent of their personal wants and the present case appears to be of this type. As in the case of grazing area, the plaintiffs cannot complain so long as there is reasonable area left for their reasonable personal requirements as cultivators in the village. The learned counsel's request that a specific area may now be demarcated for the purpose seems however to go beyond the scope of the suits. The learned counsel for the plaintiffs-respondents stated that his clients were willing to have such area demarcated. But this must I think, be left to be done by mutual agreement or through the revenue officers as may be practicable. The appeals fail and are dismissed with costs.

K.S. *Appeals dismissed.*

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4. (1881) 100 P R 1881.

A. I. R. 1933 Lahore 372

JAI LAL, J.

Beant Lal and *others*—Decree-holders—Appellants.

v.

Mt. Nihal Devi—Judgment-debtor—Respondent.

Misc. First Appeal No. 1360 of 1932, Decided on 6th January 1933, from order of Sub-Judge, First Class, Lahore, D/- 1st August 1932.

Civil P. C. (1908), O. 21, R. 18—Decree to be adjusted by set off should be capable of execution at time of adjustment.

According to O. 21, R. 18 a decree to be adjusted by set off must be capable of execution at the time when the adjustment is made. [P 373 C 2]

When a decree for maintenance is passed payable partially immediately and partially periodically in favour of a woman and another decree is passed against her in favour of those against whom decree for maintenance is passed, instalments of maintenance which are to become due subsequent to the date of adjustment cannot be adjusted by set off. Only those instalments which are due and which can be executed on the date of adjustment can be adjusted by set off. [P 373 C 2]

Mathra Das—for Appellant.

Jhanda Singh—for Respondent.

Order.—A decree for costs was passed against Mt. Nihal Devi in favour of Pala Mal, Gokal Chand and Munshi Ram and a decree was passed in favour of Mt. Nihal Devi, against the same persons for maintenance which was to be paid to her partially immediately and partially periodically. Some time before March 1928 both parties executed their respective decrees and the Court directed on 27th March 1928, that the amount due to Mt. Nihal Devi on that day be adjusted against the larger amount of the decree which had been passed against her. Consequently on 27th March 1928, the applications for execution made by both parties were consigned to the record room. On 7th March 1931, Mt. Nihal Devi, made an application for execution of the decree for maintenance in her favour against legal representatives of Pala Mal and others, the amount claimed by her up to that date being Rs. 1,163. The judgment-debtors claimed that the decree in favour of Mt. Nihal Devi, had been satisfied by the adjustment made on 27th March 1928, and having failed in this plea they made an application on 12th May 1931 for execution of their own decree. The previous application for adjustment in which they had ultimately failed was made on 16th April 1931. The executing Court held that the application of 12th May 1931 was barred by time and consequently the amount due to Mt. Nihal Devi, on her decree could not be adjusted against a decree which had been obtained by Pala Mal, Gokal Chand and Munshi Ram. Against this order the present appeal has been lodged by the legal representatives of these three decree-holders. They are Beant Lal, who is a minor, and his three minor brothers, Sohan Lal, Girdhari Lal and Lal Chand who are all sons of Gokal Chand and also Labha Ram, a son of Munshi Ram, who also is a minor. Beant Lal professes to execute the decree as guardian of these minors.

The executing Court has held that Beant Lal being the managing member of the joint Hindu family, of which the minors are members is competent to give a valid discharge in respect of the decree and that the application of Beant Lal to execute the decree is barred by time and therefore the minor cannot claim an independent period of limitation for executing the decree. The view of the Court below that Beant Lal and the minor legal representatives, whom he professes to represent in the execution proceedings, are members of a joint Hindu family is correct. In the first instance there is a presumption to that effect in the present; and secondly it appears that in the proceedings for execution Beant Lal had definitely stated that he is the manager of a joint Hindu family consisting of himself, his minor brothers and Labha Ram, and for this reason the distinction drawn by the learned Judge between the present case and *Letchmana Chetty* v. *Subbiah Chetty* (1) is justified.

The learned Judge below however has made no inquiry as to the truth or otherwise of the assertion of Beant Lal that he attained his age of majority on 1st June 1929, as made by him in his application for execution made on 12th May 1931. If this allegation is true then it is conceded by the learned counsel for the respondent that the present application for execution of the decree could not be held to be barred by time. In order therefore to dispose of the appeal finally it is necessary to ascertain the date on which Beant Lal attained his age of majority. It would be convenient to state that there is no force in the contention of the appellants' counsel that when the previous execution proceedings were consigned to the record room on 27th March 1928 the entire amount due to Mt. Nihal Devi on her decree to the extent of the decretal amount due to Pala Mal, Gokal Chand and Munshi Ram on their decree had been adjusted. In other words that the Court intended that the instalments of maintenance which were to become due to Mt. Nihal Devi after 27th March 1928, were also adjusted against the decree which had been passed against her and that therefore she could not take out execution in respect of such instalments so long as any portion of the decree in favour of the appellants remained due. This contention is clearly against the provisions of O. 21, R. 18, which applies to the adjustment of decrees. According to that rule a decree to be adjusted should be capable of execution at the time when the adjustment is made.

Also there is no force in the contention of the appellants' counsel that adjustment should be deemed to take effect from the date of the respective decrees. Whatever may be the rule as to a set off in a case of ordinary debts, the question of adjustment of the decrees must be decided with reference to the provisions of the Civil Procedure Code, O. 21, R. 18, and that rule, as I have already stated, does not support the contention of the appellants. I hereby remand the case under O. 41, R. 25, to the trial Court with direction to hold an inquiry and to submit a report to this Court within three months from today as to the date on which Beant Lal attained his age of majority. The parties may, if they so desire, file objections to the report when received within ten days.

K.S. *Case remanded.*

A. I. R. 1933 Lahore 373

TAPP, J.

Bansi Lal—Appellant.

v.

Sawanu and *another*—Respondents.

Second Appeal No. 1054 of 1932, Decided on 21st December 1932.

Mortgage—Redemption — Covenant postponing redemption—Test to see whether it amounts to clog stated—Transfer of Property Act (1882), S. 60.

The postponement of redemption for a long period in a mortgage is not necessarily or per se a clog on redemption. What has to be seen is whether the effect of such a covenant is to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor or whether the circumstances are such as to indicate that the stipulation postponing redemption is unreasonable and oppressive and intended to fetter the right to redeem. [P 374 C 1]

In this case on a full consideration of facts it was held that a period of 50 years was not a clog. [P 374 C 2]

J. R. Agnihotri—for Appellant.

Mukand Lal Puri and *Shambu Lal Puri*—for Respondents.

Judgment.—The facts necessary for the determination of this second appeal are briefly as follows: In 1905 two widows, Mt. Sandhia and Mt. Lachhmi, each mortgaged her half-share in an area of 37 kanals 17 marlas of land

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1. A I R 1925 Mad 78=82 I C 785=47 Mad 920.

for Rs. 99-8-0, in favour of Kaudu, father of defendant 1, and Duni, defendant 2. On the death of Mt. Lachhmi her co-widow, Mt. Sandhia, succeeded to her half-share according to the mutation effected in June 1915. In the same month Kaudu and Duni transferred their mortgagee rights in half the land in favour of the plaintiff-appellant, Bansi Lal, and one Kirlu the husband of Mt. Lajwanti, defendant 3, for Rs. 200, vide mutation dated 17th June 1915. On 17th May 1929, Mt. Sandhia sold the land to the plaintiff, Bansi Lal, who brought thhe present suit for redemption. He was met by the plea that he was not entitled to redemption till the expiry of 50 years as stipulated in the mortgage. This plea has succeeded in both the Courts below and the plaintiff has come up in second appeal alleging that the period of 50 years is a clog on the equity of redemption.

Now the postponement of redemption for a long period in a usufructuary mortgage is not necessarily or *per se* a clog on redemption. There are several authorities for the proposition that a period of even 60 or 90 years is not by itself a clog on redemption. What has to be seen is whether the effect of such a covenant is to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor or whether the circumstances are such as to indicate that the stipulation postponing redemption is unreasonable and oppressive and intended to fetter the right to redeem. The mortgages being usufructuary ones the mortgagors or their successors-in-interest would be in a position to redeem on payment merely of the mortgage money, and there would be no accumulation of interest. As observed by the learned Senior Subordinate Judge the mortgagors being widows with only a limited interest the mortgagees incurred a certain risk in having the alienations set aside on the ground that they had been effected without consideration and necessity.

On the other hand it is urged on behalf of the appellant that 30 kanals of land yields one maund of maize and more than half a maund of wheat per kanal every year and the mortgagees thus benefited very considerably. In my opinion, this advantage is more than balanced by the risk undertaken by the mortgagees and referred to above. It was also contended on behalf of the appellant that the mortgage money advanced by the mortgagees had been recovered by the transfer of their right in half the land in favour of the plaintiff. I do not think this contention has much force, especially in view of the fact that when the plaintiff acquired the equity of redemption in 1929 from Mt. Sandhia, he was fully aware of the stipulation postponing redemption for 50 years. On a consideration of all the above facts I am not prepared to hold that the long period fixed for the redemption of the mortgages in question operates as a clog thereon and I therefore dismiss the appeal but under the circumstances leave the parties to bear their own costs throughout.

K.S. *Appeal dismissed.*

✻ A. I. R. 1933 Lahore 374

ADDISON AND AGHA HAIDAR, JJ.

Gian Singh and *another*—Appellants.

v.

Atma Ram—Respondent.

First Appeal No. 2420 of 1928, Decided on 15th December 1932, from decree of Senior Sub-Judge, Amritsar, D/- 18th June 1928.

✻ Transfer of Property Act (1882), S. 82 —Principle underlying S. 82 is applicable to Punjab—Mortgagee purchasing one o two properties mortgaged—Effect of such purchase stated.

The general principles in the Transfer of Property Act are applicable to the Punjab and the principle underlying S. 82 is one such which is in force in the Punjab. [P 375 C 2]

Where a mortgagee buys a part of the mortgaged property, such purchase has the effect of discharging and extinguishing that portion of the mortgage debt which is chargeable on the property purchased by him, that is to say, the portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage: 22 *All* 284 (*F B*); *A I R* 1920 *All* 129; *A I R* 1920 *Mad* 375 (*F B*) and 22 *Bom* 304 (*F B*), *Rel on.* [P 375 C 1, 2]

Mehr Chand—for Appellants.

Durga Das and *Bhagwan Das*—for Respondent.

Addison, J.—On 15th August 1918, Gian Singh, defendant 1, mortgaged a building in Lahore, and another in Amritsar to Atma Ram, plaintiff, for a consideration of Rs. 15,000. Though both properties were mortgaged there was a condition that the Lahore property was primarily liable and that the Amritsar property would only be sold, if the mortgage amount was not repaid by the sale of the Lahore property. Shortly afterwards, namely, on 3rd October 1918, defendant 1, mortgaged the same properties by a further mortgage-deed to plaintiff for a consideration of Rupees

2,000. On 7th May 1923, defendant 1, sold most of the Lahore property to the plaintiff for a consideration of Rs. 35,000 of which Rs. 15,000, were paid in cash while the balance of Rs. 20,000, was left with the vendee for the complete redemption of the Lahore property and repayment of certain promissory notes. It is admitted that by this sale the first mortgage was completely redeemed. Plaintiff has brought the present suit on the basis of the second mortgage for Rs. 2,000 and it is for the recovery of Rs. 2,000 principal together with interest amounting to Rs. 3,200 total Rs. 5,200, by sale of the Amritsar property. This Amritsar property has been purchased by defendant 2. Manohar Lal and the two defendants pleaded that the sale of 7th May 1923, was meant to redeem both the mortgages. The Court below has held that the second mortgage was not redeemed but that, as plaintiff had become the owner of most of the Lahore property, the mortgage must be considered to have been discharged pro tanto by the mortgagee's purchase. The amount due on the Amritsar property, including costs was found to be Rupees 783-6-5, on 10th October 1928, 6% interest till date of realization being allowed on that sum. Against this decision both sides have appealed. It was not pressed before us by learned counsel appearing for the mortgagor that the Amritsar property had been redeemed. His contention was that the decision of the lower Court was correct in applying S. 82, T. P. Act, and in allowing the plaintiff only a portion of the mortgage amount proportionate to the value of the Amritsar property as compared with the value of the whole property mortgaged.

In the appeal of the mortgagee the learned counsel contended that S. 82, T. P. Act, did not apply and that the plaintiff-mortgagee was entitled to a decree for the full amount of the mortgage against the Amritsar property on the principle that the mortgagee is entitled to recover his money from any portion of the property mortgaged to him. This principle is a recognized one but it does not apply in the circumstances of the present case. A Full Bench of the Allahabad High Court held in *Bisheshur Dial* v. *Ram Sarap* (1) that when a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, the portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the preporty comprised in the mortgage. This ruling is applicable in full force in the present case. The only difference is that in the Allahabad case the mortgagee purchased at auction whereas in the case before us he purchased privately. Every person who purchases one of several parcels of property which are mortgaged incurs the liability to contribute to the mortgage debt in the proportion which its value bears to the whole of the property mortgaged. This decision is based on S. 82, T. P. Act, the general principles of which are applied in the Punjab. There is no doubt that this is one of the general principles applicable to mortgages, which must be held to be in force in the Punjab. The early Allahabad Full Bench decision has been followed in *Sarju Kumar Mukerji* v. *Thakur Prasad* (2). In this case, in execution of a final decree upon a mortgage, part of the mortgaged property was purchased by *M* at a sale. Subsequently, *M* obtained from the mortgagee an assignment of the mortgage decree itself. It was held, when he applied for further execution of the decree, that the effect of *M's* purchase was to discharge the mortgage debt pro tanto, that is to say, in the ratio which the property purchased bore to the rest of the property mortgaged and the decree could only be executed for the balance.

A Full Bench of the Madras High Court has taken the same view in *Ponnambala Pillai* v. *Annamalai Chettiar* (3). It was held by this Full Bench that the purchase by the mortgagee in Court auction of the equity of redemption in some items of the mortgaged properties discharged that portion of the mortgage debt which is chargeable on those items, that is, it discharged a portion of the mortgage debt which bore the same ratio to the whole mortgage debt as the value of those items bore to the value of all the mortgaged properties. Lastly, a Full Bench of the Bombay High Court in *Lakhmidas* v. *Jamnadas* (4) has come to the same decision. In that case the defendants mortgaged three premises *A*, *B* and *C*, to the plaintiff. Subsequently, the plaintiff ob-

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1. (1900) 22 All 284=(1900) A W N 69 (F B).
2. A I R 1920 All 129=58 I C 743=42 All 544.
3. A I R 1920 Mad 375=55 I C 666=43 Mad 372 (F B).
4. (1898) 22 Bom 304 (F B).

tained a money decree against the defendants and sold in execution the equity of redemption in the property *C* only. This he purchased himself, thus becoming the full owner of the *C* property. Later the plaintiff sued to recover his debt by the sale of properties *A* and *B* only. It was claimed that the debt should be apportioned, and that the property *C* should bear its proportion of the debt. It was held that this was the correct view and that when the plaintiff purchased the equity of redemption in *C* he purchased it subject to its due proportion of the mortgage debt due to himself. The proportion of the debt wiped out depended upon the properties of the value of the property *C* to the rest of the mortgaged property. There are thus three Full Bench decisions of three High Courts which have dealt with the question before us and have taken the view of the lower Courts. With this view of the three High Courts we respectfully agree and dismiss both the appeals with costs.

K.S. *Appeals dismissed.*

A. I. R. 1933 Lahore 376

ABDUL QADIR, J.

Narinjan—Plaintiff—Appellant.

v.

Co-operative Credit Society of Samrai and *others*--Defendants—Respondents.

Second Appeal No. 441 of 1931, Decided on 18th January 1933, from decree of Dist. Judge, Jullundur, D/- 13th December 1930.

(a) Co-operative Credit Societies Act (1912), S. 43—(Rules under), R. 7—Non-representation of minor by proper guardian does not give civil Court jurisdiction to entertain suit.

The ground that a minor was not properly represented before the arbitrator, is not sufficient to give jurisdiction to the civil Court to entertain the suit for a declaration that the award was not binding on the minor. [P 377 C 1]

(b) Co-operative Credit Societies Act (1912), Validity of award—Award against representative of deceased debtor affects estate of deceased only.

An award against the representative of a deceased debtor of a society affects only the estate of the deceased in his hands but cannot affect him personally. [P 377 C 1]

Mehr Chand Sud—for Appellant.

Achhru Ram—for Respondents.

Judgment.—One Kartar Singh, a resident of village Samrai, in the Phillaur Tahsil of the Jullundur District, owed some debts to the Local Co-operative Credit Society. He died leaving behind him a son named Narinjan and a widow Mt. Dhanti. The Co-operative Credit Society referred the question of their dues against the deceased to an arbitrator appointed by the Registrar. He gave an award on 12th May 1928, declaring Narinjan and Mt. Dhanti and certain other persons who were sureties for the original debtor, as liable to pay Rs. 1,243-7-6, to the Society. It appears that an appeal was filed against this award to the Registrar, but it was dismissed as time-barred. A declaratory suit was then instituted on behalf of Narinjan, minor, alleging that during the proceedings before the arbitrator, there was no duly appointed guardian of the minor, that his mother who was ostensibly appointed as his guardian ad litem was ill at the time and died afterwards, that the President of the Society concealed these facts and got an award. It was also urged that the decree should have been against the estate of the deceased Kartar Singh, and not against the person of the minor, and that the arbitrator acted dishonestly in not duly guarding the interests of the minor and in giving a wrong award against him.

In the Court of the Subordinate Judge, a preliminary objection was raised on behalf of the Co-operative Credit Society, that the civil Court had no jurisdiction to hear the suit. Some authorities were cited in support of this view and the learned Subordinate Judge dismissed the suit with costs, holding that it could not be entertained by him. Against this decision an appeal was filed by Narinjan, through his grandmother, and the learned District Judge dismissed it, taking the same view of the question of jurisdiction as had been taken by the trial Court. A second appeal has now been preferred to this Court, on behalf of the minor, and has been argued by Mr. Mehr Chand Sud. Mr. Achhru Ram, represents the Co-operative Credit Society. Counsel for the appellant contends that as the minor was not properly represented before the arbitrator, it was open to the civil Court to entertain the suit and to give a declaration that the award was not binding on the minor. He admits that, so far as the rules framed by the Local Government under S. 43, Co-operative Credit Societies Act (11 of 1912), are concerned, the only rule applicable to an award of an arbitrator is R. 7 which runs as follows:

> "An arbitrator's award, if no appeal has been made within a month, or a decision of a Registrar originally or in appeal, shall not, as between the parties to the dispute, be liable to be called in question in any civil or revenue Court, and shall be in all respects final and conclusive, ex-

[illegible] (Canb, 7.) [illegible]

[illegible] in [illegible] I think [illegible]

[illegible] alleged [illegible] the [illegible] over of that [illegible]

[illegible] alleged [illegible] have been [illegible]

[illegible] consideration and [illegible]

[illegible] of the [illegible] allegation [illegible]

[illegible] The [illegible]

[illegible] manner [illegible] Court below [illegible]

[illegible] the [illegible]

[illegible] the record [illegible]

[illegible] in [illegible] Court [illegible]

[illegible] that, even [illegible]

[illegible] have been [illegible] two years [illegible]

[illegible] with [illegible]

tinued to occupy the house thereafter for a long time and the present suit for ejectment was instituted on 8th October 1930. The two issues framed in the case were: (1) Is defendant the tenant of the plaintiff ? (2) Cannot the suit lie without notice to the defendant ?

The trial Court found that the defendant was a tenant of the plaintiff but dismissed the suit on the ground that the necessary notice had not been given. The plaintiff appealed to the District Judge who held that the tenancy had been forfeited by the defendant's denial of the landlord's title and that no notice was necessary. He held further, on the authority of *Sunder Singh* v. *Ram Saran Das* (1), that the tenancy being for a fixed period no notice was necessary after the lapse of that period. The appeal was accordingly accepted and the plaintiff's suit was decreed.

From this decision the defendant has preferred a second appeal. The ruling in *Sunder Singh* v. *Ram Saran Das* (1) on which the learned District Judge has relied, appears to be clearly distinguishable, but I am of opinion that his finding on the question whether there was forfeiture of the tenancy by reason of the defendant's denial of the landlord's title is a finding of fact and cannot be interfered with. It is true that the defendant did not make a definite statement that he had denied the landlord's title at any particular time before the suit but the defendant deposed that he had been living as owner in the house without payment of rent for a large number of years and, considering this statement along with the circumstances of the case, the learned District Judge seems to have drawn the inference (which is an inference as to fact) that there was a denial of the landlord's title prior to the institution of the suit. It is not disputed that if there was any such denial prior to the institution of the suit, no notice would be necessary. In my opinion, the finding of the learned District Judge on the point, whether it is right or wrong, is not open to interference in second appeal.

I may further add that there seems to be no substance in this appeal on merits. The appellant was at the most entitled to a month's notice. The present suit out of which this appeal has arisen has been pending for over two years. In these circumstances the appellant cannot have any reasonable grievance on the ground of lack of notice. In a similar case this Court refused to interfere in second appeal merely on the technical ground of want of notice: cf. *A. I. R.* 1926 *Lah.* 129. I dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 378

CURRIE, J.

Gobinda—Defendant—Appellant.

v.

Chanan Singh and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 349 of 1932, Decided on 9th January 1933, from decree of Dist. Judge, Ambala, D/- 19th December 1931.

(a) Evidence Act (1872), S. 68—Registered document—Execution not specifically denied—Document is admissible without proof of execution by surviving attesting witness.

Where the execution of a registered document is not specifically denied by the party against whom it is sought to be put in as evidence, it is not necessary for the admissibility of such document that the execution should be proved by the surviving attesting witnesses. [P 379 C 1]

(b) Transfer of Property Act (1882), S. 6 (a)—Alienation of reversionary right is valid in Punjab.

The Transfer of Property Act not being in force in the Punjab, alienation of reversionary rights is not void: *A I R* 1930 *Lah* 928 and *A I R* 1926 *Lah* 39, *Rel on.* [P 379 C 1]

Harnam Singh—for Appellant.

Fakir Chand—for Respondents.

Judgment.—The facts leading to the present second appeal may be briefly stated. Certain property belonging to Hari Singh, deceased was in possession of his widow, Mt. Daya Kaur. Dal Singh, who has since died without issue, was a brother of Hari Singh. According to the pedigree table, Gajja Singh, the father of Gobinda defendant, was a first cousin and Chanan Singh the plaintiff, was the son of another first cousin. On 23rd June 1905, a document was executed by Dal Singh and Gajja Singh, who signed both on his own behalf and on behalf of his minor son Gobinda. This document recited that Dal Singh had gifted to Gobinda his half-share in the land which he held jointly with Mt. Daya Kaur. Accordingly he and Gajja Singh, both on his behalf and on behalf of his son, relinquished any claims that they might have to the property of Hari Singh then in the hands of Mt. Daya Kaur. This was done apparently to stave off litigation which Chanan Singh was about to bring to contest the gift. Subsequently it appears Mt. Daya Kaur made an alienation in favour of one Basanta which Chanan Singh successfully got set aside. Mt. Daya Kaur died

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1. A I R 1933 Lah 61.

on 11th October 1930. Chanan Singh then instituted the present suit for the whole of the property left by her. The trial Court dismissed the suit on the ground that the transction effected by Dal Singh and Gajja Singh was a sale of reversionary rights and accordingly void in accordance with S. 6 (a), T. P. Act. The lower Court also held that the deed had not been proved and further held that all the property claimed had not been proved to be in the hands of Mt. Daya Kaur. On appeal the learned District Judge held that the document was admissible, that the transaction was not void and decreed the suit for whole of the property.

In second appeal it has been argued that the learned District Judge wrongly admitted the document (Ex. P-2) as the surviving attesting witness had not been produced. As the learned District Judge remarks the deed is a registered one and its execution was nowhere specifically denied by the defendants; under the proviso to S. 68, Evidence Act, it was therefore unnecessary to call the attesting witness to prove its execution. I therefore agree with the learned District Judge that this document was admissible. The next point argued was the nature of the transaction covered by this document. Mr. Harnam Singh, contended that it was an alienation of reversionary rights and as such was void under S. 6 (a), T. P. Act. Mr. Fakir Chand, on the other hand, pointed out that the Transfer of Property Act is not in force in this province and that such transactions are therefore not void. In support of this he quoted, *A. I. R.* 1930 *Lah.* 928, a decision to which I was a party. It was there held that such a contract is enforceable in this province. *A. I. R.* 1926 *Lah.* 39 is to the same effect. Mr. Harnam Singh, has further argued that, even if such a transfer is not void, it can only form the basis of a contract coming into effect when the succession opens and then forms the basis of a suit for specific performance under the Specific Relief Act. The rulings bearing on the point relate to cases which were brought under the Specific Relief Act, according to the nature of the agreements in those cases. In the present case, Mr. Fakir Chand argues that as Gobinda himself through his father acting as his guardian, was a party to this agreement, the plaintiff is now entitled to sue upon it in the form of a suit for possession. This appears to me to be a reasonable contention, the plaintiff's suit being on the basis of the agreement entered into by Gobinda and his father and his father's cousin.

The next point raised in the grounds of appeal related to the learned District Judge's finding that the transaction entered into was for the benefit of the minor. No serious argument was addressed to me to show that the Judge's view was wrong and prima facie the agreement was for the benefit of the minor as it secured to him the property given to him by Dal Singh to save the expense of litigation. No argument was addressed to me on the fifth ground regarding the extent of the property. In my judgment the learned District Judge took a correct view of the case. I therefore dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 379

COLDSTREAM AND JAI LAL, JJ.

Mt. Har Devi and *others*—Defendants—Appellants.

v.

Mohan Singh and *others*—Plaintiffs—Respondents.

First Appeal No. 1425 of 1927, Decided on 16th January 1933, from decree of Senior Sub Judge, Sheikhupura, D/- 7th March 1927.

Custom (Punjab)—Succession—Kambos of Amritsar District — Collaterals succeed in preference to daughter after death of widow.

Among Kambos of Amritsar District the collaterals of a deceased proprietor succeed to his acquired property in preference to his daughters and a gift of such property by the widow of the deceased proprietor to her daughters will not affect the reversionary rights of the collaterals after the widow's death: *A I R* 1926 *Lah* 142, *Rel on.* [P 380 C 1]

Mehr Chand and *Badri Nath*—for Appellants.

M. L. Puri and *S. L. Puri*—for Respondents.

Coldstream, J.—One Dewa Singh, a Kambo of Amritsar District, acquired colony land in Sheikhupura District. After his death about 1924, his widow Mt. Haro, gifted the land to her three daughters, Mt. Hardevi, Mt. Santi and Mt. Guro. Effect was given to the alienation by mutation of records made in August 1926. In October of the same year, Dewa Singh's. collaterals thirteen in number-sued for a declaration that the gift would not affect their reversionary rights after Mt. Haro's death. It was found by the Subordinate Judge. First Class of Sheikhupura, that the land had been acquired by Dewa Singh, that the collaterals had succeeded in proving that they were entitled to succeed to the land in preference to Dewa Singh's daughters and that as Mt. Haro had no power to gift the land, except in acceleration of the succession of her husband's heirs, he decreed the suit.

Against this decision Mt. Haro and her daughters have preferred the present appeal and we have heard Diwan Mehr Chand, on their behalf. The evidence in the case produced by the parties has been fully described by the learned Subordinate Judge. Most of it is too vague to be of much assistance. The evidence on which reliance has been placed however appears to me to justify the conclusion in favour of the collaterals including as it does a judgment of this Court: *Mt. Naraini* v. *Jowahir Singh, A. I. R.* 1926 *Lah.* 142 and three judgments of the District Judge, Amritsar. In my opinion, there is no force in this appeal which is dismissed with costs.

K.S. *Appeal dismissed.*

* A. I. R. 1933 Lahore 380

ADDISON AND AGHA HAIDAR, JJ.

Mt. Karam Kaur—Plaintiff—Appellant.

v.

Matwal Chand and *another*—Defendants—Respondents.

Second Appeal No. 681 of 1931, Decided on 21st December 1932, from decree of Dist. Judge, Jhang, D/- 9th December 1930.

*** Civil P. C. (1908), O. 1, R. 3—Plaintiffs should implead all ordinary legal representatives — Other legal representatives though not impleaded are still bound if plaintiff is diligent and ignorant of their existence.**

The plaintiff must be diligent and implead all the legal representatives under the law applicable if he wishes to bind them; but where such ordinary legal representatives are impleaded and there is no fraud or collusion the estate will still be bound, if other persons turn out to be the actual legal representatives, provided that the plaintiff was ignorant of, or had no means of knowing the facts or circumstances by reason of which the proper legal representatives were other than the ordinary ones: *A I R* 1928 *Mad* 243 and 31 *I C* 920, *Rel on*; *A I R* 1919 *Mad* 16; *A I R* 1929 *Mad* 482 and 33 *Mad* 6, *Ref.* [P 381 C 2]

Nand Lal—for Appellant.

Shambhu Lal Puri—for Respondents.

Addison, J.—One Atma Ram, died leaving a grandson, Kishan Chand. He had on 26th September 1922, made a will by which he bequeathed his property to Mt. Karam Kaur, wife of his grandson, Kishan Chand. One Matwal Chand instituted a suit on 10th October 1925, against Kishan Chand as the heir and legal representative of his deceased grandfather for the recovery of some money alleged to have been advanced to Atma Ram, on 15th May 1924. This suit was decreed on 6th April 1926. In execution of that decree Matwal Chand attached the house in which Kishan Chand and his wife Mt. Karam Kaur lived together. Mt. Karam Kaur objected to the attachment on the ground that the house had been bequeathed to her by Atma Ram. The decree-holder absented himself on 6th August 1926, and thereupon the execution application was dismissed in default while the objection of Mt. Karam Kaur was also dismissed in default. Later, on 7th December 1926, Mt. Karam Kaur instituted a suit against her husband and Matwal Chand for a declaration that the property had been bequeathed to her by Atma Ram and that it was not liable to be sold in execution of the decree obtained against Kishan Chand as legal representative of Atma Ram. This suit was decreed on 21st October 1927, but it was remanded, on appeal, for redecision on 1st February 1928. On 21st August 1928, none of the parties were present in Court and the suit was dismissed under O. 9, R. 3, Civil P. C. Thereafter namely, on 3rd April 1929, the present suit was instituted by Mt. Karam Kaur, against the same persons for the same declaration. This suit was decreed on 27th May 1930. But, on appeal, the learned District Judge held, on 9th December 1930, that the estate was bound as Kishan Chand was bona fide impleaded as the legal representative of the deceased, and that the estate of Atma Ram was properly and effectively represented by him. He therefore accepted the appeal and dismissed the suit. Against this decision the plaintiff has preferred this appeal.

The general rule no doubt is that a decree of this kind, though recoverable from the estate of the deceased, is nonetheless a decree against the particular legal representative against whom it is passed and can only be executed to the extent of the property of the deceased in his hands, the other legal representatives who are not parties not being bound by it. This principle is laid down in *Mirkha Imam Kha* v. *Bhagirathi Mahadeo* (1). In that case one heir of a deceased Mahomedan was not impleaded and it was held that his interest in the property did not pass in a subse-

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1. **A I R 1919 Bom 61=51 I C 18=43 Bom 412.**

quent auction sale. The same rule has been applied in other cases on the ground that it is the plaintiff's duty to be diligent and to implead all the legal representatives if he wants them to be bound by the decree. It is unnecessary to discuss the authorities laying down this general rule. The question is, whether, in a special case like the present, the rule is different. It has been found by the lower appellate Court that the plaintiff, Matwal Chand, had no knowledge of the will of the deceased Atma Ram. It is also clear on the record that Kishan Chand was the ordinary heir and that he was living in the house, which was attached, with his wife. The learned District Judge has held that the rule to be applied in these special circumstances is that, if the estate is effectively represented and no fraud or collusion is disclosed on the part of the plaintiff, the decree is binding on the real legal representative, even if he has not been made a party to the suit.

The first case dealing with this point which need be mentioned is *Gnanambal Ammal* v. *Veerasami Chetty* (2) a decision of a Division Bench of the Madras High Court. In that case a widow was wrongly impleaded in a suit for recovery of money due from her deceased husband as he had left a will bequeathing the property to someone also. The property was sold in execution and purchased by a third party and a suit was subsequently brought by the legatee to recover the property bequeathed to him. It was held that the sale could not be set aside merely on the ground that the legatee was not a party to the decree obtained by the creditor. Reliance was placed in this case on *Ramaswami Chettiar* v. *Oppilamani Chetti* (3) where it was held that a decree-holder, who has to apply for execution against the legal representative of the deceased judgment-debtor, may select from among several rival claimants, as legal representatives, the one whom he believes honestly to have the best prima facie title and the representation, in the absence of fraud or collusion, will be sufficient, even though it is subsequently found that some other person is the true legal representative. That is not nearly such a strong case as the present in which the obvious heir was Kishan Chand who actually was residing in the property with his wife. The will was unknown to the plaintiff decree-holder in the case before us. No executor was named in it. Letters of administration with a copy of the will annexed were never applied for. Therefore it was impossible for the plaintiff decree-holder to implead any other person than Kishan Chand. Though the latter was living with his wife he did not disclose the fact that he was the legatee under his grand-father's will. Had he done so the case might have been different. As he has not done so it seems to me that the rulings referred to are ample authority for the decision of the learned District Judge. *Ramaswami Chettiar* v. *Oppilamani Chetti* (3) was followed by another Division Bench of the Madras High Court in *A. I. R.* 1929 *Mad.* 482.

A Single Bench of the Madras High Court has taken the same view in *A. I. R.* 1928 *Mad.* 243. That was also a case where the ordinary legal representative, under the law applicable was impleaded. In that case too, there was a will under which the property went to someone else. It was held that as the plaintiff, without any fraud or collusion, had sued a person who would be the ordinary legal representative, under the law, of the deceased person, in ignorance of other facts, or circumstances, by reason whereof some other person turned out to be the real heir and actual representative such decree was binding in the same manner and to the same extent on the real heir and legal representative. In that case just as in the present case there was no appointment of an executor, either expressly or by necessary implication in the will, so that it could not be argued that the executor was the proper legal representative. Further in none of these cases just as in the case before us had any action been taken under the will. To sum up: the general rule is that the plaintiff must be diligent and implead all the ordinary legal representatives under the law applicable if he wishes to bind them; but in a case like the present where such ordinary legal representatives are impleaded and there is no fraud or collusion the estate will still be bound, if other persons turn out to be the actual legal representatives, provided that the plaintiff, was ignorant of, or had no means of knowing the facts or circumstances by reason of which the proper legal representatives were other than the ordinary ones. There is no distinguishing feature between the present case and that reported as *A. I. R.* 1928 *Mad.* 243, with the decision in that case; and in *Gnanambal Ammal* v. *Veerasami Chetty* (2), I am respectfully in agreement.

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2. (1915) 31 I C 920.
3. (1910) 33 Mad 6=4 I C 1059.

Another authority, which may be mentioned, is *Bachu Soorayya* v. *Anjaneyalu* (4), another Division Bench decision of the Madras High Court in which it was held that where a creditor in good faith obtains a decree against the person in possession of his debtor's property whom he believes to be but who is not, in fact the legal heir of the debtor, execution proceedings taken in pursuance of that decree will bind the real heir. This follows from the definition of legal representative in the Civil Procedure Code. Kishan Chand was in possession to all intents and purposes of this house as he was living there with his wife and he was also the ordinary heir under the law. For the reasons given I would dismiss this appeal with costs.

Agha Haidar, J.—I agree.

K.S. *Appeal dismissed.*

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4. A I R 1919 Mad 16=52 I C 509.

A. I. R. 1933 Lahore 382

CURRIE, J.

Suba Singh and *another*—Plaintiffs—Appellants.

v.

Bela Singh and *others*—Defendants—Respondents.

Second Appeal No. 748 of 1932, Decided on 10th January 1933, from decree of District Judge, Amritsar, D/- 18th January 1932.

Court-fees Act (1870), as amended by Punjab Act (7 of 1912), Sch. 2, Art. 22 and S. 17 — Mortgage with possession — Subsequent mortgage on some conditions simply increasing amount secured does not constitute second alienation.

A mortgage with possession was effected. A second deed of mortgage was subsequently effected on the same conditions to the same mortgagee by which only the amount secured on the mortgage was increased. In a declaratory suit by a reversioner:

Held: that there was only one alienation, that the second mortgage did not constitute a second alienation and that a stamp of Rs. 20. was sufficient: *A I R* 1932 *Lah* 465; *A I R* 1921 *Lah* 136, *Appl*; *A I R* 1920 *Pat* 105, *Dist*; 18 *Mad* 459, *Ref.* [P 383 C 1]

Fakir Chand—for Appellants.

Gobind Ram Khanna — for Respondents.

Judgment.—Buta Singh, on 30th June 1932, executed a deed mortgaging certain land with possession for Rs. 3,500, to Bela Singh. On 24th April 1928, he executed another deed charging the same land with a further sum of Rupees 232. In this deed it is stipulated that this sum was to be added to the original mortgage money of Rs. 3,500, and the land should only be redeemed on payment of both amounts at the date fixed in the first deed. Bela Singh subsequently sold the mortgagee rights to Chet Singh. On 16th June 1929, Buta Singh's sons sued for the usual declaration that the alienation should not affect their reversionary rights as it was without consideration and necessity. On 25th June 1930, the trial Court decreed the suit and Bela Singh appealed. The original plaint was stamped with a court-fee stamp of Rs. 20 and the same amount was affixed to the memorandum of appeal. In the course of audit the stamp auditor raised an objection to the effect that the suit challenged two alienations of mortgage under the Punjab Customary Law and therefore should have been stamped with two stamps of Rs. 20, one for each alienation impeached, under Art. 22, Sch. 2, Court-fees Act, as amended by Punjab Act 7 of 1922. On 10th December 1931, the learned District Judge noted that this objection had been preferred in audit and ordered the plaintiffs-respondents and the appellant to make good the deficiency of Rs. 20 each and adjourned the appeal. On 18th January 1932, the learned Judge noted that the appellant had made good the deficiency but the plaintiffs-respondents had not done so and asked for further time. As they had already had a month to do this he adjourned the case to the afternoon and finally as the plaintiffs-respondents had not made up the deficiency and said that they were unable to raise the money he refused any further adjournment and accepted the appeal and rejected the plaintiffs' suit under O. 7, R. 11 (c), Civil P. C.

Against this order the plaintiffs have preferred a second appeal through Mr. Faqir Chand. Mr. Faqir Chand has argued that the second deed does not constitute a second alienation but merely creates a further charge on the land already alienated. In support of this contention he has referred to *Remal Das* v. *Mt. Janat* (1). That was a case in which the question of the effect of the Punjab Alienation of Land Act was considered. The mortgage had been effected prior to the date on which the Act came into force and the further advance had been made after that date on the old security. It was held that the further advance was not a new mortgage, provided that no changes had been made in the terms of the original transaction. This question was considered at length in a Full Bench deci-

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1. A I R 1921 Lah 136=62 I C 789=2 Lah 202.

S. N. DAR, B.A., LL.B., Vakil, High Court, SRINAGAR (Kashmir)

sion of this Court reported in *Sher Singh* v. *Daya Ram* (2). The decision in *Remal Das* v. *Janat* (1) was approved and after full discussion and a consideration of the definition of mortgage as given in S. 58, T. P. Act, it was held that such a transaction did not amount to a fresh alienation of an interest in the land and consequently the provisions of Punjab Alienation of Land Act were not attracted. In the present case it is clear that the second deed in no way altered the conditions of the first mortgage-deed. Possession of the land had already passed to the mortgagee and the only effect of the second deed was to increase the amount of the money secured on the mortgage. Therefore the principles enunciated in the two decisions cited above obviously apply and the second deed cannot be held to constitute a second alienation. Art. 22, Sch. 2, which was inserted by Punjab Act 7 of 1922, provides that a plaint or a memorandum of appeal in a suit by a reversioner under the Punjab Customary Law for a declaration in respect of an alienation of ancestral land shall be stamped with a stamp of Rs. 20. In the present case in view of the above rulings it must be held that there was only one alienation and therefore the stamp of Rs. 20 affixed was sufficient.

Mr. Gobind Ram Khanna for the respondents raised a preliminary objection to the effect that the present appeal was insufficiently stamped as this too only bore a stamp of Rs. 20. In view of my decision on the amount of stamp duty to be levied on the original plaint and the appeal it is obvious that this objection has no force and I therefore overrule it. Mr. Khanna further argued that in any event a stamp of Rs. 20 was insufficient as there were in reality two causes of action each of which was chargeable with stamp duty under S. 17, Court-fees Act. In support of this argument he cited *Wazira Begam* v. *Shoshi Bhusan Ray* (3) and *Daiva Chilaya Pillai* v. *Ponnathal* (4). In the Madras case the report is very brief and it is impossible to say whether the alienations then contested were made to one and the same alienee in respect of the same property. In *Wazira Begam* v. *Shoshi Bhusan Ray* (3) the mortgagee was suing on two bonds and that will be clearly a case in which there were two separate causes of action. In S. 17, Court-fees Act, the actual word used is "subject," but that has been generally interpreted as meaning "cause of action." In the present case it is obvious that the subject of the suit is the alienation of the ancestral property and in view of the decisions of this Court cited above it must be held that there was only one alienation and not two. The original plaint and the memorandum of appeal were therefore correctly stamped, and the objection preferred by the stamp auditor on which the learned District Judge acted was erroneous. Mr. Faqir Chand also contended that in any case the learned District Judge instead of rejecting the plaint in toto should have dealt with the case on the merits as regards one of the deeds for which the stamp would have been sufficient. That point is not free from difficulty but need not be discussed in view of the decision I have arrived at. I therefore accept the appeal and remand the case to the District Judge for decision on the merits. Stamp of this appeal will be refunded. Other costs will be costs in the case.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 383

BHIDE, J.

Abdul Aziz Khan—Judgment-debtor—Appellant.

v.

Co-operative Bank, Ltd., Lahore—Decree—Respondent.

Misc. First Appeal No. 746 of 1932, Decided on 19th December 1932, from order of Senior Sub-Judge, Multan, D/-23rd April 1932.

(a) Civil P. C. (1908), S. 47—Objection by judgment-debtor regarding area of land mentioned in sale proclamation — Decision on this is appealable.

Where the judgment-debtor objects as to the correctness of the area of land mentioned in the sale proclamation, the decision given by the Court on such objection is appealable as such decision may be said to determine the rights of the judgment-debtor in certain respects: *A I R* 1919 *Lah* 233, *Ref.* [P 384 C 1]

(b) Practice—Question of fact raised in appeal on which no evidence is on record.

The appellate Court will not express opinion on a question of fact which is raised for the first time in the appeal and for the decision of which there is no material on the record. [P 384 C 1]

Barkat Ali—for Appellant.

Badri Das—for Respondent.

Judgment.—In the course of execution proceedings certain land was to be sold through the Collector. The area of this land was given in the sale-proclamation as 136 acres 7 kanals and

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2. A I R 1932 Lah 465=139 I C 49=13 Lah 660 (F B).
3. A I R 1920 Pat 105=57 I C 685.
4. (1895) 18 Mad 459.

16 marlas. The judgment-debtor objected that the correct area was 137 acres 6 kanals and 10 marlas. The learned Judge of the Court below however disallowed this objection, holding that the difference in the areas was due to different methods of calculation. There were certain other objections which were also disallowed, but they are not material as they are not pressed before me. The learned Judge ordered the sale to proceed and from this order, the present appeal has been preferred. The learned counsel for the respondent raised a preliminary objection that no appeal is competent, but the learned counsel for the appellant has cited *Kanhaiya Lal* v. *Bank of Upper India* (1), in which it was held that settling the terms of a proclamation is a judicial act from which an appeal would lie. In the present instance, the decision as regards the area may be said to determine the rights of the judgment-debtor in certain respects.

There is however no force in the appeal on merits. It appears from the certificate given to the appellant by Government in connexion with the property in question that 136 acres 7 kanals and 16 marlas is the area of the agricultural land exclusive of certain ahatas. The area of the latter added to the area of the agricultural land brings the total to 137 acres 7 kanals and 16 marlas. The appellant admitted before me that the "ahatas" are situated in the abadi. The learned counsel for the respondent urged that as only the agricultural land is being sold through the Collector, the area given in the proclamation of sale is correct. The proclamation of sale makes no reference to ahatas and the contention of the learned counsel seems correct. The learned Senior Subordinate Judge's remark that the difference in the areas was due to different methods of calculation does not seem to be correct; but as the area of the land to be sold seems to be correctly given in the proclamation there is no ground for interference.

The learned counsel for the appellant urges that the "ahatas" should have been sold with the land. This is an objection which he should have taken in the Court below and I express no opinion on it as it involves questions of fact for which there is no material for decision. He may raise the points in the Court below if so advised, subject to any objections which the opposite party may have to urge in that behalf. I dismiss the appeal, but as the learned Senior Subordinate Judge had made certain misleading observations in rejecting the appellant's objection as regards the area to be sold I leave the parties to bear their costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 384

ADDISON AND AGHA HAIDAR, JJ.

Bahadur Singh — Defendant—Appellant.

v.

Padam Chand-Asa Ram—Plaintiffs—Respondents.

First Appeal No. 2108 of 1928, Decided on 12th December 1932, from decree of First Class Sub Judge, Delhi, D/- 2nd June 1928.

Evidence Act (1872), S. 34—Suit on basis of entries in account books—Entries themselves should be proved.

In order to obtain a decree on the basis of entries in books of account it is not sufficient merely to prove that the books are correct and have been regularly kept in the course of business, but the entries must also be proved unless the necessity for such proof is removed by the admission of the opposite party: *A I R* 1922 *Lah* 338; *A I R* 1924 *Lah* 540; *A I R* 1927 *Lah* 903; 23 *W R* 390 (*P C*) and *A I R* 1914 *Lah* 67, *Ref.* [P 385 C 1]

Kishan Dayal, *Bishan Narain* and *Bhagwat Dayal*—for Appellant.

Jagan Nath Aggarwal and *Shambu Lal Puri*—for Respondents.

Addison, J.—The plaintiff firm, who are dealers in gold and silver lace in Delhi, sued Bahadur Singh, a Brahman milk-seller of the same place, for recovery of Rs. 5,383-6-0, advanced in cash together with interest amounting to Rs.. 827-3-0, total Rs. 6,210-9-0. The defendant pleaded that there were no dealings and that the account sued upon was fictitious. The trial Court has decreed the claim and the defendant has appealed. In the plaint it was stated that the cash advances were made to the defendant on account of contracts entered into by him. According to the plaintiff the dealings commenced on 3rd January 1920 and ended on 30th June 1925, with a balance due amounting to Rs. 5,383-6-0. In between various balances were struck and the accounts were squared on 12th September 1923, dealings re-commencing shortly after that. In the account there is no acknowledgment by the defendant or by any person alleged to have received money on his behalf. No receipts, ruqqas, or hundis were taken from the defendant. The balances were not signed by the defendant. That is, there is no acknow-

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1. A I R 1919 Lah 233=49 I C 539.

ledgment, made by the defendant or by any person stated to have taken money on his behalf, in existence; there are merely the entries in the plaintiffs' books which are, of course, admissions made by the plaintiffs in their own favour. Though, according to the plaint and according to the evidence of the plaintiff in the witness-box, the money was advanced to finance contracts entered into by the defendant, the Judge in the Court below seems to have found that the defendant was borrowing the money cheaply from the plaintiff firm in order to advance it at high rates of interest to other persons. This finding is obviously wrong. (Then His Lordship discussed the plaintiffs' evidence in detail and held that it did not help to corroborate the plaintiffs' books or to establish in any way the dealings between the parties and the judgment then proceeded). The law on the subject is quite clear. In order to obtain a decree on the basis of entries in books of account it is not sufficient merely to prove that the books are correct and have been regularly kept in the course of business, but the entries must also be proved unless the necessity for such proof is removed by the admission of the opposite party: see *Abdul Haq* v. *Shivji Ram Khem Chand* (1) and *A. I. R.* 1924 *Lah.* 540 as well as *A. I. R.* 1927 *Lah.* 903. In all these cases there was evidence of a general character given by plaintiffs or their munims that the books were correct and that the dealings took place, but this was held not to be sufficient evidence. Although entries of books of account regularly kept are relevant under S. 34, Evidence Act, they are never alone sufficient evidence to charge any person with lability. In *Baboo Ganga Pershad* v. *Baboo Indarjit Singh* (2), their Lordships of the Privy Council state that

> "where the fact of payments by a banking firm is distinctly put in issue, the books of the firm being at most corroborative evidence, the mere general statement of the banker to the effect that his books were correctly kept is not sufficient to discharge the burden of proof that lies upon him; particularly, if he has the means of producing much better evidence."

A Division Bench of this Court in *Ganga Ram* v. *Kaka Ram* (3), held that

> "where the plaintiffs can easily produce independent and trustworthy evidence in support of entries in their account books, it would be unfair to defendants and wrong in principle to accept as sufficient proof the entries, uncorroborated by any evidence other than a somewhat vague statement by one of the plaintiffs to the effect practically that the books speak for themselves."

(After refering to the evidence discussed in this case, the judgment proceeded). In conclusion it must be held that the plaintiffs have totally failed to prove the alleged dealing. I would therefore accept the appeal and dismiss the suit with costs throughout.

Agha Haidar, J.—I agree.

K.S. *Appeal accepted.*

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* A. I. R. 1933 Lahore 385

BROADWAY, J.

Hari Ram—Complainant—Petitioner.

v.

Allah Baksh and *another*—Accused—Opposite Parties.

Criminal Revn. No. 1393 of 1932, Decided on 4th March 1933, from order of Sess. Judge, Gurdaspur, D/- 19th October 1932.

*** (a) Criminal P. C. (1898), S. 528—Code does not require Magistrate to issue notice before case is transferred.**

There is no provision of the Criminal Procedure Code which requires a Magistrate acting under S. 528 to give notice to the opposite party. And the mere fact that the District Magistrate has not done what the High Court in certain cases has laid down as desirable is not a sufficient reason to hold that the order is bad in law. [P 386 C 1]

(b) Criminal P. C. (1898), S. 528—Transfer is not vitiated even if reasons thereof are not recorded.

Although an officer transferring cases from one Court to another under S. 528 ought to record his reasons for it, his omission to do so being only an irregularity is not a material ground for setting aside the order of transfer: 28 *All* 421 and 34 *Cal* 918, *Foll.* [P 386 C 2]

Kishan Datta—for Petitioner.

Facts.—On the application of Allah Bakhsh, accused respondent, under S. 528 (b), Criminal P. C., the District Magistrate, Gurdaspur, transferred the criminal case concerned to another Court with the following order:

> "The case may be transferred to the Court of Mr. Asquith, Magistrate, First Class, as a special case."

The complainant has filed a revision against this order of transfer.

Grounds.—The legality of the abovesaid order is attacked on two grounds, viz., (1) that notice of transfer was not given to the other side before recording the order and (2) that no grounds for transfer were given in the order. It is a fact that notice was not given to the other party before record-

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1. A I R 1922 Lah 338=71 I C 259.
2. (1875) 23 W R 390 (P C).
3. A I R 1914 Lah 67=22 I C 403.

ing the order of transfer. There is no specific provision that such notice should be given. But in *Sardara* v. *Emperor, A. I. R.* 1923 *Lah.* 380, it was held that notice was essential. In *Bagh* v. *Mohammad Din, A. I. R.* 1926 *Lah.* 156, it was held that a transfer order made under S. 528, Criminal P. C., is not illegal for want of notice to the opposite side. A similar view was expressed in *Rehmat Ali* v. *Fazal Ilahi. A. I. R.* 1927 *Lah.* 80, where it was held that an order of transfer without giving notice to the opposite party, though not desirable, is not illegal. The point again came up before the High Court in *Dwarka Das* v. *Emperor, A. I. R.* 1931 *Lah.* 29, where it was held that an order of transfer passed by the District Magistrate without serving a notice on the opposite party and in the absence of that party was illegal. It was remarked by the learned Judge that in accordance with the fundamental principles of universal justice no order should be passed to the prejudice of a party in his absence and behind his back and that he should be given an opportunity of contesting such an order before it is passed. The point is not free from doubt as in the rulings of 1923 and 1931, it was held by our Court that a notice was essential and want of notice rendered the transfer order illegal. But in the rulings of 1926 and 1927, it was held that an order of transfer without notice to the opposite party was not illegal though it was undesirable. An authoritative decision on this point is probably necessary in view of the conflict of opinion noted above.

On the second question, the law as enunciated in S. 528, Cl. (5) is clear. A Magistrate making an order of transfer under S. 528, Criminal P. C., shall record in writing his reasons for making the same. In this case, the learned District Magistrate has not recorded his reasons for making the transfer order. He has contented himself by remarking that the case may be transferred as a special case. I am not prepared to hold that this amounts to compliance with the provisions of S. 528, Cl. (5), and as laid down in *Sardara* v. *Emperor, A. I. R.* 1923 *Lah.* 380, a transfer order which does not give reasons for transfer, is bad in law. In my opinion, the order under reference, as it stands, is bad in law for reasons given above. I accordingly refer the revision petition under S. 438, Criminal P. C., for orders of the Hon'ble Judges of the High Court.

Order.—The learned Sessions Judge has reported this case as he considers that the order passed by the learned District Magistrate under S. 528 (2), Criminal P. C., was illegal, firstly, because before passing the order he failed to give notice to the complainant and secondly, that he failed to record his reasons for making the order. In his order of reference the learned Sessions Judge has referred to various authorities which he assumed support his contentions. Now, in the first place, it has been repeatedly held that there is no provision of the Criminal Procedure Code, which requires a Magistrate acting under S. 528, Criminal P. C., to give notice to the opposite party. Judges have from time to time pointed out that although law did not demand such a notice, it was usually advisable and desirable to issue notice to the opposite party when an application under S. 528, Criminal P. C., was to be disposed of. The mere fact that the learned District Magistrate has not done what this Court in certain other cases has laid down as desirable is not to my mind a sufficient reason to hold that the order is bad in law.

So far as the second reason given by the learned Sessions Judge is concerned, it was held by the Allahabad High Court in *Dukhi Kewat* v. *Emperor* (1) that the omission to record reasons for a transfer was a mere irregularity and did not vitiate the subsequent proceedings. In *Parkas Chunder* v. *Emperor* (2), it was held that although an officer transferring cases from one Court to another ought to record his reasons for it, his omission to do so being only an irregularity was not a material ground for setting aside the order of transfer. The Madras High Court has taken a similar view. Sitting as a Court of revision I am unable to say that the order of transfer is vitiated because notice was not given and the reasons for the transfer were not set out at length. I therefore decline to interfere and dismiss the petition.

V.S. *Petition dismissed.*

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1. (1906) 28 All 421=3 Cr L J 327=(1906) A W N 76.
2. (1907) 34 Cal 918=6 Cr L J 360.

A. I. R. 1933 Lahore 387 (1)

DALIP SINGH, J.

Bishen Das—Petitioner.

v.

Bibi Amar Kaur—Complainant—Opposite Party.

Criminal Revn. No. 34 of 1933, Decided on 17th March 1933, reported by Addl. Sess. Judge, Lahore.

Criminal P. C. (1898), S. 488—It is residence of husband and not of his father that gives jurisdiction to Court.

In proceedings under S. 488 that Court has jurisdiction where the husband is actually residing when the proceedings are started. In order to invest a Court with jurisdiction the fact that the father of the husband was residing at a certain place has nothing to do. [P 387 C 1, 2]

Brij Lal—for Petitioner.

Devi Das—for Opposite Party.

Facts.—The petitioner's wife has instituted a complaint for maintenance against him under S. 488, Criminal P. C., at Lahore. The petitioner, who is a Government servant posted at Delhi since 1927, objects to the jurisdiction of the Lahore Courts on the ground that he has no residence at Lahore and that he now resides and has for several years resided at Delhi. The Magistrate having overruled the objection, the petitioner has now come up on revision.

Grounds. — Section 488, Criminal P. C., as I read it, confers jurisdiction on Courts in any district: (1) where the husband resides or is, or (2) where the husband and wife last resided together. It is an admitted fact that the petitioner, who is in Government service, has been posted at Delhi since 1927. He obviously is and has been residing there. It is also common ground that the husband and wife last resided together at Delhi. It appears to me that, under these circumstances. the Courts at Delhi and not at Lahore have jurisdiction. The learned Magistrate has noted that the accused received his education at Lahore; that he was married at Lahore; that he performed his adoptive father's Kriya Karam at Lahore, and that his adoptive father's widow lived for some time at Lahore after the death of her husband which took place several years ago (though she now admittedly resides at Delhi, with the petitioner since one and a half years). It appears to me that all these considerations are beside the point for determining where the husband "resides or is" within the meaning of S. 488, Criminal P. C. It is further stated that the petitioner owns a piece of land at Khui Miran in this district; but that too, in my opinion, cannot help us to fix the petitioner's residence at Lahore. The petitioner in fact states that even this piece of land was purchased benami in his name. The petitioner has deposed that he himself owns or possesses no residential house or in fact any property at all in Lahore.

It is also mentioned by the learned Magistrate that the deceased adoptive father of the plaintiff used to reside at Lahore and owned property here. The whole of the property however has been left by him to his widow. This adoptive father himself, according to the petitioner, belonged originally to Gujrat. The mere fact that he resided at Lahore before his death several years ago does not, in my opinion, mean that the petitioner now "resides or is" at Lahore for purposes of these proceedings under S. 488, Criminal P. C. The petitioner, who is a Government servant liable to be transferred from place to place, has really no fixed or permanent residence and he "resides" where he is for the time being. He therefore now is or resides at Delhi. It is prayed that the order of the learned Magistrate assuming jurisdiction at Lahore should be set aside.

Order.—There is nothing shown me that the petitioner resides in Lahore now. The fact that his adoptive father did so has nothing to do with the point. I therefore accept the reference and set aside the order of the learned Magistrate holding that the Lahore Court has jurisdiction.

V.S. *Reference accepted.*

A. I. R. 1933 Lahore 387 (2)

JAI LAL, J.

(Bhai) Mathra Das—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1662 of 1932, Decided on 7th March 1933, from order of Sess. Judge, Montgomery, D/- 17th November 1932.

(a) Criminal Law Amendment Act (1908), S. 17 (2)—Leader held guilty under S. 17 (2).

The leader of the party which induces the boys to take out and publicly exhibit the Congress flags and for which those boys are given clothes and some cash in lieu of services to be rendered by them is guilty under S. 17 (2). [P 388 C 1]

(b) Government of India Act (1915), S. 55 —Unlawful association.

The delegation of powers to the Local Government to declare that associations are to be deemed to be unlawful is not ultra vires. [P 388 C 2]

B. R. Puri—for Petitioner.

Abdul Rashid—for the Crown.

Order.—The petitioner, Mathra Das, has been convicted under S. 17 (2), Criminal Law Amendment Act, 1908, and has been sentenced to two years' rigorous imprisonment and further been ordered to pay a fine of Rs. 200. The prosecution case is that, on 22nd June 1932, the petition and others, who were also convicted along with him, but under S. 17 (1), Criminal Law Amendment Act, 1908, attempted to induce, P. W. 2, Harnam Singh, a student aged 20, and P. W. 5, Tulsi Ram, aged 15 or 16, to take out and publicly exhibit the Congress flags. These boys were to be given clothes and some cash in lieu of services rendered by them. They were told that they would be arrested and would probably be imprisoned and should therefore be prepared to take the consequences. It was therefore agreed that the money payable to them should be paid to their parents. This suggestion was put before the boys first by the other convicts. They accepted the conditions and were then taken to Mathra Das who was lying on a bed. He approved of the arrangement and directed that the clothes be brought in. The clothes were brought and given to the boys along with the Congress flags. In the meantime the father of one of the boys came to know of what had happened and took his son away with him, and apparently the whole scheme fell through. It is in evidence that clothes were given to the boys, were put on by them before the scheme was frustrated by the appearance of the father of one of them. On these facts it is contended on behalf of the petitioner that he could not be convicted under the second part of S. 17, but that, if at all, he could be convicted under the first part. The circumstanecs however show that Mathra Das was the leader of the party which induced the boys to act in the manner mentioned above and, in my opinion, he has rightly been convicted under the second part and I agree with the conclusions of the learned Sessions Judge.

Another contention of the learned counsel is that the delegation of the powers to the Local Government to declare what associations are to be deemed to be unlawful is ultra vires. S. 55, Government of India Act, was cited in support of this contention. The point was not however fully developed before me and I consider that there is no force in it. The so-called delegation occurs in the definition of "unlawful association" and after providing that associations which have been formed with certain objects are to be deemed as unlawful associations it has also been provided that the expression shall include associations which have been declared by the Local Government as such. This provision is not, in my opinion, ultra vires of the legislature. I do not however consider it necessary to discuss the matter in detail because I have already stated the point was not fully developed before me by the learned counsel. With regard to sentence, in view of the fact that the conduct of the petitioner was particularly objectionable in law inasmuch as he attempted to induce two students to carry the Congress flag and thus run the risk of punishment, probably imprisonment, I decline to interfere with the substantive term of imprisonment awarded to him. In view however of the substantial imprisonment awarded to him I do not think there was any ground for adding a sentence of fine to it. I consequently accept this petition to this extent that the sentence of fine is set aside; otherwise the petition is dismissed.

R.K. *Order accordingly.*

A. I. R. 1933 Lahore 388

COLDSTREAM AND JAI LAL, JJ.

Emperor

v.

Sher Singh—Accused—Respondent.

Criminal Appeal No. 1399 of 1931, Decided on 20th December 1932, from order of Sess. Judge, Ferozepore, D/- 13th August 1931.

(a) Criminal P. C. (1898), S. 417—Appeal from acquittal—Interference when justified pointed out.

The statutory law makes no distinction between an appeal against an acquittal and an appeal from a conviction and in order to justify interference with a judgment of acquittal on a question of fact it is sufficient if the finding is clearly wrong on the evidence and unreasonable in the opinion of the appellate Court; but the indications of error in the judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing, in order to justify its being set aside than would be necessary in the case of a conviction: 7 *P R* 1904, *Foll.* [P 390 C 2]

(b) Criminal Trial—Retracted confession—Use and value depends on facts of each case —Criminal P. C. (1898), S. 164.

A retracted confession may form the basis of a conviction without any corroborative evidence. But every case of this kind must be decided upon its own circumstances and not upon the amount of credibility which was attached in other cases to confessions made. If a Judge believes that a confession made by a prisoner, although subsequently withdrawn, contains a true account of that previous connexion with a crime, the Judge is bound to act, so far as that prisoner is concerned, on that confession which he believes to be true: 20 *All* 133 and *A I R* 1914 *Lah* 321, *Rel on*; *A I R* 1927 *P C* 215 and *A I R* 1925 *Lah* 605, *Ref.* [P 391 C 1]

(c) Evidence Act (1872), S. 24—Confession under mere hope of pardon cannot be rejected.

Where a confession is positively proved by the record of Magistrate that it was voluntary, the mere fact that the accused confessed in the hope of pardon will not justify its rejection as being improperly induced, in the absence of the evidence to suggest that any police officer or other person in authority did or said anything which could possibly be construed into holding out a hope of pardon: *A I R* 1927 *P C* 215, *Ref.* [P 391 C 2]

C. H. Carden Noad—for the Crown.
J. G. Sethi—for Respondent.

Coldstream, J.—On 21st April 1931, the body of Labhu Ram (or Labhu Shah), a money lender of Khosa Pando, a village about four miles from Moga in Ferozepore District, was found in a ruined building about a mile outside the village close to the road leading to Moga. During investigation by the police a piece of wood 18 inches long stained with blood was found beside the body. This piece of wood fitted a part of the structure of a neighbouring well, known as Subedarwala, from which it appeared to have been broken off. Post mortem examination of the body proved that Labhu Ram had been strangled to death, the interior surface of his neck being swollen, with much congestion under the skin in front. There was a swelling above the right ear and two contusions above and in front of the left ear. Suspicion fell upon the sons of Natha Singh, a Jat of the village, who was heavily indebted to Labhu Ram. One of these, Sher Singh, was arrested and on the 24th he made a confession at Moga to a First Class Magistrate which was recorded with all the proper formalities. His story was that Labhu Ram, to whom Natha Singh owed Rs. 923, had put Natha Singh in prison and also prosecuted him and his sons, Bachittar Singh, Sucha Singh and Sher Singh, for assault. The assault came up for hearing in Moga on the 20th when Sher Singh and his brothers were released on bail. After the proceedings, Sher Singh and his brothers, with Sundar Singh, who had identified the accused in Court for bail purposes, together with Chanan Singh, one of the sureties, after doing some shopping and drinking tea, started to return to Khosa Pando together. At the railway crossing, close to Moga Sher Singh let the others go on and himself stayed behind. After revisiting Moga he started again for home before evening. At the Subedarwala well he was overtaken by a carpenter of Khosa Pando called Hardial Singh, who was returning on his bicycle from Moga. Hardial Singh told him that Labhu Ram was coming along behind. It was then about sunset (about 7 p. m.). Hardial Singh rode on, Sher Singh pulled out a piece of wood from the well and waited for Labhu Ram. When Labhu Ram passed by he knocked him down with the piece of wood which he then placed across his neck, pressing it until Labhu Ram was dead. He dragged the body to the ruined building and left it there with the piece of wood, and went home, taking with him a tin funnel and two bundles of onions which Labhu Ram had been carrying. On the day after he made this statement he produced from his house in Khosa Pando the funnel and the two bundles of onions.

Sher Singh was tried on the charge of murder by the Sessions Judge of Ferozepore. It was proved that on 2nd January 1931. Labhu Ram had made a complaint in a criminal Court at Moga, accusing Natha Singh and his sons Bachittar Singh and Sher Singh under S. 307, Penal Code, of having assaulted and threatening to murder him at Khosa Pando on the previous day. What had really happened was that Natha Singh and Bagga Singh, who was a surety for him, had asked Wasawa Singh, P. W. 12, to settle Labhu Ram's claim against Natha Singh. Labhu Ram had been called but instead of settling the matter Natha Singh and Sher Singh abused him, Natha Singh telling Sher Singh that if the man was murdered he (Natha Singh), could afford to let one of his four sons be hanged. (Evidence of Wasawa Singh and Bhola Singh, P. W. 13). On the 23rd February, Labhu Ram, obtained a warrant, (Ex. P. O.), in execution of a decree against Natha Singh, and had Natha Singh arrested. When the bailiff, Muhammad Shah, P. W. 17, began to take possession of his property Bachitar Singh, Sucha Singh and Sher Singh, assaulted Labhu Ram with dangs and prevented further proceedings. This was duly reported by the bailiff, (Ex. P/P). Labhu Ram submitted a complaint to a Magistrate at Moga who issued warrants of arrest against Natha Singh and his sons Bachitar Singh and Sucha Singh and fixed the 20th of April for the hearing. This hearing was the proceeding for which Sher Singh and his party had gone to Moga on the day of the murder. The prosecution duly proved the confession made by Sher Singh and also the fact that on the 25th April, Sher Singh had produced from his house the funnel and the two bundles of onions (not two onions as translated in the English record). (After giving the prosecution evidence, the judgment proceeded). Before the Committing Magistrate, Sher Singh resiled from his confession declaring that he had not been at Inayat Ullah's shop on the 20th when Labhu Ram was there, that his confession had been made under the impression that he was being examined by a police officer and would be released if he confessed, that the officer who recorded his confession had not told him that he was a Magistrate or that he (Sher Singh), was not bound to make a confession. He had not taken the onions and funnel from Labhu Ram's body and produced them before the police. These articles did not belong to him. At the trial he adhered to these statements adding that he had been beaten and otherwise tortured by the police into unconsciousness, and then told by the Sub-Inspector that he would be released if he confessed before a superior police officer who wore a kullah. He was taken before an officer wearing a kullah and repeated what the Sub-Inspector had tutored him to say.

Sher Singh called no defence evidence, and the assessors, without giving reasons for their decision, held his guilt not proved. The learned Sessions Judge agreed with their verdict and acquitted Sher Singh. We have before us an appeal against this acquittal preferred by the Government advocate on behalf of the Crown. The learned Government advocate contends that the confession alone in the circumstances of this case have sufficed to establish the respondent's guilt, that the confession is amply corroborated by the evidence of motive and opportunity as well as by the production by Sher Singh of the funnel and onions and that the acquittal is manifestly wrong and the lower Court's judgment perverse. For Sher Singh, Mr. J. G. Sethi has referred to numerous authorities laying down the principles which have been followed in dealing with Crown appeals. He has attacked the evidence produced to corroborate the confession and contended that some of it (the evidence of Hardial Singh), contradicts the confession, while the rest adds nothing inconsistent with Sher Singh's innocence.

The learned Sessions Judge had disbelieved wholly Sher Singh's explanation of how he came to make his confession, finding no evidence in support of his statement that he was maltreated by the police, and pointing out that the statement was duly recorded by a Magistrate whose good faith there is no reason to doubt. He has however refused to act upon this confession, holding that the circumstantial evidence, although it "raises serious suspicions" against the accused, is not sufficient to show that the confession is "either true or genuine." From his judgment it appears that he has accepted the evidence of the production of the onions and the funnel, while there is nothing to show that he had disbelieved any of the prosecution evidence. The only reasons he has clearly stated for doubting the genuinenness of the confession are, first, that the money lender was a rich young man, as strong as Sher Singh, who could not possibly have caused the death of Labhu Ram in the way described by him; and secondly, that the medical evidence does not completely corroborate the confession. In dealing with appeals against acquittals this Court has been guided generally by the observations made in *King-Emperor* v. *Chattar Singh* (1). The statutory law makes no distinction between an appeal against an acquittal and an appeal from a conviction, and (to quote from the judgment of Chatterji, J.):

> "in order to justify interference with a judgment of acquittal on a question of fact it is sufficient if the finding is clearly wrong on the evidence and unreasonable in the opinion of the appellate Court', but 'the indications of error in the judgment of acquittal ought to be clearer and more palpable, and the evidence more cogent and convincing, in order to justify its being set aside than would be necessary in the case of a conviction.' Again, 'the finding of fact of a Court which has had the evidence before itself is ordinarily entitled to great weight and should be set aside by the Court of appeal only when the indications of mistake are clear, and this is specially true in cases where the finding is in favour of the accused's innocence. If in such a case the evidence is all oral and its credibility is a mere matter of opinion, without involving other considerations, the opinion of the Court which heard the witnesses must be treated as almost conclusive .... The indications of guilt must be obvious, or the evidence too strong to be rejected, before the Court will interfere."

In this case, as has been made clear above, the evidence is not all oral; indeed, so far as it is oral, the lower Court seems to have accepted it, in

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1. (1904) 7 P R 1904=97 P L R 1904.

spite of the discrepancy as regards time of day between Hardit's statement and Sher Singh's confession. Great stress has naturally been laid upon this discrepancy by Mr. Sethi and his client is entitled, I think, to the exclusion of this evidence from consideration. But in it I see no justification for an inference that the rest of the evidence has been fabricated. I also exclude the evidence of Indar Singh whose cross-examination certainly throws some doubt on his veracity. I may here notice that the learned Sessions Judge is wrong in observing that the blood-stained piece of wood was recovered in consequence of information given by Sher Singh. The recovery is certainly consistent with Sher Singh's story but cannot be said to corroborate it cogently as against himself. It has no doubt been laid down by many Indian Courts that a retracted confession ordinarily requires some independent corroboration to support a conviction, but, as pointed out by the Privy Council in *Mukand Singh* v. *Emperor* (2) the rule of practice that little or no weight should be attached to a retracted confession as against a person other than the maker of it does not apply where it is used against the deponent, while a Division Bench of this Court in *Partab Singh* v. *Emperor* (3) has endorsed the view that as against the person making it a retracted confession may form the basis of a conviction even without any corroborative evidence. On this subject the Allahabad Court (Edge, C. J. and Barkit, J.), appears to me, if I may say so with proper deference, to have expressed the only possible rule in *Queen-Empress* v. *Maiku Lal* (4):

> "Every case of this kind must be decided upon its own circumstances and not upon the amount of credibility which was attached in other cases to confessions made. If a Judge believes that a confession made by a prisoner, although subsequently withdrawn contains a true account of that previous connexion with a crime, the Judge is bound to act, so far as that prisoner is concerned, on that confession which he believes to be true."

This view appears to have been adopted by the Punjab Chief Court in *Jaiwan* v. *Emperor* (5) when Johnstone, J., summarized the case law on the subject as leading to the conclusions that the use to be made by the Court of confessions, whether retracted or not, is a matter rather of prudence than of law, the business of the Court being to make up its mind in accordance with the dictates of common sense whether it is safe to believe the confession or not, and that experience and common sense show that in the absence of corroboration in material particulars it is not safe to convict on a confession unless from the peculiar circumstances in which it was made and judging from the reasons alleged or apparent of the retraction there remains a high degree of certainty that the confession notwithstanding its having been resiled from is genuine.

In the case before us the confession was made shortly after the murder when Sher Singh's brothers were under suspicion. He himself had strong motive for the murder, had been with Labhu Ram in Court at Moga and in all probability had been seen by way-farers on the road between Moga and Khosa Pando. There is no evidence or indication on the record of coercion or improper inducement, while it is positively proved by the record of the Magistrate's careful proceedings that the confession was voluntary. The mere fact that Sher Singh confessed in the hope of pardon, will not, as pointed out by the Privy Council in *Mukand Singh* v. *Emperor* (2) justify its rejection as being improperly induced, in the absence of evidence to suggest that any police officer or other person in authority did or said anything which could possibly be construed into holding out a hope of pardon. The respondent's explanation of how he came to confess is certainly false, as it has been found to be by the lower Court. Notwithstanding all these circumstances the Sessions Judge has found the confession doubtful because Labhu Ram was physically a match for Sher Singh and that the medical evidence proves injuries not detailed in the story told by Sher Singh.. (After considering the evidence, the judgment proceeded). The evidence is most cogent and convincing. The lower Court's judgment is clearly wrong and unreasonable, the evidence is too strong to be rejected and the acquittal must be set aside. I would accordingly accept this appeal and convict Sher Singh under S. 302, Penal Code. Having regard to all the circumstances which led up to and prompted the murder, including the fact that Labhu Ram had falsely accused Sher Singh of attempting to murder him, and the fact that it is more than a year since Sher Singh was acquitted by the Sessions Judge I would

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2. A I R 1927 P C 215=110 I C 225=54 I A 45=8 Lah 230 (P C).
3. A I R 1925 Lah 605=87 I C 511=6 Lah 415.
4. (1897) 20 All 133=(1897) A W N 224.
5. A I R 1914 Lah 321=25 I C 634=30 P R 1914 Cr.

impose the lesser sentence of transportation for life.

Jai Lal, J.—I agree.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 392

ABDUL QADIR, J.

Abdul Rahman—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1244 of 1932, Decided on 6th January 1933, from order of Subdivl. Magistrate, Pakpattan, D/- 29th August 1932.

Penal Code (1860), Ss. 363 and 368—Kidnapped child left in house of accused—Accused informing another about it who gave information to guardian of child—Accused is not guilty.

The brother of accused kidnapped three children and leaving one of them in accused's house went away with the other two and he was not traced. The accused finding it difficult to maintain himself informed another about the child and both were maintaining the child and information was sent to the guardian of the child after knowing from it who her guardian was:

Held: that the accused was not guilty under either S. 363 or S. 368. [P 393 C 1]

Ganesh Datta for *Govt. Advocate*—for the Crown.

Judgment.—A man named Abdullah was appointed as an Imam in a mosque near Kacha Burj in Pakpattan town. Some boys and girls of the neighbourhood became his pupils to learn the Quran from him. After some time he disappeared one day and along with him two minor girls and one little boy of the same place were found missing. The relatives of the children began to search for them and as they came to know that Abdullah was not to be found in Pakpattan, they suspected him of having kidnapped the minor children from the lawful guardianship of their parents. A report of an offence under S. 363, Penal Code, was made to the police on 16th March 1932, by Mohammad Din carpenter, father of one of the girls, Mt. Karam Ilahi, alias Karam Bibi. The police came for investigation but no clue as to the whereabouts of the said Abdullah was found. For a long time no one besides Abdullah was named as a suspect. On the 4th June, more than 2½ months after the occurrence, Mohammad Din received a letter from one Ghulam Rasul of Chak 170, in Lyallpur District, saying that there was a girl who gave her father's name as Mohammad Din of Pakpattan and asking him to come and see if she was his daughter. He went and found his daughter in the house of a carpenter named Mohammad Din, where, Abdul Rahman, brother of the said Abdullah was also residing. Abdullah has not been found so far. The police, after the recovery of Mt. Karam Ilahi, challaned Abdul Rahman for an offence under S. 363, Penal Code, and he has been convicted of it and a sentence of six years' rigorous imprisonment has been passed against him. He has appealed through jail protesting his innocence.

As I found some elements of doubt in his case, on examining the record, I asked the learned counsel, who was appearing for the Crown in some other cases before me, to study the case and to argue it on behalf of the Crown. He has done so. After carefully considering the facts on the record and the arguments addressed to me, I find that there is a doubt in favour of the appellant. The report made by Mohammad Din does not mention the presence of Abdul Rahman in Pakpattan at the time of the abduction or his disappearance along with his brother. I think if Abdul Rahman had been living in Pakpattan and had been jointly concerned with his brother in the kidnapping of the minors it was not likely that Mohammad Din would have omitted a reference to him. The accused does not deny the fact that the girl was living with him in the house of Mohammad Din, but he says that he was living in Chak 170 when his brother came along with three minor children, and on being asked by him as to who they were he said that he had brought them with him to educate them. For some time he was with him with all the children and then went away with two of them, leaving this girl where she was. He was himself a poor man and was not able to maintain himself. So he sought the help of Mohammad Din of Chak 170 to help him as well as the girl and thus they were both living in the house of Mohammad Din. Mohammad Din of Chak 170, who has been examined as a prosecution witness supports this part of the story of the appellant. He explains how he came to know that the girl was a kidnapped child. He says that the little girl used to play about with his children and one day when she saw him working as a carpenter she said her father also was doing similar work. He says that thereupon he began to question her as to who she was and and where she came from. At first she would not tell him, because she said that the two brothers with whom she had been living had threatened her not to disclose her identity, but she was eventually persuaded by him to do so. When he got from her the address of her father, Mohammad Din, he gave it to the Zaildar and it was Ghulam Rasul, son of the Zaildar, who communicated with her father and thus the girl was restored to her parents.

P. W. Mohammad Din of Pakpattan in his statement in Court says that Abdul Rahman was with his brother in Pakpattan before the kidnapping took place and similarly Mt. Karam Ilahi says that both the accused took her away and both used to threaten her, but it seems to me that they are saying so because Abdul Rahman is the man with whom the girl was actually found and he was the only man on his trial, otherwise there appears hardly anything to connect him with the original offence of kidnapping, which is alleged to have been committed by his brother Abdullah. Ghulam Rasul, (P. W. 2), also states that the accused made a statement to him when the father of the girl came to Chak 170, that he and his brother had kidnapped the girl, but one should not be surprised if he has based this on the other part of the statement of the accused to which the accused adhered in Court, when he admitted the knowledge that his brother had kidnapped the girl. However this alone cannot bring home the offence to him.

It has been pointed out by the learned counsel for the Crown that the facts admitted by the accused may bring an offence under S. 368, Penal Code, home to him, if it is held that S. 363 does not apply to his case. I have considered this aspect of the question, but I do not think that the accused can be convicted of an offence under S. 368, Penal Code, on the present record. In the first place he has not been charged with the offence and in the second place any offence under S. 368, Penal Code, if committed by him, would be in Lyallpur District, while he has been tried in Montgomery District, where the original offence under S. 363, is stated to have been committed. Apart from these technical difficulties, it appears to me that there is a difficulty in the way of the prosecution on the merits of the case, so far as S. 368 is concerned, as it makes it an offence to wrongfully conceal or confine a kidnapped person, knowing that the person has been kidnapped or abducted. On the present record I do not find any allegation of wrongful concealment or confinement of the girl on the part of Abdul Rahman and I think, therefore that this appeal must be accepted. I accept it accordingly and acquit the accused and direct that he may be set at liberty forthwith.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 393

HARRISON, J.

Emperor

v.

Bhagat Singh and *others*—Convicts—Respondents.

Criminal Revn. No. 992 of 1932, Decided on 22nd December 1932, reported by Sess. Judge, Amritsar, D/- 7th July 1932.

Criminal P. C. (1898), S. 562—Conviction for offence under S. 457, I. P. C.—No sentence of imprisonment passed by Magistrate—Though order is illegal and improper, High Court need not interfere if nothing is to be gained by passing sentence of imprisonment—Penal Code (1860), S. 457.

Accused were found guilty under S. 457, I. P. C. The Magistrate applying the provisions of S. 562, Criminal P. C., passed no sentence of imprisonment:

Held: that the order was illegal and improper; that burglary being a serious offence, people who commit it should be adequately punished, but that as nothing would be gained by passing a sentence of imprisonment, then it was not necessary to interfere: 6 *I C* 639, *Foll.* [P 394 C 1]

Mohammad Amin Khan for *Government Advocate*—for the Crown.

Hakumat Rai—for Respondents.

Facts.—On the night between 11th and 12th March the chaubara of Mt. Iqbal Kaur, who was not present in the village was broken open and certain articles such as clothes, watch, etc., were stolen. The matter was reported to the police by the mother of Mt. Iqbal Kaur. The police started investigation and recovered certain stolen articles on the information supplied by Bhagat Singh accused, certain stolen property was produced by Bhaggu and Tara Singh accused, and some was recovered from a well. The police eventually challaned Bhagat Singh, Tara Singh and Bhaggu under S. 457, Penal Code. They were tried by Honorary Lieutenant Sardar Raghbir Singh, Honorary Magistrate, First Class, Raja Sanhsi. After recording the prosecution evidence and the statements of the accused who pleaded guilty and who did not produce any defence evidence the Honorary Magistrate convicted the accused under S. 457, Penal Code, but taking into consideration the War services of the accused, their youth and the fact that the stolen articles had been recovered and the accused had confessed their guilt he considered it proper to deal with them leniently and consequently directed each of them to furnish security under S. 562, Criminal P. C., for Rs. 500, with one surety to keep the peace for one year and be of good behaviour and to attend Court when called upon to do so. The Public Prosecutor on behalf of the Crown applied under S. 435/439-562 (3), Criminal P. C., for enhancement of the sentence on the ground that S. 562, Criminal P. C., was not applicable and consequently the sentence passed by the Honorary Magistrate was illegal and inadequate in view of the seriousness of the offence established. On a reference by the Sessions Judge the High Court passed the following:

Order.—The facts of this case are that three men were found guilty under S. 457, Penal Code, of breaking into a house and stealing property of the value of Rs. 34. An illegal and improper order has been passed by the Magistrate. He has applied the provisions of S. 562, Criminal P. C., and passed no sentence of imprisonment. The case has been reported by the learned Sessions Judge, who points out the illegality of the order and suggests that a sentence of imprisonment be passed. Counsel for the Crown relied on a recent case, *A. I. R.* 1932 *Lah.* 258. On the other hand, counsel for the accused relies on *Abdul* v. *Emperor* (1). In this latter case the order runs as follows:

> "The first Court was certainly wrong in its order, for S. 562, Criminal P. C., cannot be properly used in cases falling under S. 457, I. P. C. I do not think I should alter the conviction to anything else, but I simply decline to interfere. In my opinion, there is nothing to be gained by now passing a sentence of imprisonment. Papers returned. Mr. Stephens, i. e., the Magistrate, should take care not to make such a mistake again."

There is no doubt burglary is a serious offence and that people who commit it should be adequately punished. The question here as in *Abdul* v. *Emperor* (1) appears to me to resolve itself into this: whether anything would be gained by now passing a sentence of imprisonment. Taking everything into account I do not think it necessary or advisable to do so. I dismiss the application.

K.S. *Application dismissed.*

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1. (1910) 11 Cr L J 389=6 I C 639.

A. I. R. 1933 Lahore 394

COLDSTREAM, J.

Jamna Das—Petitioner.

v.

Notified Area Committee, Shahdara—Respondent.

Criminal Revn. No. 1455 of 1932, Decided on 4th January 1933, from order of First Class, Magistrate, Delhi, D/- 23rd March 1932.

Punjab Municipal Act (3 of 1911), Ss. 81 and 170—S. 81 does not apply for recovery of arrears of rent of balcony.

Section 170 of the Act refers to money due for ground floor and not for overhanging structures. Hence the penal provisions of S. 81 cannot be applied in a case for recovery of arrears of rent of a balcony as such rent is neither money due to the committee under the Act within the meaning of S. 81 nor rent claimable by them under S. 170: *A I R* 1926 *Lah* 518; *A I R* 1927 *Lah* 161 and *A I R* 1931 *Lah* 315, *Ref.* [P 394 C 2]

Kishan Dayal—for Petitioner.

Facts.—This is a revision from the order of Rai Sahib Bakhshi Pindi Das, Magistrate, First Class, Delhi. An application was made to him under S. 81, Municipal Act, by the Notified Area Committee of Shahdara, asking for the recovery of a sum of Rs. 2-15-0, due to them on account of rent of a balcony by Lala Jamna Das, advocate. The amount of Rs. 2-15-0, plus a process fee of Re. 1-8-0 was recovered. Against this procedure Lala Jamna Das, has put in a petition for revision and urges that the penal provision of S. 81, Municipal Act, should not have been applied because the section is wholly inapplicable. S. 81, Municipal Act, lays down that

> "any arrears of income-tax, water rate or fee or any other money claimable by a committee under this Act may be recovered on application made to a Magistrate having jurisdiction within the limits of the Municipality."

One of the contentions raised is that this rent is money claimable by the Committee under the Act, but this contention cannot hold good because this rent is not money due to the Committee under the Act. It is not a tax or water rate or any sum due under the Act. On behalf of the Committee it is also contended that this rent is claimable by them under S. 170, Municipal Act, but this is not correct.

Grounds.—That money due under S. 170, Municipal Act, is for ground floors and not for over-hanging structures. S. 81, Municipal Act, does not therefore apply. See in this connexion, *A. I. R.* 1926 *Lah.* 518, *A. I. R.* 1927 *Lah.* 161 and *A. I. R.* 1931 *Lah.* 315. The penal provisions of the Act should not have been used in recovering this rent.

Order.—For the reasons stated by the Additional District Magistrate in his order of reference, I accept the recommendation and quash the order of the Magistrate dated 23rd March 1932, and set aside the attachment proceedings. The money concerned was claimed as rent and not as money claimable under the Act.

K.S. *Order quashed.*

A. I. R. 1933 Lahore 395

ADDISON AND AGHA HAIDAR, JJ.

Bindra Ban Das and *another*—Plaintiffs—Appellants.

v.

Mt. Wanti and *another*—Defendants—Respondents.

First Appeal No. 607 of 1927, Decided on 14th December 1932, from decree of Sub-Judge, First Class, Shahpur, D/- 30th November 1926.

(a) Civil P. C. (1908), S. 92—Suit under—Prayer to eject trespassers cannot be entertained.

A prayer of ejectment cannot be entertained by the Court in a suit instituted under S. 92, Civil P. C. [P 396 C 1]

(b) Civil P. C. (1908), O. 6, R. 17—Amendment of plaint can be allowed in appeal if nature of suit is not altered.

Amendment of plaint can be allowed even at the time of appeal on the plaintiffs paying costs of the defendant if by such amendment the plaintiff does not spring a surprise upon the defendant and the nature of the suit is not altered. [P 396 C 1]

Nand Lal and *Qabul Chand*—for Appellants.

M. L. Puri and *S. L. Puri*—for Respondents.

Agha Haidar, J.—This is a plaintiffs' appeal arising out of a suit which, with the exception of one or two points, to be presently noted is one under S. 92, Civil P. C. The trial Court dismissed the plaintiffs' suit on the ground that proper court-fee had not been paid on the plaint and therefore they could not maintain it. Against this decision the plaintiffs have filed a first appeal in this Court. The plaintiffs came into Court alleging that a certain thakardwara called Baba Bhagwan Das-Wala situate in the area of Mauza Girot in Khushab Tahsil was an old institution and pious people had dedicated culturable land to it, making the same Dharam Arth, and that Bairagi Fakirs had been managing the said institution for and on behalf of their community. They went on to say that there was a mandir attached to the said thakardwara where a certain idol called Thakarji was installed and worshipped and that the last Mahant of the institution was one Bawa Mathra Das Bairagi who, contrary to the practice observed by the Bhekh of Bairagis entered into the bond of matrimony with Mt. Wanti, defendant 1, Mt. Tulsi Bai, defendant 2, being their daughter. It is said that four or five days before his death, i. e., on 26th September 1924, Bawa Mathra Das executed a will in favour of the two defendants by which he bequeathed the property in suit to them. There are allegations in the plaint that this will was not a valid and genuine document in that it was obtained by the defendants by exercising undue influence upon Bawa Mathra Das when he was old and infirm and had not a sound and disposing mind. At the end the plaintiffs prayed that the defendants may be ejected from Tikana Bairagian known as Bhagwan Das-Wala and the houses and lands attached thereto and that some person may be appointed as Mahant or trustee of the said Tikana from among the Bairagi community or that the said community may be permitted to nominate a Mahant to manage the institution.

The defendants pleaded that the property in suit was the private property of Bawa Mathra Das and that he was fully entitled, as the owner thereof, to make a will of the property in their favour as they were his heirs and, as such, entitled to succeed to it according to law and custom. The trial Judge on these pleadings framed the following issues: (1) Have the plaintiffs no locus standi ? (2) Is the suit not properly stamped ? (3) Is the suit not properly framed ? (a) under S. 92 Civil P. C., (b) for want of a prayer of declaration that the property in suit is trust property; and (4) Does the previous suit bar the present suit ? The learned Subordinate Judge observed in his judgment that the defendants had conceded issues 3 and 4, but pressed issues 1 and 2. There seems to be some confusion here because in the very next sentence the learned Judge observed that, after hearing counsel on either side, he was of opinion that the suit before him could not lie as it did not fall within the purview of S. 92, Civil P. C., in that the factum of trust is denied by the defendants. He accordingly dismissed the suit holding that, as the plaintiffs prayed for the ejectment of the defendants from the property in suit, they ought to have paid ad valorem court-fee on their plaint which they have not done.

In appeal Dr. Nand Lal, the learned counsel for the appellants has urged that the plaint was not properly drawn up. He frankly admitted that a prayer of ejectment could not be entertained by the Court in a suit instituted under S. 92, Civil P. C. This admission seems to be correct. There cannot be any doubt that the pleader, who prepared the plaint, made certain allegations therein from which it is clear that he was drafting a plaint which came within the purview of S. 92, Civil P. C., but he seems to have forgotten when he drew up the prayer that it was not competent in a suit, under S. 92, to include a prayer for the ejectment of trespassers. This being so, Dr. Nand Lal has asked this Court to grant him permission to withdraw this prayer and, in lieu thereof, to substitute a prayer for a declaration that the Tikana together with the houses and lands attached to it was Dharam Arath property and that the late Bawa Mathra Das had no authority under the law or custom to make a will in respect of the same: vide, *Lachman Prasad* v. *Munia* (1). This prayer appears to be reasonable. I would therefore permit Dr. Lal to make the necessary amendment in the plaint and, in lieu of the prayer for ejectment of the defendants as trespassers, to insert a prayer for the declaration mentinoed above.

The prayer made in the plaint as regards the appointment of a new trustee is also not happily worded and Dr. Nand Lal prays that he may be allowed to amend this part of the plaint also by making it clear that what he really asked the Court was that a scheme may be settled appointing a new trustee or trustees from among the Bhekh of Bairagis and that the property should vest in the said trustee or trustees. This is a reasonable request and I grant it under the circumstances of the case. I may point out that, by making these alterations in the plaint, the plaintiffs are not springing a surprise upon the defendants-respondents and the nature of the suit would not be altered, as I am conviced in my mind, after reading the plaint as a whole, that the plaintiffs really intended to draw up a plaint according to the terms of S. 92, Civil P. C. The fact however remains that, on account of the inartistic manner in which the plaint has been drafter by the plaintiffs' pleader in the Court below, the other side has been put to a good deal of inconvenience, trouble and expense. Under the circumstances of the case, while granting the prayer of Dr. Nand Lal to make the aforesaid amendment, it is only right and proper that the appellants should pay the costs incurred by the defendants-respondents both in the Court below and in this Court. The appeal is therefore accepted in the terms indicated above and the case is remanded to the trial Court. It would be open to the defendants to file fresh pleadings in view of the amendments in the plaint. The Court below shall frame such issues as it may deem proper on the pleadings of the parties and, after recording evidence, dispose of the suit in accordance with law. Costs hereinafter are left entirely to the discretion of the trial Judge.

Addison, J.—I agree.

K.S. *Case remanded.*

A. I. R. 1933 Lahore 396

BHIDE, J.

Mt. Punjab Kaur—Defendant— Appellant.

v.

Mana Singh and *another* — Plaintiff and Defendant—Respondents.

Second Appeal No. 1069 of 1932, Decided on 19th December 1932, from decree of Addl. Dist. Judge, Ferozepore, D/- 10th March 1932.

Punjab Tenancy Act (16 of 1887), S. 59—Death of occupancy tenant — Mutation in equal shares in names of widow of deceased tenant and his mother by mutual consent—Subsequent remarriage by widow — Reversioners are entitled to succeed to tenancy.

On the death of an occupancy tenant the tenancy was mutated in the names of his widow and his mother in equal shares by mutual consent. The widow remarried and in a suit by the reversioners of the deceased tenant:

Held: that the mother did not become a cotenant merely by the mutation as the plaintiff or landlords had not consented to the arrangement as between the widow and the mother, and that the reversioners were entitled to succeed to the tenancy. [P 397 C 1]

Gurcharan Singh—for Appellant.

Ganesh Datta—for Respondents.

Judgment.—One Bachna, an occupancy tenant, died about the year 1927. The tenancy was mutated in the names of his widow, Mt. Sada Kaur and his mother Mt. Punjab Kaur in equal shares with their consent. Subsequently Mt. Sada Kaur remarried and then the tenancy was mutated in the name of Mt. Punjab Kaur alone. The reversioners of Bachna instituted the present suit claim-

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1. A I R 1925 All 759=89 I C 639=47 All 867.

ing that they were entitled to succeed to the occupancy tenancy. The trial Court granted a decree in their favour. On appeal the learned District Judge has modified the decree and excluded certain numbers which were not found to have been in possession of the common ancestor of the plantiiff and Bachna. From this decision a second appeal has been preferred by Mt. Punjab Kaur.

The only point raised by the learned counsel for Mt. Punjab Kaur before me was that Mt. Punjab Kaur was a co-tenant and was entitled to retain the tenancy in preference to the plaintiffs. Reliance was placed in support of this contention on *Moti Lal* v. *Kartar Singh* (1). I may remark at the outset that this point does not appear to have been raised in the Courts below and no issue was framed on it. Apart from this however it appears to me that there is no force in this contention. It is true that the tenancy was mutated in the names of Mt. Sada Kaur and Mt. Punjab Kaur in equal shares on the death of Bachna, but this was by mutual consent. Mt. Sada Kaur was in any case entitled to a life estate under S. 59, Punjab Tenancy Act, and whether the land stood in the name of Mt. Sada Kaur alone or in the names of Mt. Sada Kaur and Mt. Punjab Kaur was a matter of indifference to the plaintiffs so long as Mt. Sada Kaur was alive. There is no evidence on the record to show that the plaintiffs or the landlords ever consented to this arrangement. On the remarriage of Mt. Sada Kaur the present suit was instituted by the plaintiffs. Even if Mt. Punjab Kaur had been a co-tenant the plaintiffs would have been entitled to inherit the share in which Mt. Sada Kaur held a life estate, even according to the Full Bench ruling on which the learned counsel for the appellant has relied. As regards the share which stood in the name of Mt. Punjab Kaur the plaintiffs' suit was amply within time as Bachna had died only in 1927. The Courts below have found that the land decreed in plaintiffs' favour was held by the common ancestor of the plaintiffs and Bachna and on this finding the plaintiffs are clearly entitled to possession of the land. The mere fact that mutation was effected in favour of Mt. Punjab Kaur in the circumstances stated above, could not confer any rights on her as a co-tenant. The presumption arising from the entries in the revenue records has been amply rebutted by the other evidence produced in the case. In my opinion the decree passed by the learned District Judge is correct and there is no ground for interference in second appeal. I dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 397

ADDISON AND AGHA HAIDAR, JJ.

Thakar Das—Decree-holder — Appellant.

v.

Roshan Din—Judgment-debtor—Respondent.

Misc. Second Appeal No. 980 of 1931, Decided on 15th December 1932, from order of Dist. Judge, Rawalpindi, D/- 11th March 1931.

(a) Punjab Alienation of Land Act (13 of 1900) as amended by Punjab Act (1 of 1931), S. 16—Mortgage of agricultural land to non-agriculturist—Decree in mortgage suit for sale of mortgaged property on mortgagor's default to pay mortgage money—Executing Court must refuse to put to sale property.

Though no executing Court could go behind a decree which has been allowed to become final and the decree must be executed as it stands, still where a non-agriculturist to whom agricultural land has been mortgaged, applies for sale of the mortgaged property in execution of a decree which allows him to recover the mortgage money by sale of the property on the mortgagor's failure to pay the amount, the executing Court must hold its hand and not put to sale the property which has been rendered non-saleable by the Alienation of Land Act in spite of the fact that the decree holder has obtained a decree for sale of the property: *A I R* 1916 *P C* 59; 33 *All* 136; *A I R* 1921 *All* 118 and *A I R* 1919 *All* 10, *Ref*; *A I R* 1931 *Lah* 545, *Dist.* [P 399 C 1, 2]

(b) Punjab Alienation of Land Act (13 of 1900), —Object of Act explained — Duty of Courts indicated.

The Punjab Alienation of Land Act is an extremely beneficient measure and was intended primarily to protect land belonging to members of the agricultural tribes who form the backbone of the population and contribute mainly to the revenues of the Province of the Punjab. It was in order to prevent their lands from passing into the hands of non-agriculturists that this Act was passed and it is the duty of the Courts to administer it in a generous and liberal spirit and to see its useful and beneficial provisions are not whittled down by any legal quibbles. [P 398 C 1, 2]

Gobind Ram Khanna—for Appellant.

Bhagat Gobind Das—for Respondent.

Agha Haidar, J.—This appeal arose out of certain execution proceedings and has been referred to a Division Bench at the instance of a learned single Judge of this Court. The facts are briefly these: The judgment-deb-

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1. **A I R 1930 Lah 515=127 I C 1=11 Lah 427 (F B).**

tors who are admittedly members of an agricultural tribe, had executed a mortgage of their land in favour of the decree-holder who is a non-agriculturist. The latter, in due course, brought a suit on foot of his mortgage and obtained a decree with the usual provision that, in case of default by the mortgagors, the mortgage money be realized by sale of the mortgaged property. Default took place and the decree-holder asked the Court to put the property to sale for realizing the decretal amount. Nur Ahmad, one of the judgment-debtors, appeared and objected to such a course being adopted, pleading that, under the provisions of S. 16, Punjab Alienation of Land Act, (Local Act 13 of 1900), he was protected and his land could not be sold in execution of the decree. On behalf of the decree-holder an objection was taken that, as the Court had passed a decree for sale on the happening of a certain contingency and that contingency had happened in the shape of default on the part of the judgment-debtors, the property should be sold and it was not open to the Court to go behind the terms of the decree and to question its validity. The executing Court accepted the objection of the judgment-debtor and its decision was upheld in appeal by the learned District Judge. Thereupon, the decree-holder came up in second appeal to this Court. The language of S. 16, Punjab Alienation of Land Act, is clear and unambiguous. The relevant portion of this section runs as follows:

> "(1) No land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any civil or revenue Court whether made before or after the commencement of this Act."

This act was amended in 1931, vide Punjab Act 1 of 1931. Under this amendment sub-S. (2) has been renumbered as sub-S. (3) and, in place thereof, sub-S. (2) has been added. This new sub-section runs as follows:

> "(2) Notwithstanding anything contained in any other enactment for the time being in force no land belonging to a member of an agricultural tribe shall, in execution of any decree or order of any civil or revenue Court, whether made before or after the enactment of this sub-section, be leased or farmed for a period exceeding 20 years or mortgaged except in one of the forms permitted by S. 6."

Now, the Punjab Alienation of Land Act is an extremely beneficient measure and was intended primarily to protect land belonging to members of the agricultural tribes who form the backbone of the population and contribute mainly to the revenues of this Province. It was in order to prevent their lands from passing into hands of non-agriculturists that this Act was passed and it is the duty of the Courts to administer it in a generous and liberal spirit and to see its useful and beneficial provisions are not whittled down by any legal quibbles. It is true that a decree has in this case been passed, but the question is whether the Court executing it can ignore the provisions of the Act of the Legislature and can proceed to sell the property which has been specifically protected by that Legislature, as evidenced by the clear language of the Punjab Alienation of Land Act. I would beg leave here to refer to a similar policy of protection which has been thrown round a class of tenants in the neighbouring province of the United Provinces. The policy of the Legislature had been for a long period to protect the occupancy tenants and ex-proprietary tenants who enjoy certain privileges and rights akin to those of occupancy tenants, and it has been laid down in many cases that the rights enjoyed by these classes of tenants should be safeguarded not only against the onslaught of others' interest, but that they should be protected from the results of their own improvident acts. There is a long course of decisions in which this policy of the Legislature has been enunciated. I may quote here a decision of their Lordships of the Privy Council reported as *Moti Chand* v. *Ikram-ullah Khan* (1). The judgment in that case was delivered by Sir John Edge who for a number of years, as the Chief Justice of the Allahabad High Court, was quite familiar with the law and the policy of the law relating to occupancy and ex-proprietary tenants. In that case a certain lease had been granted by an ex-proprietary tenant in which he had given up some of his statutory rights and privileges to the lessor who was a cosharer in the land and had agreed to pay damages for any breach of contract on his part. It was held by their Lordships that such a stipulation was illegal and void as being in contravention of the policy of Act 11 of 1901 (Agra Tenancy Act). Sir John Edge at the conclusion of his judgment observed that

> "such right of occupancy is by the Act secured and preserved to the proprietor who becomes by transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not and

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1. A I R 1916 P C 59=39 I C 454=44 I A I A 54=39 All 173 (P C).

notwithstanding any agreement to the contrary between him and the transferee. The policy of the Act is not to be defeated by any ingenious devices, arrangements, or agreements, between a vendor and a vendee for the relinquishment by the vendor of his rights as exproprietary tenant, and that all such devices, arrangements and agreements, being in contravention of the policy of the Act and contrary to law and being illegal and void, cannot be enforced by the vendee in any civil Court or in any Court of Revenue."

In *Ram Dial* v. *Narpat Singh* (2), an occupancy tenant had purported to mortgage his occupancy holding and a house appurtenant to such holding. On a suit being brought a decree was obtained, but the decree-holder was not allowed to put either the occupancy holding or the house to sale in execution of his decree because such a course would be against the policy of the Agra Tenancy Act, 1901, which protected the rights of the occupancy tenants. In this case the house also was saved because it was treated as appurtenant to the occupancy holding and as such protected. The matter came up before a Full Bench of the Allahabad High Court in *Katwari* v. *Sita Ram* (3), where the learned Judges held that, in view of the provisions of S. 20, Agra Tenancy Act, 1901, a Court executing a decree could not order an occupancy holding to be sold, no matter whether the decree was a decree directing the sale of the holding or was a simple money decree. These cases clearly lay down that, even if a decree has been obtained by a mortgagee, the executing Court cannot ignore the provisions of law and sell the property which the Legislature has made non-transferable. The case reported as *Hanuman Prasad Narain Singh* v. *Harakh Narain* (4), deals with the Bundelkhand Alienation of Land Act (11 of 1903), S. 16 of which is in pari materia with S. 16, Punjab Alienation of Land Act. In this case it was held that, where a mortgage had been executed by a member of an agricultural tribe in contravention of that Act and a decree had been obtained on foot of that mortgage, the sale in execution following thereon could not pass a good title in the mortgaged property to the auction-purchaser. This is a stronger case because it challenges even the right of a third party who had purchased the land at an auction-sale.

The principle underlying all these decided cases applies with full force to the facts of the present case and there cannot be any doubt that the Courts below were justified in refusing to put the property of the judgment-debtors to sale in spite of the fact that the decree-holder had obtained a decree for the sale of that property. In *Surjan Chaudhuri* v. *Tegh Bahadur*, (*A. I. R.* 1931 *Lah*. 545), the learned single Judge decided the case on the merits and merely stated obiter as a general proposition that no Court could go behind a decree which had been allowed to become final. This, in the majority of cases, is true and the decree of the Court must be executed as it is; but, as in the present case, when that decree would have the effect of nullifying the Act of the Legislature, the Court must hold its hands and not put to sale the property which, under the Act, has been rendered non-saleable. The recent amendment in S. 16, Punjab Alienation of Land Act, quoted above, points distinctly in the same direction and the Legislature emphasized its policy that the protection which it has thought fit, for good reasons, to extend to the property of an agriculturist should not be set at naught in execution of "any decree" by any action of the Court. In my judgment, the Courts below rightly refused to put the property of the judgment-debtors to sale in spite of the mortgage decree obtained by the decree-holder. I would therefore affirm the decree of the Court below and dismiss this appeal with costs.

Addison, J.—I concur.

K.S. *Appeal dismissed.*

S. N. DAR, B.A. LL.B., Vakil High Court, SRINAGAR (Kashmir)

A. I. R. 1933 Lahore 399

JAI LAL, J.

Hassu—Plaintiff—Appellant.

v.

Bazida—Defendant—Respondent.

Second Appeal No. 1584 of 1931, Decided on 9th December 1932, from decree of Dist. Judge, Montgomery, D/- 2nd May 1931.

(a) Punjab Limitation Custom Act (1920), Art. 2—Alienation—Sale of ancestral land—Limitation is six years from date of sale.

Limitation for a suit to set aside a sale of ancestral property is governed by Art. 2, Act of 1920, and the period is six years from the date of sale. [P 400 C 2]

(b) Limitation Act (1908), Art. 91—Suit for possession of land—Allegation in plaint of fictitious sale to defendant—Plaintiff must

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2. (1911) 33 All 136=9 I C 931.
3. A I R 1921 All 118=63 I C 264=43 All 547 (F B).
4. A I R 1919 All 10=58 I C 551=42 All 142.

obtain cancellation of sale-deed—To such cancellation Art. 91 applies.

Plaintiff as reversioner sued for possession of certain land. He also alleged in the plaint that the defendant had a sale-deed in his favour which was fictitious. It was found that the property in question was the self-acquired property of the vendor to the defendant:

Held: it was necessary for the plaintiff to obtain cancellation of the sale-deed before he could claim possession and that Art. 91 would apply to the suit. [P 400 C 2]

B. D. Qureshi for *Farrukh Hussain*—for Appellant.

Anant Ram Kosla—for Respondent.

Judgment.—The appellant, Hassu, instituted a suit against Bazida for possession of land alleging that it belonged to one Mutalli on whose death Hassu, the plaintiff, became entitled to it by inheritance and that the defendant had taken legal possession of the land on the death of Mutalli in 1928. It was further alleged in the plaint that the defendant had got a sale-deed executed in his favour by Mutalli, which however was alleged to be without consideration and fictitious and executed in order to defeat the claim of the plaintiff the reversioner of Mutalli. The District Judge has held that the land in suit was the self-acquired property of Mutalli and that he had executed a sale-deed in favour of the respondent, Bazida, on 16th December 1918 and that Bazida had been in possession of the land in suit since 1920 at any rate. On this finding he has held that the suit must be deemed to be one for the cancellation of the sale-deed and as such governed by Art. 91, Limitation Act, which provides a period of three years for such a suit. He consequently dismissed the suit. Hassu has appealed to this Court.

When the appeal was first heard by me the only point raised by the learned counsel for the appellant was that the District Judge should have found whether Bazida had taken possession of the land after the death of Mutalli or whether he was in possession even before and for more than three years. The learned counsel for the appellant contended that the defendant took possession of the land after the death of Mutalli and it was then that he came to know the title claimed by the defendant in the land. It was conceded that Art. 91 governed the suit. I accordingly remanded the case to the District Judge to submit a finding as to the date from which Bazida had been in possession of the land. The District Judge has returned the finding that he has been in possession since 1920. Some objections were raised to this finding, but they were not pressed before me, but the appellant's counsel took up entirely a new position and contended that the question of possession of Bazida or its date was immaterial for the purpose of the present suit and that Art. 144 governed it and the time began to run on the death of Mutalli. The suit it must be mentioned was filed on 8th January 1930.

In my opinion having regard to the finding of the District Judge that the land in suit was non-ancestral it was necessary for the plaintiff to obtain a cancellation of the sale-deed in favour of Bazida before he could claim possession of the land and therefore Art. 91 would apply to such a suit though the main prayer in the suit is a decree for possession of the land. If the land be held to be ancestral then the suit would be barred by time under Art. 2, Punjab Limitation (Custom) Act, 1920, as the period would be six years from the sale in question. In either case the decree of the District Judge is correct as it was not open to the appellant under the circumstances to ignore the sale-deed. The allegation made in the plaint that the sale was without consideration and necessity and was fictitiously effected to defeat the claim of the plaintiff who was the reversioner of Mutalli would imply an allegation that the land was ancestral. On that assumption the plaintiff's suit would be barred by time under Art. 2, Punjab Act, but on the finding of the District Judge the Punjab Act has no application and the suit is governed by Art. 91 and is thus barred by time or in the alternative it is not maintainable until the plaintiff obtains cancellation of the sale-deed. The appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 400

ADDISON AND AGHA HAIDAR, JJ.

Sawan Singh—Plaintiff—Appellant.

v.

Kartar Singh and *another* — Defendants—Respondents.

Second Appeal No. 1519 of 1928, Decided on 20th December 1932, from decree of Addl. Dist. Judge, Hoshiarpur, D/- 31st January 1928.

(a) Civil P. C. (1908), S. 100—Dismissal of cross-objections—Second appeal lies.

A second appeal lies from the decree of an appellate Court disallowing cross-objections of the respondent: 10 *Mad* 292, *Foll.* [P 402 C 1]

(b) Punjab Tenancy Act (1887), S. 59—Occupancy tenant has no power to dispose of tenancy by will.

Section 59, Tenancy Act, enacts the mode of devolution of property held by occupancy tenants and there is no power in the occupancy tenant to dispose of the occupancy tenancy by a will taking effect after his death. [P 402 C 1]

Achhru Ram for *Badri Das*—for Appellant.

Fakir Chand—for Respondents.

Addison, J.—One Uttam died on 1st January 1923, leaving him surviving a widow, Mt. Nihali, defendant 1, a grand-nephew, Kartar Singh, defendant 2, and a brother, Sawan Singh, plaintiff. On 30th August 1921, he had executed a will leaving his entire property, including occupancy rights in 9 kanals of land, to his grand-nephew, Kartar Singh. On 6th February 1923, Sawan Singh brought the present suit for a declaration that the will should be held not to affect his reversionary rights after Mt. Nihali's death or remarriage. Kartar Singh, pleaded that he had been appointed his heir by Uttam fifteen years before the suit and that the will of 30th August 1921, amounted practically to a written confirmation of this appointment. He also pleaded that he had been rendering services to Uttam before his death and that for that reason the will was also valid. The Subordinate Judge, Second Class, who first heard the suit held, on 15th December 1924, that the land was ancestral, that there was not sufficient proof of the alleged oral appointment of Kartar Singh, as heir, that the will however was established and was valid according to custom, except to the extent that it purported to bequeath his occupancy rights in 9 kanals 6¾ marlas of land, succession to which is determined by statute, namely, S. 59, Punjab Tenancy Act. He accordingly dismissed the suit as regards the land but gave the plaintiff a decree to the effect that the will would not affect his reversionary rights so far as it purported to bequeath the occupancy tenancy to Kartar Singh. The plaintiff appealed against this decision and Kartar Singh preferred cross-objections as regards that portion of the decree of the Subordinate Judge, Second Class, which held that the will had no effect on the occupancy tenancy. On 2nd May 1925, the District Judge dismissed the cross-objections with costs agreed with the findings of the Subordinate Judge that the land was ancestral and that the will had been established; but remanded the question of custom as he held that that part of the case had not been properly gone into. This remand was under S. 151, Civil P. C., the issue sent down being,

"what is the custom governing the jats of Tahsil Hoshiarpur in regard to their powers to gift by a will ancestral property in favour of an agnate, such as Kartar Singh, defendant?"

The suit then went to another Subordinate Judge with Third Class powers. He held on 31st August 1926, that the will would be valid under custom only in return for services rendered. No issue had however been framed as to services rendered though Kartar Singh had pleaded this circumstance at the very commencement of the trial. An application was made to the Subordinate Judge to add this issue but he refused to do so or to hear evidence on the point. On his finding that will would only be valid in return for services rendered, which were not established, he decreed the plaintiff's suit. There was another appeal to the District Judge and he, on 8th August 1927, remanded to the lower Court an issue as to whether services had been rendered. This remand was under O. 41, R. 25, Civil P. C. The trial Court held on 17th January 1928, that services were proved to have been rendered. Thereupon the District Judge, on 31st January 1928, dismissed the whole suit, not noticing that his predecessor had, on 2nd May 1925, rejected the cross-objections of defendant 2 as regards the original decree to the effect that the will would not affect the 9 kanals 6¾ marlas of land held by Uttam as an occupancy tenant. Against this decision the plaintiff has preferred this second appeal.

The only ground argued was that the Court below should have decreed the claim for the land held by Uttam as an occupancy tenant. It is quite clear that this part of the suit was not decreed by the second District Judge, who dealt with the case, through inadvertence. It was not in his mind that 9 kanals 6¾ marlas of the land in suit was land held in occupancy tenure nor was it in his mind that the cross-objections of defendant 2, as to this portion of the original decree had been dismissed with costs. No appeal lay from the order passed by the District Judge on 2nd May 1925, remanding the appeal of the plaintiff under S. 151, Civil P. C., but it seems to me that an appeal did lie against the dismissal of the cross-objections with costs. It was held in *Ganapati* v. *Sitharama* (1) that

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1. (1887) 10 Mad 292.

a second appeal did lie from the decree of an appellate Court disallowing the cross-objections of the respondent. Further, S. 59, Tenancy Act, enacts the mode of devolution of property held by occupancy tenants and there is no power in the occupancy tenant to dispose of the occupancy tenancy by a will taking effect after his death. On the merits therefore also this second appeal must be accepted as well as on the ground that defendant 2 should have appealed against the dismissal of his cross-objections. For both reasons I accept the appeal and restore the decree of the Subordinate Judge, Second Class, dated 15th December 1924, to the effect that the will of 30th August 1921, shall not affect the plaintiff's reversionary rights on the death of Mt. Nihali so far as it relates to the 9 kanals 6¾ marlas of land held in occupancy tenancy by Uttam, the rest of the suit being dismissed. Parties will bear their own costs in this Court and in the trial Court, but respondents' costs in the lower appellate Court will be borne by the appellants.

Agha Haidar, J.—I agree.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 402

TAPP, J.

Nihal Chand—Appellant.

v.

Official Receiver, Insolvents Estates, Lahore—Respondent.

Civil Ref. No. 28 of 1932, Decided on 19th December 1932.

(a) Civil P. C. (1908), O. 46, R. 1—Reference to High Court is permissible only when lower Court entertains reasonable doubts.

Under R. 1, O. 46, a reference to the High Court on a question of law is only permissible when the Court trying the suit or appeal or executing the decree entertains a reasonable doubt. [P 402 C 2]

A District Judge was faced with the problem of having to decide between law and equity in that he found the law in favour of one party and equity in favour of the other. He referred the case to the High Court:

Held : that there was no reasonable doubt regarding the application of the law and that it was for the District Judge to decide and not the High Court, whether equity should prevail over law or vice versa. [P 403 C 1]

(b) Civil P. C. (1908), O. 46, R. 1—Case in which decision is open to second appeal—Reference of such case to High Court is incompetent.

A case from the decision of which a second appeal lies cannot be referred to the High Court under O. 46, R. 1. [P 403 C 1]

Bal Kishan—for Appellant.

Panna Lal Bahal—for Respondent.

Order.—This is a reference by the District Judge of Lahore, under R. 1, O. 46, Civil P. C., on a question of law arising under the Provincial Insolvency Act, 1920, and relating to a mortgage effected by Chiragh and others, insolvents, on 17th February 1928, in favour on one Nihal Chand. The mortgage-deed was registered on 26th March 1928, and on 19th May 1928. Jowahar Singh, a creditor, filed an application for the adjudication of Chiragh and his brothers as insolvents, as by the transfer in favour of Nihal Chand they had committed an act of insolvency. Chiragh and his brothers were adjudicated insolvents on 21st August 1929, and on 5th June 1931, the abovementioned creditor Jowahar Singh applied for annulment of the mortgage under S. 54, Insolvency Act, as the transfer had been made within three months of the presentation of the petition on which Chiragh was adjudged an insolvent. The application was granted by the Insolvency Judge and against this order an appeal out of which the present reference has arisen was preferred to the District Judge. The point of law involved briefly is, whether the period of three months should be calculated from the date on which the mortgage-deed was executed, namely, 17th February 1928, or the date of registration, namely, 26th March 1928. Now, under R. 1, O. 46, a reference to this Court on a question of law is only permissible when the Court trying the suit or appeal or executing the decree entertains a reasonable doubt, but a perusal of the order of reference does not indicate that the learned District Judge entertained any reasonable doubt on the question involved. The following extract from the order of reference will I think show this:

"'Taking an extreme case of this kind in which a dishonest debtor delays registration of a deed transferring immovable property fraudulently in favour of one of his creditors for more than three months and commits no other act of insolvency, except this act of fraudulent preference, it is obvious that to apply S. 47, Registration Act, strictly would be to deprive the other creditors of their right to apply under S. 9, Provincial Insolvency Act, and to have the transfer set aside, and on the other hand to give the debtor full liberty to transfer all his immovable property to the creditors he most favours to the injury of the rest. It would appear that the only solution is to regard the transfer as taking place from the date of the registration for the purposes of Ss. 9 and 54, Insolvency Act . . . . Such an interpretation is however strictly contrary to the plain meanings of the words and phrases used in Ss. 47 and 49, Registration Act.' 'The equities are thus entirely in favour of Jawahar Singh and the law in favour of

Nihal Chand. In my opinion, the equities must prevail as against narrowly interpreted law and Jowahar Singh should succeed in having the transfer set aside."

The conclusion to be drawn from the above, in my opinion, is that the learned District Judge was faced with the problem of having to decide between law and equity, and that he preferred the latter to the former. No reasonable doubt appears to have existed as to the application of S. 47, Registration Act, in the matter and it was for the learned District Judge to decide and not this Court whether equity should prevail over law or vice versa. A further question arises as to whether any decision arrived at by the learned District Judge in the appeal would not be open to a second appeal, under prov. 2, S. 75, Insolvency Act. If a second appeal does lie, then a reference under O. 46, R. 1, Civil P. C., would not be competent but, in view of the observations made by me above that the reference is not otherwise permissible, I do not consider it necessary to definitely rule on this point. For the reasons given above I order that the reference be returned to the learned District Judge with the direction that he should dispose of the appeal in accordance with law.

K.S. *Reference returned.*

A. I. R. 1933 Lahore 403

BROADWAY, C. J. AND ABDUL QADIR, J.

Abdul Rahman and *Brothers*—Defendants—Appellants.

v.

Parbati Devi—Plaintiff—Respondent.

First Appeal No. 1533 of 1931, Decided on 12th December 1932, from decree of Senior Sub-Judge, Rawalpindi, D/- 12th May 1931.

Civil P. C. (1908), O. 12, R. 6—Admission must be clear and unambiguous.

Before a Court can act under O. 12, R. 6, Civil P. C., the admission must be clear and unambiguous and the amount due and recoverable must be due and recoverable in action in which the admission is made: 45 *Cal* 138, *Rel on.* [P 403 C 2]

Partap Singh—for Appellants.

Badri Das and *Achhru Ram*—for Respondent.

Broadway, C. J.—In the suit giving rise to this appeal one Shrimati Parbati sued the defendants, Abdul Rahman and Brothers, for Rs. 5,250. Het claim to the extent of Rs. 3,300, was based on a pro-note and the balance was claimed on account of rents alleged to have been realized or due in regard to properties which were held jointly between the plaintiff and the defendants and were in the possession and under the control of the defendants. The defendants raised certain preliminary points and then proceeded to dispute the figures as alleged in the plaint and, finally, after making a calculation, in paras. 3 and 4 of their written statement admitted that on their calculations the sum of Rs. 2,186-1-3 was due by them to the plaintiff and alleged that nothing more was due. Issues were then settled and from them it is perfectly clear that the preliminary objections raised were either given up or considered of no value. Subsequent to this the plaintiff moved the Court under O. 12, R. 6, Civil P. C., and asked for a decree for the amount of Rupees 2,186-1-3, which had been admitted to be due by the defendants and for leave to continue the suit *qua* the balance. Objection was taken to this course by the defendants, but, on 12th May 1931, the learned Senior Subordinate Judge held that the rule and order were applicable and granted the plaintiff a decree for Rs. 2,186-1-3, and permission to proceed, if she wished, for the balance of her claim. Against this decree the defendants have preferred this appeal to this Court through Mr. Partap Singh.

It appears that the learned counsel for the appellants based a great deal of his arguments and his case on a certified copy which, on examination, is proved to have been a faulty one inasmuch as it omitted a whole line in para. 3. When this was pointed out to Mr. Partap Singh, he admitted that there was an admission of liability, but fell back on the preliminary objections taken by him. As I have already said those preliminary objections were obviously not regarded seriously either by the defendants themselves or by the plaintiff, and were wholly ignored by the Court. It is true, as alleged by Mr. Partap Singh, that before a Court could act under O. 12, R. 6, Civil P. C., the admission must be clear and unambiguous and the amount due and recoverable must be due and recoverable in the action in which the admission is made. Reference has been made principally to *Premsuk Das Assaram* v. *Udairam Gungabux* (1), which is an authority which supports the action taken by the Court. In the present case, after a careful and thorough examination of the pleadings, there can be no doubt that the admission so far as

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1. (1918) 45 Cal 138=44 I C 233.

the sum of Rs. 2,186-1-3, is concerned is clear and unambiguous and this amount is clearly due and recoverable in the present action. In these circumstances the appeal fails and is dismissed with costs.

Abdul Qadir, J.—I agree.

K.S. *Appeal dismissed.*

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* A. I. R. 1933 Lahore 404

ADDISON AND BHIDE, JJ.

Des Raj-Hukam Chand—Defendants—Appellants.

v.

Lachhi Ram-Prabh Dayal—Plaintiffs—Respondents.

First Appeal No. 187 of 1927, Decided on 28th February 1933, from decree of Senior Sub-Judge, Ferozepore, D/- 18th December 1926.

(a) Legal Practitioner —Pleader giving up plea of limitation in lower Court after evidence on all issues had been taken—Party is not bound by his statement and can raise plea in appeal—Practice.

Counsel for the defendant definitely gave up the plea regarding limitation after the evidence of all the issues had been taken:

Held : that the question was one of law, that the party was not bound by the statement of his counsel and that as the opposite party was not prejudiced, the plea can be taken in appeal by the party. [P 404 C 2]

(b) Limitation Act (1908), S. 3—Question whether suit is in time should be decided on basis of plaintiffs own pleadings.

The question whether a suit is within time must be decided primarily on the basis of the plaintiffs' own pleadings and not on the basis of defence set up. [P 405 C 1]

(c) Civil P. C. (1908), S. 11—Remarks on point in prior suit which were not necessary for such suit do not operate as res judicata.

Remarks made by a Judge on a point in a prior suit which is neither necessary for the suit nor decided therein are only obiter dicta and do not operate as res judicata. [P 405 C 2]

*** (d) Limitation Act (1908), Arts. 61 and 83—Defendants purchasing goods and getting transaction entered in plaintiff's name —Decree against plaintiff by vendor—Suit by plaintiff against defendant for decree amount without paying decree amount—Suit is premature under Art. 61 and is not governed by Art. 83.**

Defendant purchased goods and wrongfully got the transaction entered in the name of the plaintiff. A suit by the vendor against the plaintiff was decreed. Plaintiffs before paying the decree amount sued the defendant for the amount:

Held: that Art. 83 has no application as there was no contract of indemnity, that the article applicable to such a case was Art. 61, but that the present suit was premature as plaintiffs had not paid the amount and that the cause of action will arise only on actual payment: 13 *Cal* 155; 31 *P R* 1904 and 26 *Mad* 322, *Rel on.* [P 405 C 2; P 406 C 1]

Oertel, Fakir Chand and *M. C. Mahajan*—for Appellants.

J. N. Aggarwal and *J. L. Kapur*—for Respondents.

Bhide, J.—This was a suit for recovery of Rs. 7,328-4-6, as the price of wheat sold to the defendants. The suit has been decreed and the defendants appeal. The facts giving rise to this suit are rather peculiar and may be briefly stated as follows: A firm named, Charanji Lal-Kishori Lal brought a suit against the present plaintiffs and defendants on the allegation that a "kotha" of wheat was sold to the present plaintiffs and that the present defendants had stood surety for the price. The suit was decreed against the present plaintiffs only on the finding that Charanji Lal-Kishori Lal had sold the kotha to the present plaintiffs and that the defendants were not sureties. The learned Subordinate Judge who decided the previous suit while granting the decree against the present plaintiffs remarked that they could file a separate suit against the present defendants if the kotha was sold by them to these defendants. The plaintiffs thereafter instituted the present suit for recovery of Rs. 4,817-12-3, as the price of the kotha from them, together with interest. The defendants pleaded inter alia that the suit was barred by time, but this plea was rejected by the learned Subordinate Judge and a decree was passed against them as stated above.

The learned counsel for the defendants-appellants has only agitated the question of limitation in this appeal. It was urged on behalf of the plaintiffs-respondents that the defendants' counsel had definitely given up this point in the Court below and hence it was not open to the defendants to raise it again in this Court. The statement in question was however made by the counsel for the defendants in the Court below after the parties had led their evidence on all issues including that relating to limitation and had closed their cases. The plaintiffs have therefore not been prejudiced thereby in any way. In the circumstances, the point must be treated as purely one of law to be decided on the material already on the record and the aforesaid statement of the counsel cannot be held to be binding on the appellants. The learned Subordinate Judge has held the suit to be one by a vendor for the price of goods sold and as such governed by Art. 52, Sch. 1, Limitation Act. On behalf of the appellants it is urged that on the facts alleged by the plaintiffs the suit would be governed by Art. 83, Sch. 1, Limitation Act, and would be barred by time. The learned counsel for the respondents urged in reply that the defendants themselves stated in their Jawabdawa that the cause of action arose when the wheat was delivered to them on 20th September 1920. They thus admitted by implication that the suit was governed by Art. 52 and the learned Subordinate Judge has found that the suit is within time under this article. It was contended that it was not open to the defendants to resile from this position now.

There is no doubt that the parties to this case have made conflicting statements on different occasions as it suited them. But it is well-settled that the question whether a suit is within time must be decided primarily on the basis of the plaintiffs' own pleadings and not on the basis on the defence set up. The plaint in the present case is rather vaguely worded. It is nowhere asserted in the plaint that the wheat was sold by the plaintiffs to the defendants and that the plaintiffs were suing for the recovery of its price. In fact there is no indication in the plaint that the suit was of the nature specified in Art. 52, Sch. 1, Limitation Act. All that is stated therein is that it was held in the previous suit that the plaintiffs had sold the kotha in question to the defendants. In para. 5 of the plaint it was stated, further that the cause of action arose when the decree was passed against the plaintiffs in the previous suit, i. e., on 31st October 1922. The wheat was admittedly delivered to the defendants in September 1920. It seems therefore clear that according to the allegations in the plaint the suit was, at any rate not one of the type falling within Art. 52, for which the cause of action arises when the goods are delivered. Unfortunately, the parties were not further examined before the issues to elucidate their pleadings; but plaintiff, Prabh Dayal, was examined as a witness in the case and his evidence may be looked at to ascertain the real nature of the suit. In his deposition Prabh Dayal stated the facts as below:

> "The real facts were that the purchase of wheat was made by the defendants' firm from Charanji Lal-Kishori Lal directly, but they had wrongly put the transaction to have been entered into with us. The dispute arose because the defendants refused to pay to Charanji Lal."

In view of the above statement plaintiffs' real case would appear to be that the defendants wrongly got the transaction entered in their name with the result that a decree for the price of the wheat was passed against them on 31st October 1922. As the decree was the result of the defendants' wrongful action the plaintiffs claimed to be entitled to realize from the defendants the amount of the decree, for which they had become liable. The findings of the Court in the previous case were no doubt somewhat different but the nature of the suit has to be determined on the plaintiffs' allegations in the present case and not on the findings of the Court in the previous suit. It may be noted in this connexion that the findings in the previous suit cannot operate as res judicata. The decision of the question whether the present plaintiffs sold the wheat to the present defendants was not necessary for the purposes of the previous suit and in fact the question was not decided therein. The remarks of the learned Judge on the point in the previous suit were merely in the nature of obiter dicta. The learned counsel for the appellants has urged as stated already that the suit as framed is governed by Art. 83 and is time barred. As regards the first contention Art. 83 applies only when the suit is based on "any other contract of indemnity." In the present instance there was according to the plaintiffs, no contract. According to the plaintiffs' allegations it would seem that the suit arose really out of a wrongful act on the part of the defendants in having the kotha of wheat entered in the name of the plaintiffs. Consequently Art. 83 seems inapplicable. Moreover, even if that article were applicable, the cause of action would have arisen only when the plaintiffs were "damnified," i. e., put to loss. But admittedly plaintiffs had not paid anything in satisfaction of the decree passed against them before the present suit was instituted (vide statement of Charanji Lal, P. W. 1), and consequently they had not suffered any loss. It was suggested that the cause of action arose when the transaction was wrongly entered in the name of the plaintiffs. But such an entry, which was unauthorized according to the allegations of the plaintiffs, could not give rise to any liability. The defendants' contention that the suit is barred under Art. 83, Sch. 1, Limitation Act, cannot therefore be sustained.

I have held above that Art. 83 is inapplicable as the present suit is not based on any contract of indemnity, whether express or implied. Probably the article applicable to a suit of the present type will be Art. 61, Sch. 1, Limitation Act. But it seems to me that the suit is premature and must fail on this ground. The plaintiffs base their claim merely on the liability incurred by them as a consequence of the decree passed in the previous suit. But the first question for consideration is whether the mere passing of a decree gives them any cause of action at all. In *Patti Naryanamurti* v. *Marimuthu* (1) it was held in somewhat similar circumstances that no cause of action arose until actual payment. To the same effect are the decisions in *Toral Ali Khan* v. *Nilrutun Lal* (2) and *Fitzgerald* v. *Musa* (3), in which also the facts were of a similar character. In my opinion, the same principle would govern the present case. The mere passing of the decree has not put plaintiffs to any loss. It may be that the plaintiffs incurred some expenditure on the previous suit, but they have not sued for any compensation in that behalf. As stated already, plaintiffs base their suit only on the decree passed against them in the previous suit, and are merely claiming the amount decreed together with interest. But the plaintiffs have paid nothing to Charanji Lal in satisfaction of the decree and hence the suit does not seem to be maintainable at present; for the plaintiffs have suffered no loss so far on account of the defendants. It is possible that the decree may never be satisfied. It may be noted in this connexion that plaintiffs are paupers and even the present suit was lodged in forma pauperis. The decree was passed in October 1922 and more than 10 years have already elapsed. So, the chances of the decree being satisfied seem rather remote. For the reasons given above, I would hold that the plaintiffs have no locus standi to maintain the present suit. It is true that this matter was not put in issue, but the point is one of law and seems to be patent on the plaintiffs' own pleadings. I would accordingly accept this appeal and dismiss the suit, but as neither party has come to Court with clean hands, I would leave the parties to bear their own costs throughout.

Addison, J.—I concur.

K.S. *Appeal accepted.*

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1. (1903) 26 Mad 322.
2. (1889) 13 Cal 155.
3. (1904) 31 P R 1904.

A. I. R. 1933 Lahore 406

TEK CHAND, J.

Nanak Singh and *another*—Plaintiffs—Appellants.

v.

Tulsi and *others*— Defendants—Respondents.

Second Appeal No. 1525 of 1932, Decided on 2nd March 1933, from order of Dist. Judge, Ludhiana, D/- 29th June 1932.

Civil P. C. (1908), O. 22, R. 2—Omission to bring on record representative of party in appeal who is not necessary party but only added as pro forma defendant is not fatal to hearing of appeal.

Omission to bring on record the representative of a deceased respondent who has been added in the suit only as a pro forma defendant and who is not a necessary party to the suit is not fatal to the hearing of the appeal and the appeal does not abate on that ground. [P 407 C 1]

Jhanda Singh—for Appellants.

J. R. Agnihotri—for Respondents.

Judgment. — The learned District Judge has held that the plaintiff-appellants' appeal in his Court had abated as Mt. Santi, defendant 4, had died more than a year before the hearing of the appeal and that her legal representatives had not been brought on the record within the period prescribed by law for the purpose. The plaintiffs-appellants have preferred a second appeal to this Court and contend that the order of the learned District Judge is wrong. After examining the record and hearing both counsel I am of opinion that this contention is well-founded and must prevail.

The appellants' father Jawahri brought a suit on the ground that he was entitled to possession on the death of Mt. Atri, widow of Gonda, who was a colleteral of his in the third degree, and that defendants 1 and 2, who are the maternal uncle's sons of Gonda, had taken wrongful possession. The real dispute therefore is between the appellants and defendants 1 and 2. Mt. Thakri, defendant 3, who is the sister of Gonda, and Mt. Santi, his daughter, were impleaded as pro forma parties, as it was alleged that defendants 1 and 2 had taken wrongful possession in collusion with defendants 3 and 4. as well as defendants 5 and 6 who are proprietors in the village. No relief was claimed against Mt. Santi, either in the plaint or in the memorandum of appeal in the District Court. The defendants pleaded inter alia that the plaintiffs were not entitled to succeed in the presence of Mt. Santi, who is the daughter of Gonda, and an issue was framed as to whether the plaintiffs had no right to succeed in the presence of Mt. Santi. It was admitted in the trial Court, and it is no longer disputed before me, that Gonda had died on 10th January 1904, leaving two minor sons, Shadi and Salig. Shadi died a few days later, on 23rd January 1904, and Salig died on 18th February 1904. On Salig's death his mother Mt. Atri succeeded and remained in possession until her death in 1926. From these facts it is clear that the last male holder was Salig, and Mt. Santi as his sister has got no right to succeed in preference to the plaintiffs. She cannot claim the status of a daughter of Salig's father and thus get the property in preference to the colleterals: see *Hamira* v. *Ram Singh* (1). Moreover, she is not in possession and, according to the plaintiffs, she was impleaded merely as a person who had collusively helped defendants 1 and 2 in obtaining wrongful possession. She was therefore not a necessary party to the suit, and the omission of her representative from the record is not fatal to the hearing of the appeal.

I accept the appeal, set aside the judgment of the learned District Judge and remand the case to him for rehearing and decision on the merits in accordance with law. Court-fee on this appeal will be refunded, other costs will be costs in the cause.

K.S. *Appeal accepted.*

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1. (1907) 134 P R 1907=74 P L R 1908=85 P W R 1907 (F B).

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* A. I. R. 1933 Lahore 407

AGHA HAIDAR, J.

Karmun and *others*—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1535 of 1932, Decided on 4th March 1933, from order of First Class Magistrate, Lyallpur, D/- 28th November 1932.

*** (a) Penal Code (1860), Ss. 379 and 390 —In order that theft may amount to robbery, hurt must be caused for committing theft and must be quite separate and distinct from act of theft.**

In order that theft may amount to robbery, it must be shown that hurt was caused in order to commit the theft or in carrying away or attempting, to carry away the property obtained by theft. The hurt contemplated must be a conscious and voluntary act on the part of the thief for the purpose of overpowering resistance on the part of the victim, quite separate and distinct from the act of theft itself. [P 408 C 2]

A woman was sitting in a railway station waiting room holding a bundle with her hands. Accused caught hold of the bundle and tried to run away with it. The woman however kept her grip on the bundle and was dragged 2 or 3 karams along with it as the accused made good his escape with it:

Held: that the hurt caused to the woman was only an accidental circumstance, that it was not caused voluntarily for committing theft and that accused was guilty only of theft but not of robbery: *Thomas Gnosil*, (1824) 1 *C & P* 304 and *Edwards*, (1843) 1 *Cox* 32, *Rel on.* [P 408 C 2]

(b) Criminal Trial—Evidence of lambardar and zaildar by itself is insufficient for conviction—Evidence Act (1872), S. 118.

The lambardar and zaildar are part of the investigation machinery and are expected to support the prosecution. They cannot be called independent witnesses and their evidence by itself is not sufficient for conviction in the absence of independent evidence on record. [P 409 C 1]

Mohammad Monir—for Appellants.

S. K. Ahmad—for the Crown.

Judgment. — Karmun and Mokha have been convicted by a Magistrate of the First Class, exercising enhanced powers under S. 30, Criminal P. C., at Lyallpur, of an offence under S. 392, Penal Code; and have been sentenced to five years' rigorous imprisonment each. Hayatu has been convicted of an offence under S. 411, Penal Code, and sentenced to two years' rigorous imprisonment. The three convicts have submitted their appeal to this Court through Mr. Mohammad Monir. The facts of the case are given in the judgment of the trial Magistrate and may be briefly stated as follows:

On the night between 13th/14th August 1932, Mt. Karam Bhari, P. W. 3, wife of Hussain Bakhsh Patwari, P. W. 10, accompanied by her two sons, namely, Haidar Ali, aged 16, and Rahmat Ullah, aged 10, alighted at the Kanjwani, Railway Station, at about twelve o'clock at night and took shelter in the passengers' shed. After half an hour the two accused, namely, Karmun and Mokha, also came there. One of them took his seat on a bench, which was lying there, while the other lay down on the floor and went to sleep. The man, who was sitting on the bench, after some time went out and, after having washed himself, said his prayer and, returning to the passengers' shed, again took his seat on the bench. He awoke the man who was sleeping on the floor and then both of them went out and returned after about half an hour. Again, one of them sat down on the bench while the other went to sleep on the floor. Shortly, afterwards both of them went out. While these preliminary manoeuvres were going on, Mt. Karam

Bhari was sitting quite alert and wide-awake holding with her hands a bundle containing her valuables in front of her. All of a sudden one of the culprits came from behind and caught hold of the bundle which Mt. Karam Bhari was holding and tried to run away with it. Mt. Karam Bhari, however kept her grip on the bundle and was in fact dragged 2 or 3 karams along with it as the culprit, who had first pounced upon it, tried to make good his escape. In the end she lost her hold on the bundle and the two culprits, made away with the booty. According to the prosecution, some days afterwards the two culprits, namely, Karmun and Mokha, were traced and the police managed to recover some stolen property from their possession. In fact it is stated that they themselves produced the stolen property. Hayatu accused, according to the prosecution, is also alleged to have produced part of the stolen property.

So far as the actual theft is concerned, I have no reason whatsoever to doubt the evidence of Mt. Karam Bhari. She is a matronly woman aged about 50 and is the mother of two sons. Her husband is a Government official, holding the modest post of a patwari. I cannot imagine that Mt. Karam Bhari would falsely implicate these two accused persons, namely, Karmun and Mokha, if they had been innocent. She had ample opportunities of watching them from a short distance while they were behaving in a strange and mysterious manner and it would not be a matter of surprise if she had entertained some suspicions about their intentions and watched them all the more carefully to see what they were going to do next. There is evidence on the record that the passengers' shed had light in it and there is no reason to suppose that Mt. Karam Bhari's sight was not normal. I am therefore fully satisfied as to the main incident of the removal of the bundle by the two culprits while it was in the possession of Mt. Karam Bhari and there can be no manner of doubt that, on the facts stated above, the two accused, namely, Karmun and Mokha, had committed the offence of theft. The next question for determination now is whether, under the law and having regard to the ascertained facts, the two accused have committed the aggravated form of theft, namely robbery. Robbery is defined in S. 390, Penal Code, and for the purposes of the present case, leaving out irrelevant portions:

> "Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end voluntarily causes hurt."

The words "for that end" and "voluntarily" are important. Before a person can be convicted of robbery the prosecution must prove that hurt was caused for the end, namely, in order to the committing of the theft or in committing the theft or in carrying away or attempting to carry away the property obtained by the theft. In the present case the object of the accused was to steal the bundle and run away with it and it cannot be said that, because Mt. Karam Bhari was dragged to a distance of 2 or 3 karams along with the bundle, they voluntarily caused hurt to her for that end. In fact far from voluntarily dragging and thereby causing hurt to Mt. Karam Bhari as she stuck to her bundle, they would have been mightily pleased if she had not held fast to the bundle at all and allowed them to carry it away without any let or hindrance. The hurt contemplated must be a conscious and voluntary act on the part of the thief for the purpose of overpowering resistance on the part of the victim, quite separate and distinct from the act of theft itself. In an English case reported as *Thomas Gnosil* (1), the accused, while walking behind a woman in a street, forcibly pulled the shawl, which she was wearing on her shoulders, and in doing so, used considerable violence which must have at least caused her bodily shock. It was held that, inasmuch as violence was not used for the purpose of overpowering the lady, but only to get possession of her shawl, the accused was not guilty of highway robbery. Again, in another case reported as *Edwards* (2), a person, while cutting a string by which a basket was suspended, with the intention of stealing it, accidentally cut the wrist of the owner who tried to seize and retain the basket and prevent the thief from running away with it. It was held that the offence committed was theft and not robbery. In the present case the hurt caused to Mt. Karam Bhari took the shape of her being dragged away a short distance and was merely an accidental circumstance which followed in the natural course of events from the act of asportation as described above. In my opinion, as a matter of first impression as well as on the authorities

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1. (1824) 1 C & P 304.
2. (1843)1 Cox 32.

(not cited by counsel) which I have noted above the two accused, namely, Karam and Mokha, are not guilty of robbery. They are however clearly guilty of the offence of theft which, in the present case, is of a serious nature, as the victim was an unprotected woman who happened to be all alone at a wayside railway station. Under these circumstances I allow the appeal, so far as they are concerned, to this extent only: that I set aside their conviction and sentence under S. 392, Penal Code, and, convicting them under S. 379, sentence them to the maximum punishment provided thereunder, i. e., three years' rigorous imprisonment.

As regards the case of Hayatu accused, there are three witnesses namely, Bawa Singh, Sub-Inspector of Police, P. W. 1, who was carrying on the investigation in the case, Karam Ali, Lambardar, P. W. 7, and Sajawal Khan, Zaildar, P. W. 8, who have stated that part of the property, which had been stolen from Mt. Karam Bhari on the night in question, was recovered from his possession. I think it would not be safe to uphold his conviction on the testimony of these three persons, as none of them can be called an independent witness. The Sub-Inspector of Police was himself investigating the case and the Lambardar and the Zaildar are part of the investigating machinery and are expected to support the prosecution. There are decisions of this Court according to which evidence of such witnesses standing by itself has been held to be insufficient. On their evidence therefore and in the absence of any other independent evidence on the record, I do not consider it advisable to uphold the conviction of Hayatu under S. 411, Penal Code. I therefore allow the appeal so far as Hayatu is concerned and, setting aside his conviction and sentence, order that he be released forthwith.

K.S. *Appeal allowed.*

A. I. R. 1933 Lahore 409

BHIDE, J.

Prem Kaur and *another*—Accused—Petitioners.

v.

Benarsi Das—Complainant—Opposite Party.

Criminal Revn. Petn. No. 2 of 1933, Decided on 31st January 1933, from order of Dist. Magistrate, Lahore, D/- 22nd December 1932.

(a) Criminal P. C. (1898), S. 145—Possession on behalf of applicant converted into one adverse within two months of application—Court can proceed under S. 145.

Where an application under S. 145 alleges that the non-applicants had within two months of the application converted by force their possession on behalf of applicant into one advrerse to him, the Magistrate is entitled to take proceedings under S. 145. [P 410 C 2]

(b) Criminal P. C. (1898), S. 145—State of emergency is for Magistrate to decide—His action should not be lightly interfered with in revision—Criminal P. C. (1898), S. 439.

The question whether there is a state of emergency or not is a matter within the trial Court's discretion and his action in ordering attachment for maintenance of peace should not be lightly interfered with in revision. [P 410 C 2]

(c) Criminal P. C. (1898), S. 145—Attachment need not be only by prohibitory order—Court can take possession or appoint receiver.

Attachment under S. 145 may be made by taking possession or by appointment of a receiver or by a prohibitory order restraining payment of rent, delivery of possession, etc. These are recognized modes of attachment and any one or the other method may be adopted, as may be considered appropriate for the object in view, and the Court is not restricted only to the last method which is provided by Civil Procedure Code: 3 *Pat L J* 147, *not Foll*; *A I R* 1920 *Mad* 209, *Foll*; 13 *Cr L J* 295, *Rel on.* [P 411 C 1]

(d) Criminal P. C. (1898), S. 145—Moveable property in building—Dispute regarding both—Order to police to take charge of both if proper.

Moveable property as such does not ordinarily come within the purview of S. 145 unless it is in the shape of crops or other produce of land, or rents and profits of the property in dispute. But where the dispute relates not to the mere building or structure itself but also to the valuable property inside and there is a state of emergency the Magistrate can order the police to take charge till decision of case of the moveables also along with the building which contains them: 13 *Cr L J* 222, *Rel on.* [P 412 C 1]

C. Bevan Petman and *Harnam Singh*—for Petitioners.

Manohar Lal, *Jagan Nath Agarwal* and *Ram Lal Anand*—for Opposite Party.

C. H. Carden Noad—for the Crown.

Judgment.—This is a petition for revision arising out of proceedings under S. 145, Criminal P. C., relating to a dispute about the possession of the Kuldip Oil Mills, belonging to the respondent Rai Bahadur Benarsi Das. The petition under S. 145, Criminal P. C., was filed by Benarsi Das and the respondents to that petition were Mt. Prem Kaur, who is said to have been his mistress for a number of years, Khazan Singh her adoptive father and his four sons named Kartar Singh, Gurbux Singh, Prem Singh and Mohinder Singh. Kartar Singh was working as manager of the Kuldip Oil Mills. Recently disputes arose between Benarsi Das and these persons and they left his house. Subsequently, they are said to have beaten and forcibly turned out Benarsi Das when he went to the Mills. This has led to these proceedings under S. 145, Criminal P. C. The learned Magistrate is holding an inquiry, but this petition for revision has been filed by Mt. Prem Kaur and Kartar Singh on the ground that the Magistrate has acted wholly without jurisdiction and it would be unjust and sheer waste of time to allow the proceedings to continue. In support of the above grounds Mr. Bevan Petman has urged on behalf of the petitioners that: (1) even on the facts admitted by the respondent Benarsi Das in his petition, the learned Magistrate had no jurisdiction to take any proceedings under S. 145, Criminal P. C.; (ii) that there was no emergency justifying the order of attachment passed by him; (iii) that the manner in which the property was attached was illegal; and (iv) finally, that the attachment of certain moveable property on the premises of the Mills was, at any rate, ultra vires.

As regards the first point, stress was laid on the statement in para. 11 of the petition of Benarsi Das under S. 145, Criminal P. C., to the effect that the opposite party were in possession of the Mills. This statement however must be read along with the other allegations of facts in that petition. These allegations show that Kartar Singh was in possession merely as a manager and his possession must be deemed to have been on behalf of Benarsi Das, the owner of the Mill. This point was not seriously disputed by the learned counsel for the petitioners, but he contended that the other petitioners were, at any rate, in possession in their own rights. I do not however see that there is any force in this contention. Out of the other respondents in the petition under S. 145, Khazan Singh, is the father of Kartar Singh while Gurbux Singh, Prem Singh and Mohindar Singh are his brothers. They were apparently living together. It is not suggested that they had any sort of claim to the Mill. It is said that Benarsi Das owed Rs. 60,000, or so to these persons, but it is not alleged that the Mill was mortgaged to them or any sort of lien was created by any document. As regards Mt. Prem Kaur, it appears that she left the house of Benarsi Das and went to live with Khazan Singh, her adoptive father, only about 27th November 1932, i. e., about a couple of weeks before the petition under S. 145, Criminal P. C., was lodged. According to the allegations in that petition the aforesaid persons beat the munim of Benarsi Das on the 4th December last and refused to allow him to examine the accounts. The next day, they gave a similar treatment to Benarsi Das himself. It was therefore apparently on these dates that Kartar Singh, etc., are alleged to have by force converted their possession which was originally on behalf of Benarsi Das, into possession adverse to him. If these allegations be correct, the possession thus obtained within two months before the petition will be of no avail (vide proviso to sub-S. 4, S. 145, Criminal P. C.). After carefully considering the allegations in the petition and the statements before the learned Magistrate, I am satisfied that there was a prima facie, case justifying proceedings under S. 145, Criminal P. C.

As regards the necessity of attachment, the Magistrate considered the case to be one of emergency. The matter was one within his discretion and the action taken by him for maintenance of peace cannot be lightly interfered with. It has been urged that Benarsi Das was lying injured in the hospital and hence there could be no emergency. This seems to me a preposterous position to take up in view of the fact that Kartar Singh, etc., are alleged to have been themselves responsible for the injuries, which necessitated Benarsi Das's detention in the hospital for treatment. Even if Benarsi Das was unable to go to the Mills, he was entitled to send his servants there to look after his interests. In view of the treatment given to Benarsi Das himself, there was obviously danger of a breach of peace. Further, the conduct of Kartar Singh and others also raised reasonable apprehension of damage to the Mills and the other property of Benarsi Das connected therewith. I see therefore no reason to hold that there was no such emergency at all, as could justify the action of the learned Magistrate under the law.

The learned Magistrate has attached the Mills through the police, who are now in possession. The learned counsel for the petitioners urged that the learned Magistrate could only attach property in the manner provided for by the Civil Procedure Code, i. e., by issue of an order prohibiting alienation of the property. In support of this contention the learned counsel drew my attention to a ruling of the Patna High

Court reported as *Mewa Lal* v. *Emperor* (1). The view taken by Mullick, J., in that ruling has however been dissented from by Burn, J., in a later ruling of the Madras High Court reported as *Gopala Aiyar* v. *Krishnaswami Aiyar* (2) and I respectfully concur in the latter view. As pointed out by Burn, J., in his judgment a mere restraint on alienation would generally be of no use in preventing a breach of peace which is the primary object of proceedings under S. 145, Criminal P. C. The Criminal Procedure Code certainly does not contemplate prohibitory order as the only mode of attachment under S. 88 of the Code, e. g., it is laid down that attachment may be made by taking possession or by appointment of a Receiver, or by a prohibitory order restraining payment of rent, delivery of possession, etc. These are recognized modes of attachment and in the absence of any restriction in the section itself there seems to be no good reason why one or the other method should not be adopted, as may be considered appropriate for the object in view. It was remarked by Sankaran Nair, J., in *Srinivasa Pillai* v. *Sathayappa Pillai* (3) that the right to attach property carries with it the right to take necessary steps for its custody and management and that a Receiver can be appointed for the purpose under S. 145, Criminal P. C., just as he can be appointed under S. 146, Criminal P. C., though in the former case he acts merely as an agent of the Court and has not all the powers which are specifically conferred by S. 146, Criminal P. C., upon a Receiver, appointed under that section. I accordingly hold that there was nothing illegal in the mode of attachment. Lastly, it was urged that attachment of moveable property on the premises of the factory, i. e., the machinery, coal goods, etc., was at any rate beyond the scope of S. 145, Criminal P. C., and therefore ultra vires. In support of this contention reliance was placed on *Dhani Ram* v. *Bhola Nath* (4) in which it was held that attachment of shop goods was illegal. But the point was conceded by the counsel in that case and there is no discussion of the subject in that ruling.

It may be conceded at once that proceedings under S. 145, Criminal P. C., can only be taken in respect of a dispute concerning "land and water" and the section only gives power to attach the subject of such dispute in case of emergency. The expression "land and water" has been explained in the section as including buildings, markets, fisheries, crops and other produce of land and the rents and profits of any such property. Moveable property as such would not therefore ordinarily come within the purview of section, unless if it is in the shape of crops or other produce of land, or rents and profits of the property in dispute. But a difficulty arises in cases where there is moveable property in the building, etc., to be attached. Very often the dispute relates not to the mere building or structure itself but also to the valuable property inside. In the present instance, e. g., it is obvious that the dispute relates not merely to the building of the factory, but also to the valuable machinery, goods, etc., on the premises. What is then to be done when a Magistrate has to attach such property in the case of emergency? There seems to be paucity of authority on the point. The only authority to which reference was made in the course of arguments was *Kochunni* v. *Manavikrama Rajah* (5), in which an elephant was attached along with some forest land in the course of proceedings under S. 145, Criminal P. C. It was held that attachment of the elephant was not legal, but at the same time the elephant being on the premises to be attached, the officer attaching the forest was entitled to take it temporarily in his custody. The learned Judge, who decided the case (Sankaran Nair, J.), remarked as follows:

> "But the immovable property or the forest is under attachment and it is conceded that the elephant was not removed from the forest at the time of attachment. Neither of the parties is entitled to enter the forest after the attachment. The officer attaching the forest is therefore entitled to take possession of the elephant. It is clear that the owner or the person in possession of the forest in which the pit was dug is also entitled to the ownership or possession of the elephant; and prima facie the person, if any, in whose favour, the order under S. 145, Criminal P. C., will be passed, will also be entitled to the possession of the elephant unless there are special circumstances in the case to show that he is not entitled to its possession. Assuming then without deciding, that the petitioner removed the elephant out of the pit and kept it within the boundaries of the forest attached, I am not now prepared to direct the elephant to be delivered to him. The order for delivery of possession to

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1. (1918) 3 Pat L J 147=19 Cr L J 249=44 I C 41.
2. A I R 1920 Mad 209=54 I C 473=21 Cr L J 73.
3. (1912) 13 Cr L J 295=14 I C 759.
4. (1902) 23 P R 1902=135 P L R 1902.
5. (1912) 13 Cr L J 222=14 I C 318.

the party entitled can, in the circumstances, be made only after the final order under S. 145, Criminal P. C. concerning the immovable property."

This seems to me to be the only reasonable view to take in the circumstances. It would be, I think, absurd to hold that when a Magistrate takes possession of immovable property in case of emergency he should first remove the moveable property therefrom or hand it over to one or the other of the parties until the question of possession of the immovable property is decided in the proceedings. Prima facie, the moveable property in such cases belongs to the person entitled to the possession of the immovable property in dispute. The order passed by the Magistrate is only a provisional administrative order and does not in any way decide the rights of the parties. I am therefore of opinion that the police officers who have been appointed to take charge of the factory are entitled to retain for the present the custody of the moveable property which was on the premises at the time of attachment, subject to the final order of the Magistrate, when the question of the possession of the factory itself is decided in the proceedings under S. 145, Criminal P. C. There is, of course no justification for detaining any property about which there is no dispute, but I understand that all such property has been already excluded. I dismiss the petition.

M.N. *Petition dismissed.*

A. I. R. 1933 Lahore 412

TEK CHAND AND MONROE, JJ.

Sukhdeo Singh and *others*—Appellants.

v.

Mathra Singh and *others*—Respondents.

First Appeal No. 1610 of 1925, Decided on 14th December 1932, from decree of First Class Sub-Judge, Rohtak, D/- 8th June 1925.

(a) Specific Relief Act (1877), S. 42—Land held under common title—Defendant disputing part of such title—Declaratory suit is maintainable.

Where by disputing their title to a part of the lands held under a common title, defendant has in effect disputed title of the plaintiffs to all the lands a suit for a declaration lies and time for such suit runs from the date when plaintiffs' title was disputed. [P 414 C 1]

(b) Punjab Land Revenue Act (17 of 1887), S. 117—Jurisdiction to decide declaratory suit by civil Court is not ousted.

Where jurisdiction is given to the Revenue Court, the jurisdiction of the ordinary Courts is not necessarily ousted S. 117 does not expressly deprive the ordinary Courts of jurisdiction to decide a declaratory suit. [P 414 C 1]

(c) Evidence Act (1872), S. 115—Legitimacy of defendants challenged—Treatment as and admission of defendants to be members of family do not amount to estoppel.

Where in a suit the plaintiff challenged the legitimacy of the defendants and the lower Court found that the plaintiffs were estopped, such finding being based on the fact that the defendants had been treated as or admitted to be members of the family on various occasions:

Held: that such treatment and admission were not representations on which estoppel could be based nor was it suggested that defendants acted on them to their detriment. [P 414 C 1]

(d) Civil P. C. (1908), O. 2, R. 2—Claim that ought to have been joined in previous suit was not joined—Later suit is barred under O. 2, R. 2.

In previous suit the plaintiffs were claiming all the land in a certain mauza and it was open to them to claim on the basis that the branch of the family represented by the defendants in a later suit was illegitimate in its origin. The facts to be established for the purpose of establishing the claim in the later case were identical with those which were actually presented, or ought to have been presented, to establish the entire claim:

Held: that the latter suit was barred by the provisions of O. 2, R. 2 in that the plaintiffs in the former suit omitted to sue in respect of that portion of their claim to the ancestral property which was in the latter suit. [P 415 C 1]

(e) Civil P. C. (1908), S. 11—Obiter dictum in previous suit cannot be res judicata in subsequent suit.

For the purpose of determining the effect of the former suit the Court must look not only to the issues which were decided but to the necessity for their decision. And if the question of legitimacy raised in a previous suit was irrelevant and even though the Court hears evidence on and decides the point, its expression of opinion is unnecessary for the purpose of the decree it actually made and is an obiter dictum and hence cannot be res judicata on a subsequent suit. [P 415 C 1]

(f) Wajibularz—Entry in wajibularz having no bearing on questions put—Such entry is inadmissible in evidence.

Where statements regarding a certain person's family recorded in a wajibularz have no bearing on the question put, and it does not appear on whose testimony the statements are based, those statements are inadmissible in evidence for the purpose of establishing the facts stated in it about that family. [P 415 C 2]

Shamair Chand and *Qabul Chand*—for Appellants.

Nand Lal, *Kahn Chand* and *Krishan Swarup*—for Respondents.

Monroe, J.—This suit was instituted by the plaintiffs to obtain a declaration that they and defendants 6 to 10 are owners in possession of one-fifth share of property situate in five different places left by Mt. Jado Kaur, which share is now entered in the names of defendants 1 to 5 in the revenue papers; the suit was dismissed by the Subordinate Judge, First Class, Rohtak, on 8th June 1925. Against this decree the plaintiffs have appealed. For a proper appreciation of the present dispute it is necessary that the earlier history of the property and of the family to which both plaintiffs and defendants belong be set out at length.

A pedigree table is given at pp. 123-127 of the printed book, which shows the family relationships. Bhoop Singh, the common ancestor, was the owner of the following property: (1) lands at Mauza Lohat; (b) lands at Mauza Sheopura; (c) lands at Mauza Kemalgarh; (d) lands at Mauza Kolana; (e) lands at Mauza Nagla and (f) lands at Mauza Kutana with all of which except (f) the present suit is concerned. Bhoop Singh left six sons, namely: (1) Hindu Singh, ancestor of plaintiffs 1 and 2; (2) Shaloo Singh, who died in 1862 leaving a widow Mt. Bhooran by whom he had a son Ram Singh who died in 1863 sonless, and Mt. Ganga by whom he had sons whose interests are now represented by defendants 1 to 5; (3) Salig Ram ancestor of plaintiffs 3 to 7, and defendants 7 and 8; (4) Indar Singh, the father of defendant 6; (5) Kishan Lal, the ancestor of plaintiffs 9 and 10 and defendants 8, 9 and 10; (6) Shivji Singh, who died in 1888 leaving a widow, Jadokaur but no son; and (7) Soorat Singh, who died many years ago sonless, leaving a widow, Mt. Sangharan who died in 1886.

The present controversy therefore arises between the descendants of Shaloo Singh by Mt. Ganga on the one side and the representatives of the other five branches which have survived. During his lifetime Shaloo Singh provided for his sons born of Mt. Ganga, and after his death and the death of his son Ram Singh, his one-seventh share of the whole property was mutated in the name of his widow, Mt. Bhooran; on the death of Mt. Sangharan in 1886, the branch of Soorat Singh became extinct and the share of each remaining branch was increased from one-seventh share to one-sixth of the whole, and Mt. Bhooran continued in enjoyment first of her husband's one-seventh share and after 1886 of the one-sixth share to which it had been increased, until her death in October 1908. This one-sixth share was then mutated in the names of defendants 1 to 5 or their predecessors at that date. On 27th January 1915, Mt. Jado Kaur, widow of Sheoji Singh, died and Sheoji Singh's. original share with the accretions, amounting to one-sixth share of the whole property, became divisible amongst the surviving branches of the family and was mutated accordingly, one-fifth in the names of defendants 1 to 5. In 1923, Mathra Singh, brought proceedings in the Revenue Court for partition of the lands at Kemalgarh and on 29th June 1923, the Assistant Collector, Rohtak, ordered the objectors, the present plaintiffs, to file a declaratory suit in the Revenue Court, staying the proceedings for partition. The plaintiffs preferred in the circumstances to have recourse to the ordinary Courts and have accordingly instituted the present suit, which, it will be observed, relates not only to the lands at Kemalgarh, but to the other ancestral property which passed on the death of Mt. Jado Kaur.

The plaintiffs' case is based, in the first place, on the allegation that defendants 1 to 5 are not legitimately descended from Shaloo Singh because Mt. Ganga, mother of Hardhan Singh, and Mughil Singh, was not the wife of Shaloo Singh, but only a Karewa wife; and this allegation is founded on a statement in the Wajibularz relating to Mauza Kutana prepared at the settlement of 1862 (Ex. P-5 at p.51 of the paper book). It will be necessary to discuss this entry more fully hereafter. The plaintiffs also claim that the question whether Mt. Ganga was the wife of Shaloo Singh has been decided in favour of the plaintiffs in a previous suit and was as between them and defendants 1 to 5, res judicata; the defendants relied on this suit as operating under O. 2, R. 2, Civil P. C., to bar the present suit. The issues and findings of the Subordinate Judge are as follows: (1) Does O. 2, R. 2 bar the present suit ? No. (2) Does a suit for a declaration lie ? Only in the case of the lands at Melagarh, the subject-matter of the proceedings in the Revenue Court. (3) Is the suit within time ? Within time in respect of the land at Kemalgarh. (4) Can the plaintiffs not bring the present suit as they did not bring a suit for declaration of title in the Revenue Courts ? No, proceedings should have been taken in the Revenue Court in accordance with the order of the Assistant Collector. (5) Was Mt. Ganga, the Karewa wife of Shaloo Singh ? Yes. (This means that she was not the wife of Shaloo Singh and that in consequence her children were illegitimate and could not inherit). (6) Is the judgment of Mehta Dwarka Nath, dated March 1920, res judicata on the question whether Mt. Ganga was the Karewa wife of Shaloo Singh or not ? Yes. (7) Are the plaintiffs estopped from urging that Mt. Ganga was the Karewa wife of Shaloo Singh ? Yes.

The learned Subordinate Judge accordingly dismissed the suit with costs and the plaintiffs have appealed to this Court. In the grounds of appeal the findings on issues 2, 3, 4 and 7 are attacked; and of this part of the case I can dispose shortly. As to issue 2 the plaintiffs are in possession; by disputing their title to a part of the lands held under a common title, defendant 1 has in effect disputed their title to all the lands and I am unable to discover why a suit for a declaration as framed should not lie. As to issue 3 counsel for defendants 1 to 5 has not pressed this point in his favour. In my opinion time runs from the date when plaintiffs' title was disputed, namely, the institution of the proceedings for partition by defendant 1.

As to issue 4 the argument in favour of this finding is that as jurisdiction is given to the Revenue Court, the jurisdiction of the ordinary Courts is ousted. S. 117, Land Revenue Act, to which this effect is attributed does not expressly deprive the ordinary Courts of jurisdiction and I do not find in the section any such strong implication as would be necessary to effect the result suggested; in form the section merely enables the Revenue Court to make such a declaration as the plaintiffs have sought. I may add that in any event the result of holding that the section ousts the jurisdiction of the ordinary Courts can affect the present suit only so far as it applies to the lands of Kemalgarh. As to issue 7 this point again was not pressed by the respondents' counsel and no facts appear on the record to support it; the learned Subordinate Judge based his finding on the fact that the defendants had been treated as or admitted to be members of the family on various occasions, but such treatment and admissions are not representations on which estoppel could be based nor is it suggested that defendant 2 acted on them to his deteriment.

As the case was argued before us, the controversy turns on the answers to issues 1, 5 and 7, which having been decided by the Subordinate Judge in favour of the plaintiffs-appellants have not been referred to in the grounds of appeal. Issues 1 and 7 are both concerned with the effect of the decision in a suit, No. 177 of 1920, between the parties or their predecessors in interest. The petition of plaint in that suit is dated 21st December 1919, and though Mt. Jado Kaur had then been dead for nearly five years, her death was not mentioned in the plaint; the prayer of the plaint was for a declaratory decree to the effect that the plaintiffs and defendants 3 and 4 (who are represented in the present suit by the plaintiffs and defendants 6 to 10), were the owners and possessors of one-fifth share of the lands at Mauza Kutana which had descended from Thakar Bhoop Singh. Defendants 1 and 2 who are now represented in the present suit by defendants 1 to 5 did not appear and the proceedings against them were ex parte; and it appears from the record of the proceedings that the case was disposed of in a very summary manner. In the judgment, delivered on 6th March 1920, it was found that

> "the oral evidence produced by plaintiffs proves that defendants 1 and 2 are illegitimate sons of Thakar Shaloo Singh."

The claim was held to be proved ex parte and was accordingly decreed in the plaintiffs' favour and the decree was drawn in the following terms:

> "a declaration is hereby made that one-fifth of the land in suit is in the possession of plaintiffs 3 and 4."

We have examined the scanty record of the suit and have found that a pedigree table was proved, which shows the death of Mt. Jado Kaur. Now the question to be considered is what is the exact operation of this judgment and decree. It is argued by the plaintiffs that the judgment has decided the question of legitimacy which is therefore, res judicata between the parties to the present suit. It is argued by defendants 1 to 5 that in that suit the relief now sought could have been obtained and that O. 2, R. 2 prevents the plaintiffs from succeeding in the present suit: further, the decision in the case as embodied in the decree is that the plaintiffs and defendants 3 and 4 were in possession of the property, a question of fact to which the issue of illegitimacy was irrelevant. It is unfortunate that record, plaint, judgment and decree in this earlier case should be unsatisfactory, as an examination of these various documents (including the record) has convinced me that they are, but we must now give as full effect to the decision as is possible in the circumstances. The outstanding fact in the case for the present purpose is that the claim was for the one-fifth of the land then entered in the names of defendants 1 and 2. It was owing to the death of both Mt. Bhooran and Mt.

Jado Kaur that one-fifth share was considered by the Revenue Authorities to have descended to defendants 1 and 2, and though the death of Mt. Jado Kaur was not mentioned in the plaint or the judgment, it was proved by the pedigree which was produced in evidence. In my opinion, there can be no doubt that the plaintiffs were claiming all the land in Mauza Kutana that it was open to them to claim on the basis that the branch of the family now represented by the present defendants 1 to 5 was illegitimate in its origin. The facts to be established for the purpose of establishing the claim in the present case are identical with those which were actually presented or ought to have been presented, to establish the entire claim and accordingly I held that the present suit is barred by the provisions of O. 2, R. 2, Civil P. C., in that the plaintiffs in the former suit omitted to sue in respect of that portion of their claim to the ancestral property which is made in the present suit.

For the purpose of determining the effect of the former suit we must look not only to the issues which were decided but to the necessity for their decision. The declaration in that suit is that the plaintiffs were in possession of the property described in the plaint.

To the question, whether the then plaintiffs and defendants 3 and 4 were not in possession, the issue of legitimacy was, in my opinion, irrelevant and though the Subordinate Judge heard evidence on and decided this point, his expression of opinion was unnecessary for the purpose of the decree which he actually made and was an obiter dictum, and issue 6 in the present case is not determined by the doctrine of res judicata. If my view that O. 2, R. 2, applies to the present proceedings is wrong and if the question of legitimacy is not res judicata, it becomes necessary to examine whether the children of Shaloo Singh by Mt. Ganga were legitimate. The plaintiffs' case against the legitimacy of these children is based, first, on an extract from the settlement of 1862, secondly, on the fact that on the death of Shaloo Singh and Mt. Sangharan, widow of Soorat Singh, the plaintiffs got no share of these ancestral lands; thirdly, oral evidence that the children of Mt. Ganga were illegitimate supported by the statement that defendants 1 to 5 were not recognized as members of the family. The extract from the settlement of 1862 is para. 17 of the Wajibularz relating to Mauza Kutana (Ex. P-1, p. 51). The questions were:

> "(1) Does a gailer (a child by a former husband) succeed? (2) Is succession among sons by different wives per stirpes or per capita?"

The questions are first answered:

> "a gailer does not succeed, and succession among sons by different wives is per stirpes"

and the entry then continues:

> "Salam Singh (i. e. Shaloo) one of the cosharers has two wedded wives and one kept-woman. He has no children from the wedded wives. If he begets children from the wedded wives, they can get his share. He has three sons Hardhan Singh, Mughli Singh and Saledhi Singh by his kept-woman. They shall not get a share in the village."

Now, it must be observed that the statements about Shaloo Singh's family have no bearing on the question put; it does not appear on whose testimony these statements are based and further that it is not the function of the Wajib-ul-arz to record such statements as these. The extract is therefore in my opinion, inadmissible in evidence for the purpose of establishing the facts stated in it about the family of Shaloo Singh. (After a consideration of the evidence of the plaintiffs' witnesses his Lordship came to the conclusion that there was not a particle of credible testimony to show that defendants 1 to 5 had been treated other than as enjoying the social privileges of Rajputs and proceeded). For the reasons which I have given I think that the plaintiffs' appeal fails and ought to be refused with costs.

Tek Chand, J.—I agree that this appeal should be dismissed with costs.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 415

SHADI LAL, C. J. AND BROADWAY, J.

Fateh Chand—Plaintiff—Appellant.

v.

Arjan and *others*—Defendants—Respondents.

Letters Patent Appeal No. 115 of 1929, Decided on 15th February 1933, from decision of Jai Lal, J., D/- 1st May 1929.

Punjab Tenancy Act (1877), S. 77 (3) (4)—Suit to recover arrears of rent by purchaser of landlord's right to recover rent is cognizable by civil Court.

A suit to recover arrears of rent in respect of agricultural land by a person who has purchased the landlord's right to recover the arrears is cognizable by a civil Court as such purchaser cannot be regarded as a landlord within the meaning of Cl. (n), S. 77 (3): 13 *I C* 511 and *A I R* 1931 *Lah* 623, *Rel on.* [P 416 C 1]

J. L. Kapur—for Appellant.

Badri Das—for Respondents.

Shadi Lal, C. J.—In execution of a decree against one Nanda his right to recover arrears of rent in respect of agricultural land from his tenant, Arjan Singh, was purchased by the plaintiff, who has brought the present suit for the recovery of the money due from Arjan Singh, on account of the arrears. The question for determination is whether the suit should be held to be one brought by a landlord for arrears of rent within the meaning of Cl. (n), S. 77, sub-S. (3), Punjab Tenancy Act. Now, it is clear that the plaintiff, who is merely a purchaser of the landlord's right to recover arrears of rent, cannot be regarded to be landlord within the meaning of that clause. Nanda was certainly the landlord, but the plaintiff is not his successor-in-interest in the land, and cannot therefore be held to be a landlord as contemplated by the Tenancy Act. The judgment in *Ganpat Rai* v. *Sardara* (1) is an authority for the proposition that a suit to recover arrears of rent in respect of agricultural land by a person to whom the landlord has sold the right to recover the arrears is cognizable by a civil Court. The same view has been taken in *Ishar* v. *Dittu* (2). The suit is therefore cognizable by a civil Court.

I would accordingly accept the appeal and setting aside the judgment of the Single Bench remit the case for decision on the merits. The respondent must pay the costs incurred by the appellant in this appeal.

Broadway, J.—I concur.

K.S. *Appeal accepted.*

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1. (1912) 13 I C 511.
2. A I R 1931 Lah 623=134 I C 1119=12 Lah 433.

A. I. R. 1933 Lahore 416

SHADI LAL, C. J. AND BROADWAY, J.

Sita Ram and *another*—Appellants.

v.

Kartar Singh and *others*— Respondents.

Letters Patent Appeal No. 124 of 1928, Decided on 22nd February 1933, from judgment of Dalip Singh, J., in Civil Appeal No. 417 of 1928, D/- 2nd June 1928.

Provincial Insolvency Act (1920), S. 33—*S* paying off debt of *P* due to Bank and taking back title-deeds—*P* adjudged insolvent—*S* is entitled to be subrogated to Bank.

One *P* was indebted to the Bank in the sum of Rs. 10,000, payment of this amount being secured by the deposit of certain title-deeds. An arrangement was entered into between *P* and *S* by which the latter advanced to the former a sum of Rupees 35,000 of which Rs. 10,000 were paid to the Bank and the title-deeds taken back. Subsequently *P* was adjudicated an insolvent and his property vested in the Official Receiver. *S* put forward his claim as a creditor and contended that *qua* the sum of Rs. 10,000 he was in equity entitled to be subrogated to the Bank:

Held: that it was clearly the intention of the parties that out of the Rs. 35,000 advanced by *S* the debt due to the Bank was to be liquidated and therefore *S* was entitled to be subrogated to the Bank. [P 417 C 2]

Shamair Chand and *Hans Raj Sawhney*—for Appellants.

Jagan Nath Aggarwal—for Respondents.

Broadway, J.—One Pindi Das of Rawalpindi, was indebted to the Punjab National Bank in the sum of Rupees 10,000, payment of this amount being secured by the deposit of certain title-deeds. On 27th May 1924, an arrangement was entered into between the said Pindi Das and one Sardar Nath Singh by which the latter advanced to the former a sum of Rs. 35,000, of which Rs. 10,000, were paid to the Bank and the title-deeds taken back. On this date two documents were executed by Pindi Das in favour of Sardar Natha Singh: (1) a promissory note for Rs. 35,000; and, (2) an agreement. In the promissory note Pindi Das undertook to pay the sum of Rs. 35,000, "on demand" together with "interest thereon at 15 per cent per mensem from this date to date of payment in full as per deed executed today." The deed referred to was obviously the agreement in which the transaction was set out in detail and certain properties charged with the payment of the sum of Rs. 35,000, the payments to be made in certain specified instalments. In this document it was recited that the properties then charged were free from encumbrance and that their title-deeds had been deposited with Sardar Natha Singh. The said title-deeds together with the document itself were to be returned to Pindi Das on his repaying the sum advanced with the interest thereon.

On 6th February 1926, Pindi Das was adjudicated an insolvent and his property vested in the Official Receiver. Sardar Natha Singh put forward his claim as a creditor under the promissory note for Rs. 35,000, and at the same time contended that he was a secured creditor inasmuch as he held an equitable mortgage on the properties to which the title-deeds related as the said deeds had been deposited with him.

In support of his contention he produced the promissory note and the agreement of 27th May 1924. His claim to be a secured creditor was rejected by the Insolvency Court and on appeal by the learned District Judge, it being held that the agreement was really a simple mortgage-deed which could not be admitted for want of registration. A further contention that, in any event, *qua* the sum of Rs. 10,000 he was in equity entitled to be subrogated to the Punjab National Bank was also disallowed.

Sardar Natha Singh having died his son, Kartar Singh, then preferred a second appeal to this Court which came before a Judge sitting in Single Bench before whom it was urged firstly, that Sardar Natha Singh, by virtue of the deposit of title-deeds which accompanied the execution of this agreement, was a secured creditor to the extent of Rs. 35,000, *qua* the properties mentioned in that agreement; and secondly, that in equity Sardar Natha Singh was entitled to be subrogated to the Punjab National Bank *qua* the sum of Rupees 10,000, paid to the Bank in liquidation of their debt. The learned Judge held that the agreement embodied the terms of the transaction between Pindi Das and Sardar Natha Singh and that no equitable mortgage by the deposit of title-deeds could be proved aliunde, but that *qua* the sum of Rs. 10,000, Sardar Natha Singh was entitled to be subrogated to the Punjab National Bank and held that he was to that extent a secured creditor. Both parties being dissatisfied with this result separate appeals have been filed under Cl. 10, Letters Patent. In one the creditors claim that the doctrine of subrogation does not apply in this case, and in the other Kartar Singh, son of Sardar Natha Singh, urges that an equitable mortgage was provable, and had been proved, covering the entire amount of Rs. 35,000.

Kartar Singh's appeal need not detain us long. An examination of the agreement in question makes it clear that it constitutes the bargain between the parties and the question is therefore concluded by the decision of their Lordships of the Judicial Committee in *Subramonian* v. *Lutchman* (1). I would therefore dismiss this appeal. The question of subrogation involved in the creditors' appeal is a little more difficult. Mr. Shamair Chand urged that inasmuch as the money in question (i. e., Rs. 10,000), had been paid to the Bank by Pindi Das their lien on the properties to which the title-deeds related came to an end, and therefore no question of subrogation arose. He cited various authorities in which the payments had been made by the person claiming to be subrogated. I do not think it necessary to discuss these authorities as I consider that when the transaction as a whole is examined, (and I think it must be examined in its entirety) there can be no doubt that the Punjab National Bank was paid off by Sardar Natha Singh and it seems to me immaterial whose hand actually paid the money over. It was clearly the intention of the parties that out of the Rs. 35,000, advanced by Sardar Natha Singh the debt due to the Bank was to be liquidated and I have no doubt that the payment to the Bank must be regarded as having been made by Sardar Natha Singh. I would therefore dismiss this appeal as well. In the circumstances I would leave the parties to bear their own costs in both appeals in this Court.

Shadi Lal, C. J.—I concur.

v.s. *Appeal dismissed.*

A. I. R. 1933 Lahore 417

TEK CHAND, J.

Har Bhajan Singh-Sohan Singh — Plaintiffs—Appellants.

v.

Siri Gopal and *another*—Defendants—Respondents.

Second Appeal No. 2393 of 1928, Decided on 1st July 1932, against decree of Addl. Dist. Judge, Amritsar, D/- 6th July 1928.

Contract Act (1872), S. 264—Business not going concern at time of transaction—Balance struck or loan raised by one partner does not bind other partners.

In the case of dissolution of partnerships, of which no notice has been given, the liability of an ex-partner to an old customer for post dissolution transactions with the supposed old firm does not depend on the customer knowing that such partner was a partner prior to the dissolution. If however at the time of the transaction in dispute the business was not a going concern, the balance struck by one of the partners, or a loan raised by him, does not bind the other partners, for in such circumstances it cannot be said that the executant was acting as the duly authorized agent of the firm: *A I R* 1932 *Cal* 236; *A I R* 1929 *P C* 132; 40 *P R* 1889 and 10 *Bom* 358, *Ref.*

[P 418 C 2; P 419 C 1]

Jagan Nath Aggarwal **and** ***Nihal Singh*** **—for Appellants.**

Kishan Dayal **and** ***Bhawani Singh Puri*****—for Respondents.**

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1. A I R 1923 P C 50=71 I C ,650=50 I A 77=1 Rang 66=50 Cal 338 (P C).

Judgment.—On 21st December 1925, Lachhman Das, defendant 2, purporting to act on behalf of the firm Sri Gopal-Lachhman Das, executed a hundi for Rs. 1,200, in favour of the plaintiff-appellant. The hundi was not honoured on the due date and the plaintiff brought a suit for recovery of the amount due against Sri Gopal and Lachhman Das. Lachhman Das admitted the claim, but Sri Gopal denied liability on the ground that he had ceased to be partner in the firm Sri Gopal-Lachhman Das, in 1921, and that the aforesaid firm was not a going concern at the time when the hundi in dispute was executed by Lachhman Das. The lower appellate Court has passed a decree against Lachhman Das, but has dismissed the suit against Sri Gopal. The plaintiff has preferred a second appeal praying that Sri Gopal also be made liable. It may be stated at the outset that in the plaint it was alleged that the plaintiff was an old dealer with the firm and that a hundi had been executed in part payment of the amount due by the firm Sri Gopal-Lachhman Das, to the plaintiff in lieu of debts due before Sri Gopal's separation. The plaintiff however did not go into the witness-box to prove this allegation, nor did he produce his account books. On a consideration of the evidence the learned District Judge has found the allegation unproved. It must therefore be taken as settled for the purposes of this appeal that the consideration of the hundi was not the amount due to the plaintiff on account of pre-dissolution debts.

The learned District Judge has also found that Sri Gopal was a "dormant" partner in the firm and in judging of his liability has largely relied on the judgment of the Chief Court reported as *Hashmat Ali* v. *Lachmi Narain* (1). But the findings of fact arrived at by the learned District Judge and the other admitted facts on the record, do not support this conclusion. Sri Gopal had lent his name to the firm when it was in existence and had otherwise taken an active part in its affairs. His status therefore can by no means be held to be analogous to that of a dormant or undisclosed partner. This however does not settle the matter. The other findings of fact arrived at by the learned District Judge are that the firm continued to work till 28th February 1921, when it was dissolved. On that date Sri Gopal retired from the business. A large sum was found due by Lachhman Das to Sri Gopal and he undertook to pay it in instalments. In the meantime Lachhman Das was allowed to carry on the business for the purpose of winding up and to use the old name of the firm "Sri Gopal-Lachhman Das" until he had paid the aforesaid amount to Sri Gopal. Admittedly no notice of this dissolution was given either by public advertisement or to the old customers by name. In accordance with the arrangement set out above Lachhman Das worked in the firm's old name for some years after the dissolution in 1921, Sri Ram taking no part whatever in it. In has however been found that long before the hundi in question was executed Lachhman Das had ceased to transact business in the name of Sri Gopal-Lachhman Das and that in the same premises a new firm, known as Lekh Raj-Gurdit Chand in which Lachhman Das was interested, had been started and was working in November 1925. The learned District Judge has recorded a very definite finding that the firm Sri Gopal-Lachhman Das was not a going concern on the date on which Lachhman Das passed the hundi in favour of the plaintiff.

The question for determination is whether on these facts Sri Gopal can be held liable on the hundi which Lachhman Das purported to execute on behalf of the defunct firm "Sri Gopal-Lachhman Das" long after Sri Gopal had retired therefore and the firm had ceased to be a trading concern. For the appellant reliance is placed on S. 264, Contract Act, which lays down that persons dealing with a firm are not affected by a dissolution of which no public notice has been given, unless they themselves have notice of such dissolution. Now, there can be no doubt that if the business of the firm had been continued by Lachhman Das in the name of the old firm and the firm had been a going concern at the time of the execution of the hundi, the mere fact that Sri Gopal had retired from it some years before, would not have absolved him from liability unless the plaintiff had notice of the dissolution. See in this connexion the recent pronouncement in *Jwala Dutt* v. *Bansi Lal Moti Lal* (2). Indeed, recent decisions in India have gone the length of adopting the rules of English law that in the case of dissolution of partnerships, of which no notice has been given, the liability of an ex-partner to an old customer for post-dissolution transactions with the supposed old firm does not

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1. (1908) 75 P R 1908=122 P W R 1908.

2. A I R 1929 P C 132=115 I C 707=56 I A 174=53 Bom 414 (P C).

depend on the customer knowing that such partner was a partner prior to the dissolution: *Pramatha Chandra* v. *Bhagwandas Madanlal* (3).

The position in the present case is however materially different. As stated already the finding of the learned District Judge is that at the time when the hundi in dispute was executed, the firm Sri Gopal-Lachhman Das had ceased to be a going concern and that no business whatever was being done in its name. The case therefore is not one of a firm, from which one partner had retired and the other was carrying on the business in the name of the firm and while doing so he borrowed in the firm's name. Here we have the quondam partner of a defunct firm, which had long since ceased to do any business, raising a new loan wrongly describing himself as the representative of the firm. In my opinion, in such a case the presumption of implied agency, which is applicable to the case of a going concern, does not arise. The case is analogous to *Butamal* v. *Ruldu* (4) in which it was held that if at the time of the transaction in dispute the business was not a going concern, the balance struck by one of the partners or a loan raised by him, did not bind the other partners, for in such circumstances it could not be said that the executant was acting as the duly authorized agent of the firm. Similarly in *Premji Ludha* v. *Dossa Doongersey* (5), Scott, J., observed that if at the time of the transaction in dispute the firm had been a going concern the plaintiff's authority to make such an acknowledgment on behalf of the firm might have been presumed, but if the business had been closed at the time and no firm of that name was in existence at all, no such presumption arises and any acknowledgment made or debt raised by one of the quondam partners does not bind the other: see also to the same effect *I. L. R. 7 Lah. 403*. The result therefore is that on the finding of fact arrived at by the learned District Judge, Sri Gopal is not liable on the hundi. The appeal fails and is dismissed. As the learned District Judge was not quite correct in some of the propositions of law which he had laid down, I leave the parties to bear their own costs in this Court.

K.N./R.K. *Appeal dismissed.*

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3. A I R 1932 Cal 236=136 I C 529=59 Cal 40.
4. (1889) 40 P R 1889.
5. (1886) 10 Bom 358.

A. I. R. 1933 Lahore 419

HARRISON AND AGHA HAIDAR, JJ.

Karam Devi and *another*—Plaintiffs—Appellants.

v.

Chuni Lal and *others*—Defendants—Respondents.

Second Appeal No. 82 of 1926, Decided on 14th February 1933, from decree of Dist. Judge, Amritsar, D/- 17th August 1925.

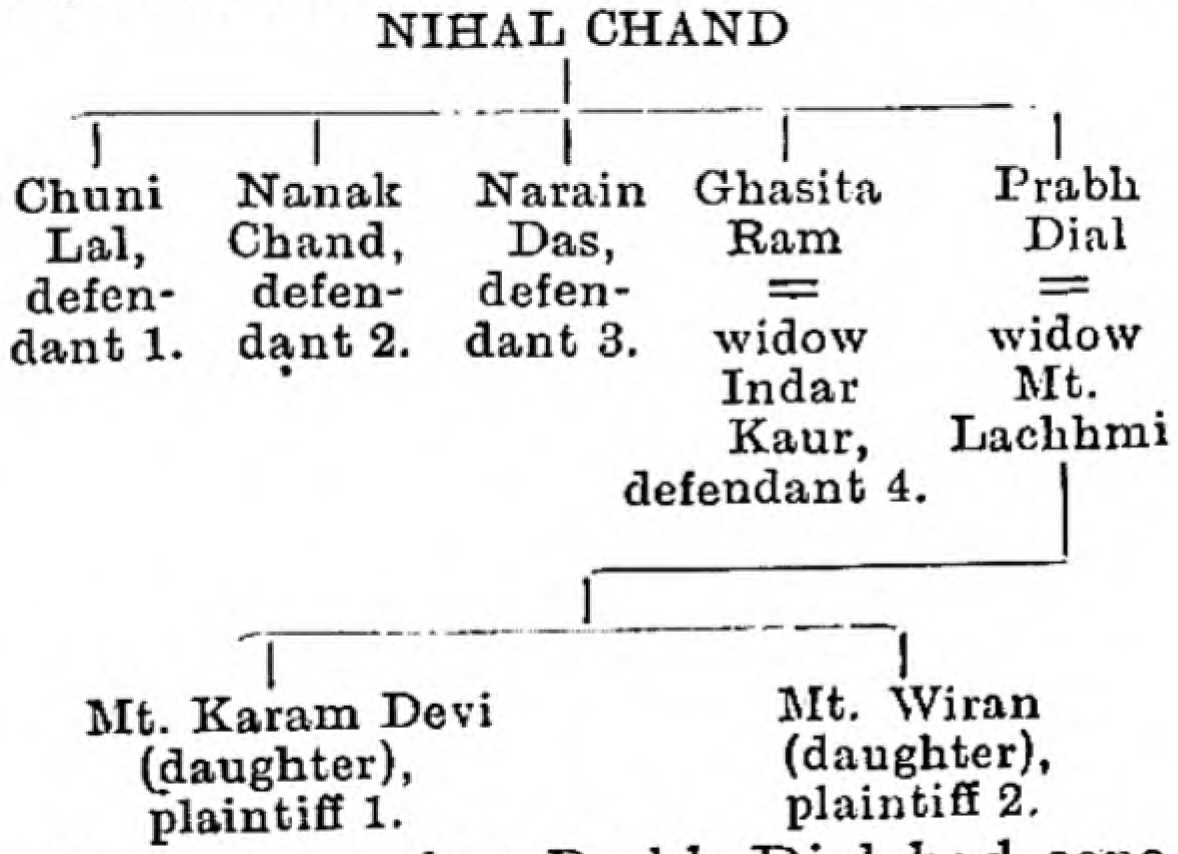
Family Arrangement—One of parties being minor compromise entered into by his de facto guardian—Compromise being not to detriment of minor is valid.

Where disputes having arisen between the members of a family a compromise is entered into and a certain person is admittedly a minor at the date of the compromise, if the fact remains that the compromise entered into is not in any way to the detriment of that person, the compromise so made will not be invalid merely because it is entered into by a de facto guardian unless that person establishes that the compromise is not to her advantage. [P 420 C 2]

K. J. Rustomji—for Appellants.

Anant Ram Khosla—for Respondents.

Agha Haidar, J.—This appeal arises out of a suit for possession of certain landed property and some moveables in the shape of jewelry, clothes and money. The trial Court granted a decree in favour of plaintiff 1, for a sum of Rs. 50 only, being the amount of certain produce of land, and dismissed the rest of the claim. The plaintiffs went up in appeal to the lower appellate Court and the defendants also filed a cross-appeal as regards the sum of Rs. 50, decreed in favour of plaintiff 1. The learned District Judge dismissed the plaintiffs' appeal, but accepted that of the defendants. The plaintiffs have come up to this Court in second appeal. The following pedigree table may be subjoined here for facility of reference:


NIHAL CHAND
Chuni Lal, defendant 1.
Nanak Chand, defendant 2.
Narain Das, defendant 3.
Ghasita Ram = widow Indar Kaur, defendant 4.
Prabh Dial = widow Mt. Lachhmi
Mt. Karam Devi (daughter), plaintiff 1.
Mt. Wiran (daughter), plaintiff 2.

It appears that Prabh Dial had separated from his other brothers. He died leaving him surviving his widow, Mt.

Lachhmi, and two daughters, Mt. Karam Devi and Mt. Wiran. Mt. Lachhmi died on 3rd May 1918, and, on her death, disputes arose between the two daughters and the other members of the family as regards the family property. A compromise was entered into on 15th May 1918, and registered on 16th May 1918, by which all the disputes and differences between the parties were settled. On 3rd October 1922, the plaintiffs instituted the present suit, alleging that they were not bound by the terms of the compromise, as Mt. Wiran, plaintiff 2, at the date of the compromise was a minor and therefore the fact that she signed the deed of compromise would not make it binding upon her. As regards Mt. Karam Devi, plaintiff 1, who was admittedly a minor at the date of the compromise, it was alleged that, as the document was signed on her behalf by her father-in-law, Doctor Ghasita Ram, who was not her legal guardian she was not bound by it. The defendants contested the plaintiff's claim on various grounds, but the main plea, with which we are concerned in the present appeal, was that the plaintiffs had given up all their rights in the property in suit under the compromise dated 15th May 1918, behind which they cannot go. The trial Court, as already stated, decreed the suit of plaintiff 1, for a sum of Rs. 50 only, and dismissed the rest of the claim. On appeal the learned District Judge held that Mt. Wiran was a major, in that she had stated in the deed of compromise itself that she was aged 24 and, further, that the lady did not lead any evidence whatsoever in the present case showing that she was a minor and therefore not bound by the compromise which she had signed. It was further held that her husband had also signed the compromise on her behalf and he must be deemed to have been acting as her de facto guardian. As regards Mt. Karam Devi the finding was that, although she was a minor, Doctor Ghasita Ram, her father-in-law, had acted as her guardian and that it was not open to her now to challenge the binding character of the compromise. The learned Judge further held that the compromise was beneficial to the two ladies, in that it averted the litigation which would have followed, in which one Sundar Das was about to claim as the adopted son of Prabh Dial, the husband of Mt. Lachhmi. He also held that the plaintiffs' suit as regards moveables was barred by time. On these findings the learned Judge of the lower appellate Court dismissed the plaintiff's suit in toto and allowed the defendants' appeal.

Mr. Rustomji, counsel for the plaintiffs-appellants, has clearly admitted that he could not challenge the compromise on the ground that it was not beneficial to the plaintiffs. His argument is that the ladies were not bound by the compromise as Mt. Wiran was a minor and Doctor Ghasita Ram could not represent Mt. Karam Devi as her lawful guardian. He further argued that the claim as regards moveables was not barred by time. So far as the case of Mt. Wiran is concerned, it is concluded by the finding of fact arrived at by the Court below that the lady was a major at the time when she entered into the compromise and there is considerable force in the reasoning of the learned Judge of the lower appellate Court when he says that no evidence whatsoever had been led on behalf of Mt. Wiran to prove that, on the date on which the compromise was effected, she was, as a matter of fact, a minor. As regards Mt. Karam Devi who was admittedly a minor at the date of the compromise, the fact remains that the compromise, according to the admission made by her learned counsel in this Court, was not in any way to her detriment. This being so, the compromise entered into by a de facto guardian when it was admittedly for her benefit would be binding upon Mt. Karam Devi. If she had been able to establish the case that the compromise was not to her advantage then of course, it would have been open to her to repudiate the action of Doctor Ghasita Ram, her father-in-law, who accepted the terms on her behalf; but this is not the case here. Under these circumstances and having regard to the findings arrived at by the lower appellate Court the compromise is in every way binding upon the plaintiffs. In this view the question as to whether or not the plaintiffs' suit as regards certain moveable property was within time does not arise, because the compromise of 1918 put an end to all outstanding claims and disputes between the parties. I would therefore dismiss with costs the appeal preferred by the plaintiffs.

Harrison, J.—I agree. It appears that the points raised in appeal are concluded by findings of fact. Mt. Wiran was a major at the time the compromise was effected. A de facto guardian acted for Mt. Karam Devi, who was admittedly minor and his conduct has not even been challenged on any other ground on which it could be set aside.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 421

TEK CHAND, J.

Diwan Chand & Co.—Decree-holders—Appellants.

v.

B. Thompson & Co. and *another*—Judgment-debtors—Respondents.

Misc. First Appeal No. 1922 of 1932, Decided on 24th March 1933, from order of Addl. Dist. Judge, Lahore, D/- 10th December 1932.

(a) Civil P. C. (1908), O. 21, R. 58—Attachment in execution of decree—Objection to attachment—Court should investigate into claim and not hastly admit objection and dismiss execution.

Where an objection is filed by a person to an attachment of property in execution of decree on the ground that he has a lien over it, the Court should investigate into the matter and not hastily allow the objection and dismiss the execution application. [P 421 C 2]

(b) Civil P. C. (1908), Ss. 47 and 115—Objection to attachment allowed and dismissal of execution application—Appeal from order as against objector does not lie but appeal can be treated as revision.

Where an objection to an attachment in execution of a decree is allowed and the execution application is dismissed, an appeal from such order by the decree-holder is competent only as against the judgment-debtor. Though an appeal as against the objector is incompetent, the Court can treat the appeal as an application for revision and dispose of it. [P 421 C 2]

Kahn Chand—for Appellants.

Hari Chand—for Respondents.

Judgment.—The learned Additional District Judge has dealt with this matter in a very unsatisfactory manner and his order must be set aside and the case remitted to him for disposal in accordance with law. The relevant facts are that Messrs. Dewan Chand & Co., obtained a decree against Messrs. B. Thompson & Co., under the Arbitration Act, and applied for execution by attachment and sale of certain bales of khaki flannel, which were alleged to belong to the judgment-debtors and were in possession of Messrs. Grindlay & Co. On 5th July 1932, Messrs. Grindlay & Co., objected to the attachment and sale of the bales, on the ground that they did not belong to the judgment-debtors, but were held by the objectors on behalf of Barclays Bank Limited. In reply to these objections the decree-holders filed a written statement on 19th November 1932, denying the allegations of Messrs. Grindlay & Co. and repeating that the latter were holding the goods on behalf of the judgment-debtors. They also stated that on several occasions previously Messrs. Grindlay & Co. had admitted the goods to be the property of the judgment-debtors and they were now estopped from stating that this was not so. It was not admitted that Barclays Bank Limited had a lien on the goods.

The objections came up for hearing before the Additional District Judge, on 10th December 1932, when an affidavit by one Harry Smith of Manchester was filed by counsel for Messrs. Grindlay & Co., who also made a statement in Court. He admitted that the facts had not been correctly given in the objection petition, and that in reality the goods belonged to Messrs. Thompson & Co., but that the objectors, as representing the Union Bank of Manchester, had a lien on them. The learned Judge without inquiring from the decree-holders if they admitted the alleged lien, or giving them an opportunity of showing that no such lien existed accepted the objection and dismissed the application for execution. The decree-holders have appealed and have impleaded the judgment-debtors as well as Messrs. Grindlay & Co., as respondents. There can be no doubt that the order of the learned Judge was hasty and ill-advised, and cannot be sustained. On the statement made by the objectors' counsel in Court on 10th December 1932, that the goods belonged to the judgment-debtors the decree-holders were entitled to proceed against them in execution of the decree. The only question for determination was whether the objectors had a lien on the goods and this matter should have been investigated under O. 21, R. 58, *et seq.* Admittedly no such investigation was made, and the order allowing the objections and dismissing the execution petition is manifestly wrong.

Mr. Hari Chand, while admitting that the appeal was properly filed against the judgment-debtors, urged that no appeal lay under S. 47, Civil P. C., against the objectors, Messrs. Grindlay and Co. This is correct, and Mr. Kahn Chand has asked me to treat the memorandum of appeal as a petition for revision of so much of the order of the lower Court as affects Messrs. Grindlay & Co. This prayer is reasonable and must be granted in the circumstances. On the merits Mr. Hari Chand admitted his inability to support the order accepting the objections without investigation. I accept the petition, set aside the order of the lower Court and remit the case to it for redecision and disposal in accordance with law. Court-fee on the memorandum of appeal shall be refunded; other costs shall be costs in the cause.

K.S. *Petition accepted.*

A. I. R. 1933 Lahore 422

BROADWAY, J.

Sahib Singh and *others*—Defendants—Appellants.

v.

Dalip Singh—Plaintiff—Respondent.

Second Appeal No. 464 of 1932, Decided on 1st March 1933, from preliminary decree of Dist. Judge, Ludhiana, D/- 23rd December 1931.

(a) Registration Act (1908), Ss. 17 (b) and 49—Deed of relinquishment of rights.

A deed by which certain rights are relinquished in respect of property over Rs. 100 requires registration and is inadmissible as evidence without registration. [P 422 C 2]

(b) Registration Act (1908), S. 49—Unregistered partition deed is admissible to prove nature of possession.

An unregistered deed of partition though inadmissible to prove the partition, is admissible for collateral purposes of proving the nature of possession. [P 423 C 1]

Dev Raj Sawhney—for Appellants.

Achhru Ram—for Respondent.

Judgment.—One Surjana had four sons: Sundar Singh, Hazara Singh, Ram Ditta and Sahib Singh. In April 1930, Dalip Singh, son of Sundar Singh who had died, instituted a suit against his three uncles for possession by partition, of his one-fourth share in certain properties which were alleged to be joint. The defendants pleaded inter alia that a partition of the joint property had taken place some 20 years previously since when each of the parties had been in separate possession of their respective shares. The question as to whether there had been such partition was put in issue and decided in the plaintiff's favour, it being held that the entire property was still joint and undivided, and the plaintiff was granted a preliminary decree for possession by partition of his one-fourth share.

An appeal by the defendants to the District Court proved unsuccessful, the learned District Judge holding that the defendants had failed to prove the oral partition set up by them. In coming to this decision three documents marked Exs. D-25, D-32 and D-42, had been considered by the learned District Judge who came to the conclusion that they were inadmissible in evidence for want of registration inasmuch as they clearly constituted either a deed of partition or a deed of relinquishment. He then went on to hold that, although they could be referred to for collateral purposes such as to prove the nature of the defendants' possession, there was nothing in them to indicate that possession of the defendants had originated in the oral partition said to have been made 20 years previously. One of the defendants, Sahib Singh, had also pleaded that he was the owner of a certain site which he had acquired in exchange for certain property. The finding as to this was that this site had been exchanged for joint property and the mutation entry showed that it had been entered in the joint khata of the parties. It was therefore held that this property was also liable to partition. Against this decision the defendants have preferred this second appeal to this Court and I have heard Mr. Dev Raj Sawhney, for the appellants, and Mr. Achhru Ram, addressed me on behalf of the plaintiff-respondent.

It is perfectly clear, indeed it has been admitted, that the finding of the learned District Judge that the defendants had failed to prove the oral partition set up by them is one of fact. It has been urged however that this finding is vitiated and therefore liable to be examined by this Court owing to the fact that the three documents, Exs. D-25, D-32 and D-42, have not been taken into consideration. Mr. Sawhney, urged that the learned District Judge was wrong in holding that they required registration and, in order to support his contention, he read out the three documents. Now, Exs. D-25 and D-42, were both executed on 28th September 1928, the former by Sahib Singh, in favour of Hazara Singh while the latter was executed by Dalip Singh in favour of the defendants. A reference to these two documents clearly shows that the view taken by the learned District Judge is correct and that these two documents are not merely recitals of an event that had taken place sometime before-hand, but definitely relinquish certain rights in favour of the other parties. Admittedly the value of the properties dealt with was in excess of Rs. 100, and registration was therefore compulsory. The third document Ex. D-32, was executed by Dalip Singh, Hazara Singh and Ram Ditta in favour of Sahib Singh on 9th October 1928, and by it they relinquished their right in the site which Sahib Singh is said to have obtained in exchange and which has been referred to above. A perusal of this document clearly shows that it is a definite relinquishment of certain rights and that the relinquishment was "as from the date" of its execution.

Mr. Sawhney then contended that the documents should have been referred to for the collateral purpose of proving the nature of the defendants' possession. It is true that in these documents reference is made to a partition and the reference is in the past tense, that is to say it recites the facts that a partition had been effected and that the various parties had taken possession of the properties allotted to them. The learned counsel for the appellants asks me to hold that this must have reference to the partition set up by the defendants and not to any partition that may have immediately preceded the execution of the documents or may have formed part of the transaction of which Exs. D-25 and D-42, afforded written evidence. I am unable to see any justification for this proposition. The documents no doubt can be looked at for the collateral purpose of ascertaining the nature of the defendants' possession. Inasmuch as the documents were only executed in 1928 and the suit was brought in 1930 there can be no question of adverse possession and the possession can only be regarded as having been obtained in 1928. As a matter of fact it seems to me clear from the phraseology of these three documents that some question as to partition arose in 1928, and these documents were intended to be evidence of the partition and indeed to effect that partition. Inasmuch as the documents cannot be used for the purpose of proving the partition for want of registration it is clear that the finding of fact arrived at by the learned District Judge is not vitiated by his decision with regard to these documents and I must therefore dismiss this appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 423

JAI LAL, J.

Mast Ram—Plaintiff—Appellant.

v.

Muhammad Khalil and *others*—Defendants—Respondents.

Second Appeal No. 972 of 1932, Decided on 11th January 1933.

Practice—Conclusion arrived at by Judge should not be reversed by his successor unless by review or under S. 152, Civil P. C.

No doubt in some cases it is open to the same Judge or his successor to rectify the mistake made by the former, but the mistakes must be of such a character that they could be rectified either on review or under S. 152, Civil P. C.

But where a Judge had heard the parties at length and had given well-considered and final decisions on the points involved and it was in consequence of this that a remand was considered to be necessary by him:

Held: that the conclusion of such a Judge was binding on his successor and it was not competent for the latter to reverse such decision. *Case law referred.* [P 424 C 2]

M. C. Mahajan, *Shamair Chand* and *Qabul Chand*—for Appellant.

Badri Das—for Respondents.

Judgment.—This second appeal arises out of a suit for possession by redemption of property alleged to have been mortgaged. The defendants pleaded that the mortgage did not exist as the equity of redemption had, subsequent to the mortgage, been purchased by the mortgagee. The trial Court dismissed the suit holding that the plea of the defendants had been proved that they were the owners of the house in dispute. In their pleadings the defendants had alleged that they had made considerable improvements to the mortgaged property and if the mortgage of the property be held to subsist, then they should be awarded compensation for the improvements to be paid by the plaintiff before the redemption of the mortgage. An appeal was preferred by the plaintiff to the District Judge against the decree dismissing his suit. The District Judge, Mr. Devi Dayal Joshi, who heard the appeal originally, definitely found against the defendants with regard to their plea as to the sale of equity of redemption and the consequent extinction of the mortgage. He was of opinion that the plaintiff was entitled to redeem the mortgage, but subject to the payment of compensation for improvements to the defendants mortgagees and as the trial Court had given no finding as to the value of such improvements the learned Judge remanded the case to the trial Court for determining the same. The remand was made under O. 41, R. 23, Civil P. C., and an appeal was preferred to this Court, which was heard by me and, I held that the remand should have been under O. 41, R. 25, Civil P. C., and accepting the appeal to this extent I directed the District Judge to make the remand under O. 41, R. 25, Civil P. C. This having been done the trial Court reported to the District Judge that the value of improvements made by the mortgagees was Rs. 5,000. Another issue also was remanded, but it is not necessary to discuss it for the purpose of this case.

When the appeal came up for hearing finally before the District Judge after the report of the trial Court had been received. Mr. Soofi heard it as an Additional District Judge. Mr. Joshi had in the meantime died. Mr. Soofi was of opinion that he was legally competent to go behind the conclusions of his predecessor in office, Mr. Devi Dayal Joshi, and consequently he reheard the appeal even on matters which had been decided by Mr. Joshi at the time of the order of remand and came to contrary conclusions thus agreeing with the trial Court. In other words, he held that the mortgage did not exist and that the mortgaged property had subsequently been sold by the mortgagor to the mortgagees, whereas, as already stated, Mr. Joshi had held that the mortgage still subsisted and that the property had not been sold to the mortgagees as alleged by them. He therefore dismissed the suit. The plaintiff has presented this second appeal, and the only ground before me is that Mr. Soofi was not competent to set aside the well-considered decisions of his predecessor in office and learned counsel on both sides have addressed me on this matter at length.

Mr. Mehr Chand Mahajan for the appellant has relied upon *Balvant Ram Chandra* v. *Secy. of State* (1), *Lingo Raoji* v. *Secy. of State*, *A. I. R.* 1928 *Bom.* 201 and *Hira Lal Pal* v. *Etbar Mandal* (2), a judgment of the Calcutta High Court which appears to me practically on all fours with the present case; while Mr. Badri Das for the respondents has cited *Hiatunnessa Bibi* v. *Kailash Chandra* (3), *Hanuman Das* v. *Gursahay Singh* (4), *Bara Estate Ltd.* v. *Anup Chandra* (5), *Mubarak Husain* v. *Bihari* (6), *Ganendra Nath* v. *Surja Kanta* (7) and *Masih-un-nissa Bibi* v. *Kaniz Sughra Bibi* (8), with the exception of *Bara Estate Ltd.* v. *Anup Chandra* (5), which is a Patna case, the other ruling from the Indian Cases cited on behalf of the respondents are of the Calcutta High Court; but *Hira Lal Pal* v. *Etbar Mandal* (2), relied upon by the appellant, is a later decision of the Calcutta High Court. In *Gopi Nath Shukul* v. *Sat Narain Shukul* (9) the Allahabad High Court held that a successor of a Judge could reconsider the decision of his predecessor on a question of law.

So far as this province is concerned, it was held in *Shahab-ud-din* v. *Fazal Din* (10) that a Judge is competent to reconsider and differ from the conclusions of his predecessor in office, but that ordinarily he should not do so. The question involved is not free from difficulty as will appear from the diversity of opinion which prevails in the several High Courts. In the present case however I am of opinion that Mr. Soofi was not competent legally to reverse the conclusions of his predecessor in office. Mr. Joshi heard the appeal and finally remanded the case after reversing the conclusions of the trial Court and the remand would not have been necessary if he had agreed with such conclusions. He therefore gave definite findings on the matters argued before him. He erroneously made a remand under O. 41, R. 23, Civil P. C., and if such remand had been valid in law, his conclusions would have been binding not only on his successor in office, but also on this Court on appeal. In my opinion, to a case like the present the anology of principles of res judicata applies. No doubt in some cases it is open to the same Judge or his successor to rectify the mistakes made by the former, but the mistakes must be of such a character that they could be rectified either on review or under S. 152, Civil P. C. In the present case the mistakes were not, if they were mistakes at all, of that nature. On the other hand, Mr. Joshi had heard the parties at length and had given well-considered and final decisions on the points involved and it was in consequence of this that a remand was considered to be necessary by him. I hold therefore that the conclusions of Mr. Joshi were binding on Mr. Soofi and are binding on this Court also on this second appeal, with the result that the mortgage must be held to subsist and to be capable of redemption. Counsel agree before me that in this view of the case the plaintiff's suit must be decreed on payment of Rs. 99, the principal mortgage amount, and Rupees 5,000, compensation for improvements found to have been made by the mortgagees. The usual preliminary decree for redemption shall be prepared. Three months' time to be fixed for the payment of the decretal amount by the plaintiff. Costs of this litigation shall be borne by the defendants-respondents

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1. (1908) 32 Bom 432=10 Bom L R 531.
2. (1916) 32 I C 866.
3. (1912) 17 I C 224.
4. (1913) 21 I C 700.
5. (1917) 41 I C 337.
6. (1894) 16 All 306=(1894) A W N 97.
7. (1912) 15 I C 39.
8. A I R 1921 All 276=60 I C 975=43 All 377.
9. A I R 1923 All 384=74 I C 1014.
10. (1902) 52 P R 1902=89 P L R 1902.

before me, and the plaintiff will be entitled to deduct such costs out of the amount to be deposited by him.

Mr. Mehr Chand Mahajan further contended that on the merits also the conclusions of Mr. Soofi were erroneous, but in view of my decisions on the main point urged before me it is necessary to decide this question. I consequently accept this appeal and setting aside the decree of the District Judge grant the plaintiff a decree in the terms mentioned above.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 425

TEK CHAND AND COLDSTREAM, JJ.

Secy. of State—Defendant—Appellant.

v.

Megh Raj—Plaintiff—Respondent.

Second Appeal No. 1373 of 1931, Decided on 7th March 1933, from decree of Dist. Judge, Montgomery, D/- 2nd July 1931.

Railways Act (1890), S. 77—Risk-note B — Exception — Railway officials delivering goods in contravention of express and definite instruction of sender—Case falls within exception and railway is liable for damages.

Where the railway officials delivered the goods in contravention of the express and definite instructions of sender, held that the case fell within the exception of the Risk Note B as the misdelivery was due to misconduct of the officials and that the railway was liable for damages.
[P 426 C 1]

C. H. Carden Noad and *Datta Ram*—for Appellant.

Achhru Ram and *Badri Das*—for Respondent.

Tek Chand, J.—This second appeal arises out of a suit instituted by the plaintiff-respondent against the Secretary of State for India in Council for recovery of Rs. 3,758, as damages for non-delivery of a consignment of 112 bags of saltpetre despatched by him from Okara (N. W. Ry.) to Howrah (E. I. Ry.), on 5th October 1927, under a railway receipt, covered by Risk Note B. The trial Court dismissed the suit, but on appeal the learned District Judge has granted the plaintiff a decree for Rs. 1,500, with proportionate costs in both Courts. On second appeal the defendant prays for a total dismissal of the suit.

The facts found are that the plaintiff despatched two consignments of saltpetre, the first containing 111 bags on the 4th October, and the second containing 112 bags on 5th October 1927. The consignor and the consignee of both the consignments was the plaintiff himself. He sent the railway receipts, unendorsed, to a firm of commission agents in Calcutta working under the name and style of Gopi Ram-Ram Chandra. On 18th October 1927, the plaintiff got a telegram sent, through the Railway Authorities at Okara, to the Goods Superintendent, Howrah, instructing him not to deliver the goods to Messrs. Gopi Ram-Ram Chandar. The Goods Superintendent, Howrah, duly acknowledged receipt of the telegram and wired back stating that the first cnosignment of 111 bags had been delivered to Gopi Ram-Ram Chandar, already, and that he had noted the plaintiff's instructions with regard to the second consignment, which had not reached Howrah till then. Two days later, on 20th October 1927, the plaintiff, through the Station Master, Okara, sent instructions by telegram to the Goods Superintendent, Howrah, that the second consignment be delivered to R. S. Jessa Ram-Hira Nand of Calcutta, and stating that an indemnity bond had been duly executed by the plaintiff in favour of the Secretary of State and handed over to the Railway Authorities at Okara. This bond has been produced at the trial, and its due execution has been admitted on behalf of the defendant.

It appears however that in contravention of these clear and definite instructions by the plaintiff, the Railway Authorities at Howrah, delivered the second consignment to Gopi Ram-Ram Chandar, on the 27th October; it is stated that on that day a member of the firm of Gopi Ram-Ram Chandar went to the Goods Office, Howrah, accompanied by a man called Kishori Lal, who represented himself to be an agent of the plaintiff, and declared that he had been authorized by the plaintiff to endorse the railway receipt in favour of Gopi Ram-Ram Chandar. He accordingly made the endorsement on the railway receipt and the consignment was delivered to Gopi Ram-Ram Chandar, who executed an indemnity bond in favour of the Secretary of State in Council, undertaking to reimburse him for any loss that he might suffer in consequence of delivery of the goods to the executants. Two days later, a hundi for Rs. 4,500, was drawn by Messrs. Gopi Ram-Ram Chandar of Calcutta on their own firm at Bombay and was sent to the plaintiff at Okara, who got it cashed at the local branch of the Punjab National Bank. In the trial Court the plaintiff contended that the amount of this hundi represented the price of the first consignment only; while it was pleaded on behalf of the Secretary of State that the hundi was for the price of the second consignment only, and that nothing more was due to the plaintiff on that account. The learned District Judge however has rejected both these contentions, and has found as a fact that the sum of Rs. 4,500, for which this hundi was drawn, covered the price of the first consignment and a part of the price of the second consignment.

The learned Government advocate has urged that on the finding recorded by the District Judge the Railway Administration is protected by the terms of the Risk Note B, which the plaintiff had admittedly executed at the time of consigning the goods. There has been considerable discussion before us as to the meaning of the word "loss" as used in the Risk Note. The contention of the learned Government advocate is that the word is used in a comprehensive sense meaning loss to the owner however caused, and that it includes cases of misdelivery by the railway. On the other hand, the learned counsel for the plaintiff-respondent has urged that the word "loss" is used in a restricted sense as meaning loss of the goods to the railway. Both counsel have cited rulings in support of their respective contentions and there is no doubt that there is a serious conflict of judicial opinion on the point in this Court as well as in the other Courts. It is however not necessary to decide the question for the purposes of this case, as even if the contention of the learned Government advocate were accepted as correct and it was assumed that there was "loss" of the consignment in the sense in which (according to his argument) the word is used in the Risk Note, the Railway Adiministration is still liable, as the "loss" was clearly caused by the misconduct of its employees. As stated already, the goods were delivered to Gopi Ram-Ram Chandar in contravention of the explicit and definite instructions of the plaintiff and there can be no doubt that the learned District Judge was right in holding that the case falls within the exception mentioned in the Risk Note, and as the goods have been misdelivered or "lost" by reason of the misconduct of the Railway Officials, the plaintiff has a good and valid cause of action against the defendant for recovery of damages.

The learned Government advocate has however contended that the plaintiff by accepting the hundi for Rupees 4,500, from Gopi Ram-Ram Chandar must be taken to have absolved the defendant from all liability in respect of any loss caused to him by misdelivery of the second consignment, as according to the findings of the learned District Judge this hundi included a part of the price of this consignment. There is however nothing on the record to indicate that at the time of the receipt of the hundi, the plaintiff was aware of this fact. The covering letter which is alleged to have been sent with the hundi is not forthcoming, and Gopi Ram-Ram Chandar, who are said to be a business firm of standing, have not produced the office copy of the letter or given other proof of its contents. Moreover the hundi included the price of the first consignment which the plaintiff was admittedly entitled to receive from Gopi Ram-Ram Chandar, and he could not possibly receive payment of the hundi piecemeal. In these circumstances I am of opinion, that the contention of the learned Government advocate is without force and the plaintiff cannot be said to have waived his claim for damages against the defendant in respect of the delivery of the consignment in dispute. (After discussing the amount of damages to be paid, the judgment proceeded). For the foregoing reasons, I would accept this appeal and in lieu of the decree of the District Judge, pass a decree in favour of the plaintiff against the Secretary of State for Rs. 817. The plaintiff will get proportionate costs on this amount in the trial Court and the District Court, but the parties shall bear their own costs in this Court. It appears that Messrs. Gopi Ram-Ram Chandar, have admitted that they hold Rs. 590, in deposit as the balance of the sale price of the goods in dispute. On our findings the plaintiff's claim for misdelivery has been fully satisfied by this judgment. It follows therefore that he has no further claim against Gopi Ram-Ram Chandar, who will pay this amount if so advised, to the Secretary of State.

Coldstream, J.—I agree.

K.S. *Decree amended.*

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* A. I. R. 1933 Lahore 426

HARRISON AND ADDISON, JJ.

Sat Bharai and *others*—**Appellants.**

v.

Jamiat Rai and *others*—**Respondents.**

Second Appeal No. 316 of 1927, Decided on 29th March 1932.

(a) Civil P. C. (1908), Sch. 2, Para. 16 (2)—Reference to arbitration — Question of invalidity—No appeal lies.

The question of the invalidity of a reference to arbitration from whatever cause, including the failure of a party to sign, cannot form the subject-matter of an appeal to the District Judge or the High Court: *A I R* 1927 *Lah* 362; *A I R* 1929 *Lah* 476; *A I R* 1931 *Lah* 126 and *A I R* 1932 *Lah* 239, *Foll.* [P 427 C 2]

* **(b) Civil P. C. (1908), Sch. 2, Para. 16 (2)—Provision of appeal bars revision.**

A limited appeal as defined in para. 16 is allowed from the decree following upon the award and the fact that such an appeal is allowed closes the door to a revision. It does not follow that because an appeal is not allowed on certain points the door is therefore reopened, but rather the reverse. The provision of any appeal at all bars a revision: *A I R* 1932 *Lah* 239, *Foll.* [P 427 C 2]

Nand Lal—for Appellants.

Mehr Chand Mahajan and *Hem Raj Mahajan*—for Respondents.

Judgment. — Two cross suits were brought by Des Raj against the firm Aya Ram-Devi Dyal and by Aya Ram-Devi Dyal through Mangal Sain against Des Raj. In both cases there was a reference to arbitration and in accordance with the award the suit of the firm Aya Ram-Devi Dyal was dismissed and a decree was passed in favour of Des Raj for Rs. 1,107-15-0. No objections were raised in the trial Court. The only appeals presented to the District Judge were by three individuals, Buta Ram, Paras Ram and Jiwan Mal, who alleged that they were members of the firm Aya Ram-Devi Dyal, that they had not been individually impleaded and that they were not aware of the reference to arbitration. They therefore prayed that the decrees passed on the award be set aside.

The appeals were dismissed by the learned District Judge on the finding that they were not competent. He relied on *Kanhia Lal* v. *Narain Singh* (1) and *A. I. R.* 1924 *Bom.* 324. The second appeals have been presented in this Court and, in the alternative, in his last ground, Dr. Nand Lal has asked that they be treated as petitions for revision. The point agitated is one, on which there is more than ample authority and especially of this Court, viz., *Guran Ditta* v. *Pakhar Ram* (2), *Bal Kishan* v. *Sahan Singh* (3), *Mt. Wiran Wali* v. *Hira Nand* (4) and finally *Ralla Ram-Walaiti Ram* v. *Bansi Lal Jagannath* (5), in which the learned Chief Justice has reviewed the position of the case law on the question. We hold that the decision of the District Judge is perfectly correct and that no appeal lay to him and that no appeal lies to us, the point being whether the question of the invalidity of a reference to arbitration from whatever cause, including the failure of a party to sign, can form the subject-matter of an appeal to the District Judge or the High Court. The decision is that it cannot.

The question of the alternative prayer for revision remains and this is decided in *Ralla Ram Walaiti Ram* v. *Bansi Lal Jagannath* (5), at p. 166. The whole law of references, awards and decrees following upon the awards is highly technical. A very limited right of appeal is conceded. Certain points can be agitated before the trial Court and the decision of such as fall within the ambit of Cl. 15 (1) (c) is final. A limited appeal as defined in para. 16, Sch. 2 is allowed from the decree following upon the award and the fact that such an appeal is allowed closes the door to a revision. It does not follow that because an appeal is not allowed on certain points the door is therefore reopened, but rather the reverse. The provision of any appeal at all bars a revision. The appeals and the applications for revision are dismissed with costs.

K.N./R.K. *Appeal dismissed.*

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1. (1916) 28 P R 1916=31 I C 700.
2. A I R 1927 Lah 362=104 I C 202=8 Lah 693.
3. A I R 1929 Lah 476=116 I C 559=10 Lah 871.
4. A I R 1931 Lah 126=131 I C 348=12 Lah 408.
5. A I R 1932 Lah 239=136 I C 11=13 Lah 528.

A. I. R. 1933 Lahore 427

SHADI LAL, C. J. AND BROADWAY, J.

Harnam Singh—Plaintiff—Appellant.

v.

Ganda Singh and *others*—Defendants—Respondents.

Letters Patent Appeal No. 101 of 1929, Decided on 24th February 1933, from decree of Dalip Singh, J., D/- 1st February 1929, reported in *A. I. R.* 1929 *Lah.* 545.

Civil P. C. (1908), O. 21, R. 35 (2)—Decree for symbolic possession — Non-compliance with requirements of O. 21, R. 35 (2) and possession not delivered as required by law—Suit for possession by successor-in-interest of decree-holder—Limitation does not run from date of execution.

Plaintiff's predecessor-in-interest obtained a decree for symbolic possession of certain immovable property, but the execution proceedings taken by him did not comply with requirements of O. 21, R. 35 (2) and hence symbolical possession was not delivered as required by law. Plaintiff filed a suit for possession of one-third of a joint field which was also included in the decree:

Held: that limitation did not run from date on which the decree was executed by his predecessor-in-interest. [P 428 C 1]

Chandar Gupta and *Fakir Chand*—for Appellant.

Shadi Lal, C. J.—The sole question for determination in this appeal is whether the plaintiff's suit for possession of one-third of a joint field No. 574 was brought within the period of limitation prescribed by law. It is common ground that the plaintiff's predecessor-in-interest obtained in December 1904, a decree for possession of certain immovable property including the land in dispute, but the execution proceedings taken by him for the recovery of the joint possession of the property in dispute did not comply with the requirements of O. 21, R. 35 (2), Civil P. C.

Our attention has been invited to the authorities which lays down the rule that symbolical possession given in a case in which the decree provided for the delivery of actual possession operated as actual possession against the judgment-debtor, but not against third persons who were not parties to the decree. There is considerable divergence of judicial opinion on this point, but it is unnecessary to dilate upon it, because in the present case the decree did not provide for actual possession, but only for symbolical possession. But, as pointed out above, symbolical possession was not delivered as required by law. It is therefore clear that the limitation did not run from the date on which the decree was executed by the plaintiff's predecessor-in-interest. I would accordingly hold that the suit was barred by limitation and dismiss the appeal.

Broadway, J.—I concur.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 428

COLDSTREAM AND JAI LAL, JJ.

Rup Chand—Plaintiff—Appellant.

v.

Sardar Khan and *others*—Defendants—Respondents.

First Appeal No. 384 of 1929, Decided on 19th January 1933, from decree of Senior Sub-Judge, Mianwali, D/- 24th November 1928.

Custom (Punjab)—Shamilat—Sale of—Fact that sale-deed does not expressly mention transfer of shamilat is not conclusive against vendee.

Shamilat rights are not a mere accessory to the land separately held and the onus lies on a purchaser of proprietary land to show that a sale to him included a share in the shamilat. But the mere fact that the sale-deed does not expressly mention the transfer of shamilat rights will not be conclusive against the vendee. The Court has to look also at the surrounding circumstances including the subsequent conduct of the parties. [P 431 C 2]

On 4th August 1885 the vendor conveyed by registered deed the property he had purchased to the vendee, specifying the fields sold by their numbers in the revenue records and detailing the boundaries of the area, the southern boundary being described as "shamilat land." The deed did not refer to any rights in the shamilat. But the vendor had severed all connexion with the village and took no further interest in the shamilat:

Held: it was clearly established on evidence that at the time of the sale the parties intended that all the rights of the vendor, whether in the shamilat or in the proprietary holding, should pass to the vendees: *A I R* 1925 *Lah* 99 and 38 *I C* 120, *Rel on*; 6 *I C* 1003 and 113 *P R* 1901, *Ref.* [P 431 C 2]

Badri Das, Nanak Chand and *Ude Bhan*—for Appellant.

J. N. Aggarwal, J. R. Jeremy for *M. L. Batra* and *S. R. Laul*—for Respondents.

Coldstream, J.—In 1851, Nur Muhammad of village Harnauli in Mianwali District sold a third share of the Samoranawala well and the lands attached thereto, of which he was the original proprietor, to Parsa Ram (Parsa), a resident of Rahdari, twenty miles from Harnauli. At that time the uncultivated waste round the village had not been included within the revenue estate. In 1856-1857 however the waste land in the vicitnity was demarcated, specific areas being allotted to different estates, Harnauli being given a large portion with the result that, to quote the gazetteer of the Banu District

"a strong feeling of proprietary rights in all the waste land included within the villages boundaries soon sprang up in each community."

At the first regular settlement of 1878 a liberal area of grazing land was attached to each village as its separate property and the remainder marked off as Government reserves. Thus it was not until this time that proprietary rights in the shamilat were recognized. On 4th August 1885, Parsa conveyed by registered deed the property he had purchased to Nota Ram for Rs.210, specifying the fields sold by their numbers in the revenue records and detailing the boundaries of the area, the southern boundary being described as "shamilat land." The deed did not refer to any rights in the shamilat. Nota Ram was a proprietor in the village when he acquired this land. Mutation of records was attempted in 1888, but not finally effected until 15th June 1894, the delay being apparently due to efforts to obtain a statement from Parsa who had left Harnauli after his sale and was dead.

Twenty-one years later, on 4th October 1906, Nota Ram and his brother Khota Ram sold the property acquired from Parsa Ram by registered deed to Mehnga Ram, the father of Rup Ram, the present appellant, expressly including in the property conveyed the shamilat rights attached to the parcel of land sold. Mutation in the revenue records was duly sanctioned on 13th March 1910, it being noted that a share in the shamilat had been conveyed with the land. In 1916, Nur Muhammad and others, nephews of Nur Muhammad, sued against Mehnga Ram, Nota Ram and the successors-in-interest of Parsa for a declaration to the effect that, as the sale by Nur Muhammad did not convey any rights in the shamilat, they, the plaintiffs, were the owners of these rights in the shamilat pertaining to the area sold. Nota Ram did not contest the suit. The successors of Parsa pleaded that they were the owners of the rights in suit by virtue of the sale. The suit was dismissed, the Senior Subordinate Judge holding that Nur Muhammad had no rights in the shamilat which he could have sold. In his judgment the Senior Subordinate Judge remarked that Mehnga Ram had no claim to these rights which could not have been acquired by virtue of the purchase from Nur Muhammad, and that Parsa's heirs were not entitled to any rights in the shamilat as these had not been reserved to himself by Parsa when he sold the land to Mehnga Ram. An appeal by Nur Muhammad and the other plaintiffs was dismissed by the District Judge and a further appeal by this Court on 27th January 1922 (Second Appeal No. 1462 of 1917), by Harrison and Raoof, JJ., who pointed out that what did not exist in 1851 could not have been sold by Nur Muhammad, remarking at the same time that when the grant of shamilat rights was made in 1878, the existing proprietors of cultivated land acquired thereby a proportionate share in the waste land gifted by Government. "These grantees included the vendee of one-third of Samorana well and his representatives." The Senior Subordinate Judge in giving judgment had stated his opinion that the proprietary body of Harnauli might very well ignore the rights of any of the parties to the shamilat land in suit. The learned Judges on appeal pointed out that this expression of opinion was unnecessary and did not affect the decision dismissing the suit against the defendants.

In 1920 the revenue authorities had, in view of the Senior Subordinate Judge's decision, made mutation in the records so as to record Mehnga Ram as merely a malik kabza, i. e., not a share-holder in the shamilat. Efforts made by Rup Chand (Mehnga Ram's son) to revise this mutation were unsuccessful and on 2nd November 1923, he instituted the suit from which this appeal arises for a declaration that he was entitled to the share of shamilat rights proportionate to the land purchased by his father, alleging that Nota Ram's purchase included these rights, which Nota Ram resold to Mehnga Ram. The suit was actively contested by the descendants of Parsa and their alienees (the members of the proprietary body impleaded as such admitting the claim) whose case was that no rights in the shamilat were transferred by Parsa to Nota Ram. The learned Senior Subordinate Judge struck a number of issues including one on a plea of limitation and another on the question whether Parsa had severed his connexion with the village after his sale. He decided that the suit was within limitation, but dismissed it holding that no rights in the shamilat were sold by Parsa, who, he believed, did not know that he had any such rights because he was living in another village and the rights had been recognized very recently. Against this judgment Rup Chand has preferred the present appeal which has been argued before us by Mr. Jagan Nath.

The question for decision is simply whether Parsa Ram's sale of 4th August 1885, did or did not convey to Nota Ram the shamilat rights attaching to the land specified in the deed. As already made clear, no rights in the waste could have been transferred by Nur Muhammad, for such rights were not in existence before 1878. If Parsa's sale included his rights in the shamilat, Rup Chand's suit must be decreed. There can be no doubt that when Parsa Ram sold to Nota Ram in 1885, he had, by virtue of his being a proprietor of village land and thus one of the proprietors of the waste, attached to Harnauli, became a cosharer in the shamilat, and could have transferred the proportionate share attaching to the property specified in his deed.

The learned Subordinate Judge based his decision against the plaintiff-appellant on the grounds: (1) that there was no evidence to prove that Parsa was even in physical possession of any of the shamilat area, or that Nota Ram had been in possession of any of it in consequence of his purchase of the Samoranawala well land; (2) that the price paid by Nota Ram was very small (Rs. 210), and out of all proportion to the area of shamilat appertaining to the land expressly sold; (3) that as Parsa did not realize he had any rights (which were a recent creation) in the shamilat it could not rightly be held that he had intended to sell them, such intention not being expressed in his deed, although the shamilat area is mentioned as one of the boundaries of the parcel sold; and (4) that in the pedigree tables of village proprietors of Harnauli forming part of the land revenue settlement record of 1908 there is a remark below Parsa's name to the effect that he had sold all his estate, except the shamilat land, to Nota Ram. He has relied strongly upon the judgment of the District Judge in another case, relating to the same village of Harnauli, *Muhammad Hayat* v. *Uttam Chand,* delivered on 23rd December 1916, in which the District Judge, remarking that no satisfactory or absolutely correct decision was possible in such cases, based his decision solely on the fact that the conveyance deed in that case did not purport to convey shamilat rights. An appeal was summarily dismissed by this Court (Second Appeal No. 743 of 1917, decided on 29th March 1917). For the appellant Mr. Badri Das contends that in the present case the circumstances, the conduct of the parties, and the entries in the revenue records clearly indicate that, as a matter of fact the shamilat rights were sold and did pass to Nota Ram with the land purchased from Parsa. Mr. Jagan Nath who opposes the appeal on behalf of the descendants of Parsa Ram and their alienees supports the decision of the lower Court on the grounds given by it and on the strength of remarks made in several judgments of the Punjab Chief Court in analogous cases.

To the pedigree table on which the learned Subordinate Judge has relied no importance can be attached. No doubt there is a presumption of correctness attaching to the remarks recorded in such documents, but in this case this part of the record has been shown to be incorrect, for it wrongly described one Jawaya Ram as joint vendor with Parsa Ram. Jawaya Ram was not a party to the sale and an order for the correction of this entry had been obtained from the revenue authorities 23 years previously by Parsa Ram, in order to clear his title before he sold the property to Nota Ram: (see Ex. P-105, at pp. 75 to 77 of the paper book). The entry was also inconsistent with the existing record which did not at that time show Parsa as a proprietor of proprietary rights in any village land, but described Nota Ram and his brother as full proprietors of there lands on the Samoranawala well and not merely as makli kabza. Nota Ram's successor Mehnga Ram was described as owner with a share in the shamilat in the Jamabandi of 1910-11 (mutation in his favour having been sanctioned, as stated above, on 13th March 1910). Nor, in this case, does the smallness of the price paid for the land raise any presumption, or indeed afford reliable evidence regarding the intention of the parties with respect to the disposal of rights in the appurtenant shamilat. As remarked by the Chief Court in *Shahamad* v. *Ibrahim* (1), land was not in those days (1862) regarded as a valuable property. The learned Judges "failed" in that case

> "to understand what possible object there could have been in separating the shamilat from the proprietary holding and reserving the former for the original owners."

The applicablity of these remarks to the present case is not affected by the distinction drawn by the learned Subordinate Judge between the facts of that case and the facts of this one. It is not shown that the shamilat rights conferred upon the proprietors in 1878 had any monetary value from the cultivated area. The waste was extensive and the proprietors in all probability used it in common for grazing without regard to their individual undivided shares. The fields sold were in 1878 all unirrigated, the well having fallen into disuse. A very small area (seven kanals) out of that expressly sold (217 kanals) was under cultivation in 1888 and the land revenue and cesses imposed at the settlement amounted to only 14 annas 11 pies.

It is true that Mehnga Ram was the first proprietor of the suit property, clearly proved to have been expressly described in the land revenue record as owner of rights in the connected shamilat. I do not think that this fact justifies the view that these rights had not been acquired by Nota Ram and reconveyed to him. I have already noted that the records do not mention

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1. (1915) 57 P R 1915=30 I C 100.

Parsa as owner of any shamilat. Nor was Nota Ram described as malik kabza, as he ought to have been had he not been a sharer in the shamilat attached to the holding. Nor was Mehnga Ram ever so described until 1920, by which time he was dead. On the other hand, the revenue records of the settlement of 1888 and the subsequent jamabandis go to show that Nota Ram (whose father was alive in 1888 and shown as in possession of shamilat land) was holding some shamilat in his own name, being recorded as a tenant of this separate portion in 1888 and as proprietor in 1892-93, after mutation in his favour in respect of the lands purchased from Parsa had been proposed. It is probable enough that this share of shamilat was that which passed to him (irrespective of his father's share as proprietor of other land in the village) by virtue of his acquisition of the Samoranawala fields.

That Parsa did not know that he had rights in the shamilat by virtue of being owner of the Samoranawala land is a pure surmise. On the other hand it is perfectly clear that he did not intend to reserve to himself any rights of any kind attaching to the property sold. The deed purported to convey all rights of entry and dispossession and stated that the vendor would have no further concern or connexion with the land sold. Two thatched cottages were sold with the land, and Parsa left the village where he had no other land, and took no further interest in the holding. His sons who apparently had notice of the mutation made no representation when their father's name was removed from the records (Ex. P-9). Nor did any person raise objection when Nota Ram's sale to Mehnga Ram was given effect in the records in 1910 when it was noted that a share of the shamilat went with land (Ex. P-10). When Mehnga Ram's rights in the shamilat were first questioned in 1916, it was not Parsa's successors, but the successors of Nur Muhammad, the first vendor, who went to law. Meanwhile there had been two settlements and revisions of records at which Parsa's heirs and successors had shown no interest in the rights now claimed for them.

As pointed out by a Division Bench of the chief Court in *Shahamad* v. *Ibrahim* (1), each case of this kind must depend on its own particular facts and circumstances and it is impossible to lay down a hard and fast rule which would be applicable to all cases. In that case, as here, the sale-deed did not mention shamilat rights, but, as here, the vendor had severed all connexion with the village and took no further interest in the shamilat. The learned Judges held it clearly established that at the time of the sale the parties intended that all the rights of the vendor, whether in the shamilat or in the proprietary holding, should pass to the vendees. The judgment in *Ahmad* v. *Ahmad* (2), on which respondent's counsel relies was cited in the Chief Court's judgment and not followed: see also *Gullu* v. *Khuda Bakhsh Khan* (3), a case in which there were many circumstances similar to those of the case before us. It is true that more recently, noticeably after the judgment in *Ram Das* v. *Amir Shah* (4) this Court, has, in several rulings, laid it down emphatically that shamilat rights are not a mere accessory to the land separately held and that the onus lies on a purchaser of proprietary land to show that a sale to him included a share in the shamilat: see *Gobind Ram* v. *Ali Muhammad* (5) and *Zaida* v. *Raja* (6).

But the mere fact that the sale-deed did not expressly mention the transfer of shamilat rights will not be conclusive against the vendee: *Gullu* v. *Khuda Bakhsh Khan* (3). We have to look also at the surrounding circumstances including the subsequent conduct of the parties. In the present case these all point in my opinion, very decidedly to the conclusion (of the correctness of which I am in no doubt) that Parsa sold to Nota Ram all rights connected with the lands mentioned in the deed, including the right to share in the shamilat. His successors took no interest in the shamilat—Parsa's name disappeared from the records: two settlements took place. The vendees and their successors were recorded as full proprietors of their land at Samoranawala well. Partition proceedings had been in progress from 1923, but no objection on behalf of Parsa's descendants was put foward in these proceedings until 1924. None of them had ever been in possession of any land in the village.

I may before ending this judgment note that reference was made by Mr. Jagan Nath to a statement made on 22nd November 1928, by Nota Ram, as a witness in a case in which Mehnga

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2. (1910) 6 I C 1008.
3. (1917) 38 I C 120.
4. (1901) 113 P R 1901=34 P L R 1902.
5. A I R 1925 Lah 99=79 I C 84.
6. A I R 1923 Lah 350=84 I C 113.

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Ram was plaintiff, to the effect that he had not bought the shamilat rights from Parsa. The statement was made after Nota Ram had parted with his rights, and it is not apparent how it can affect Mehnga Ram here. The value of his statement may be judged from the fact that he denied that he had sold shamilat rights to Mehnga Ram although his deed expressly transferred them. For the reasons given I would accept the appeal and setting aside the judgment of the lower Court grant plaintiff the decree sought with costs against the contesting defendants.

Jai Lal, J.—I agree.

V.S. *Appeal allowed.*

A. I. R. 1933 Lahore 432

SHADI LAL, C. J. AND BROADWAY, J.

Hira Nand—Decree-holder — Appellant.

v.

Shah Nawaz Khan and *others*—Judgment-debtors—Respondents.

Letters Patent Appeal No. 142 of 1928, Decided on 21st February 1933, from judgment of Johnstone, J., in Civil Appeal 2409 of 1927, D/- 23rd June 1928.

Civil P. C. (1908), O. 21, Rr. 15 and 16—Decree in favour of brothers—Decree allotted to one on partition—Execution application by such brother for his own benefit—Notice to other brothers is necessary.

A decree passed in favour of brothers was allotted to one of the brothers on partition. Execution application was filed by such brother for his own benefit and notice of application was sent only to the judgment-debtor:

Held: that the case came within O. 21, R. 16 and not under R. 15, that notice to the other brothers was necessary under law, that the failure to issue notice though affected the validity of the execution proceedings, did not warrant the dismissal of the application and that notice should be sent to the other brothers. [P 432 C 2]

Jagan Nath Aggarwal—for Appellant.

Mohsin Shah—for Respondents.

Shadi Lal, C. J.—This appeal arises out of proceedings in execution of a money decree obtained by the appellant Hira Nand and his two brothers in July 1914. It appears that several applications for execution were made after that year, but they proved infructuous. The last application, with which we are concerned was made on 12th June 1926, by Hir Nand without impleading his brothers, and the question for determination is whether he alone was entitled to apply for the execution of the decree. The Court of first instance granted the application, but the District Judge on appeal dismissed it. The judgment of the District Judge was affirmed by a Single Judge of this Court, with the result that Hira Nand has preferred an appeal under Cl. 10, Letters Patent. It appears that there was a partition among the three brothers in pursuance of which the decree in question was allotted to Hira Nand. On 4th December 1925, an award was made in respect of the partition of the joint property, and that document shows that the decree fell to the share of Hira Nand. The award was made a rule of Court, and a decree was passed in accordance therewith. The parties to the decree are therefore bound by the award.

The learned counsel for the appellant contends that the application made by his client on 12th June 1926, should be deemed to be one under O. 21, R. 15, Civil P. C., which allows any one or more of joint decree-holders to apply for the execution of the whole decree for the benefit of them all. A perusal of the application however leaves no doubt that Hira Nand applied for execution for his own benefit, and not for the benefit of himself and his two brothers. The case does not therefore come within the ambit of R. 15. The Courts below were therefore justified in holding that the application in question is governed by R. 16, which provides that, where the interest of any decree-holder in a joint decree has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections, if any, to the execution. Now, in the present case notice of the application was given to the judgment-debtor, but there is no evidence on the record to show that any such notice was given to the two decree-holders whose interests were assigned to the appellant in pursuance of the decree which followed upon the award.

The object of the notice is to enable the transferor to raise such objections as regards the transfer as may be available to him, and it is contended by the learned counsel for the appellant that his client's brothers, being bound by the award and the decree never intended, nor were competent, to raise any objection to the execution of the decree by the appellant alone. Be that as it may, it was necessary to comply with the requirements of the law. But the failure to give notice to the transferors may affect the validity of the proceedings in execution, but does not warrant the dismissal of the application.

It is to be observed that, if the judgment-debtor had taken this objection in the Court of first instance, the learned Subordinate Judge would have issued notice to the two decree-holders and determined the objections, if any, which might have been raised by them. The failure to raise the objection at the proper time has rendered the subsequent proceedings infructuous.

The learned District Judge was under a misapprehension when he stated that the award was made on 4th December 1926, after the date of the application in question; and this mistake was repeated in the judgment of the learned Judge of this Court. But as pointed out above, the award was made, not in 1926, but in 1925 more than six months prior to the date of the application for execution. The appellant was therefore justified in applying for the execution of the whole of the decree, and the only thing, which was necessary, was to give notice to the other decree-holders. This requirement of the law, though a mere formality in the present case, must however be complied with. I would accordingly accept the appeal and direct the Subordinate Judge to give notice to the transferors in accordance with the provisions of O. 21, R. 16, Civil P. C., and then proceed in accordance with law. The parties are directed to bear their own costs in all the Courts.

Broadway, J.—I concur.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 433 (1)

ADDISON, J.

Nanhun—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 125 of 1933, Decided on 21st March 1933, from order of Addl. Dist. Magistrate, Karnal, D/- 12th November 1932.

(a) Penal Code (1860), S. 457—Going on roof of house is not entering building.

Going on to the roof of a house is certainly not entering a building. The appellant reached the roof of a house and had started to go down the ladder towards the court-yard which was a building within the meaning of S. 457. He had not gone far when he retraced his footsteps and jumped down from the back of the roof:

Held: that he cannot be said to have entered into the building though he was guilty of attempt to commit offence of housebreaking. [P 433 C 2]

(b) Penal Code (1860), S. 75—Attempts.

Attempts do not come within the purview of S. 75, I. P. C. [P 433 C 2]

***Judgment*.—Nanhun, alias Fajar Ali, appellant, has been sentenced to seven** years' rigorous imprisonment to be followed by two years' police surveillance for the offence of house breaking by night punishable under S. 457, Penal Code, read with S. 75, Penal Code. On the night of 4th October 1932, Ibra Chowkidar of village Siwah in the Karnal District saw certain persons in the village. He kept a look out and ultimately saw one of them kneel down against the back wall of the house of Phulla while another climbed over him and went on to the roof of Phulla's house. Ibra awakened Sutra and certain others and they went to the back of Phulla's house where they found two or three persons standing. These persons fled on their approach, at the same time shouting out to their companion. Thereupon Nanhun, appellant, jumped down from the roof ,but was caught. Phulla has deposed that he saw him starting to get down the ladder from the roof into the court-yard, but he never reached the court-yard as he retraced his steps almost at once. This is the evidence on which he has been convicted.

It has been held that a court-yard consisting of a walled enclosure with four kothas opening into it and an outer door leading into a side street is a building. Going on to the roof of a house is certainly not entering a building. The appellant in the present case reached the roof of the house and, it is said, had started to go down the ladder towards the court-yard. He had not gone far when he retraced his footsteps and jumped down from the back of the roof. In my judgment it cannot be said that he entered into the building though he is certainly guilty of an attempt to commit the offence of house breaking. Attempts however do not come within the purview of S. 75, Penal Code. For the reasons given I accept this appeal, convict the appellant of an attempt to commit house breaking by night under S. 457/511, Penal Code, and reduce the sentence to one year's rigorous imprisonment.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 433 (2)

HARRISON, J.

Emperor

v.

Wali and *others*—Accused.

Criminal Revn. No. 979 of 1932, Decided on 22nd December 1932, from order of Dist. Magistrate, Muzaffargarh.

(a) Criminal P. C. (1898), S. 439—District Magistrate is not entitled to make reference regarding propriety of order passed by Sessions Judge.

Though it is one of the duties of the District Magistrate to report to Government whenever he thinks that action should be taken by Government regarding an order passed by the Sessions Judge, as a District Magistrate he has not the authority and cannot refer direct to the High Court the question of the propriety of an order passed by a Sessions Judge or a Court superior to himself: *A I R* 1924 *Lah* 437, *Foll.* [P 434 C 1]

(b) Criminal P. C. (1898), S. 439 (2)—Direction as to service is mandatory.

The direction as to service in S. 439 (2) is mandatory. [P 434 C 2]

Mohammad Amin Khan—for the Crown.

Order.—An order regarding the disposal of certain property, said to have been stolen in a burglary, was passed by Mr. Mohammad Yakub Magistrate. From this order what is called an application, but headed as an appeal was made to the Sessions Judge. This was dismissed, the order of the Sessions Judge upholding that passed by the Magistrate. From this a reference has been made by the District Magistrate. The admitting order on this reference is as follows:

"Notice should go to both parties and the question whether the reference is competent or not decided judicially after hearing them."

I have no hesitation in finding that the reference is not competent. The point has been very clearly decided in *Emperor* v. *Wasawi* (1), the heading of which is as follows:

—"*Held*: that the District Magistrate was not competent to make the present reference...... and the legislature never intended to give to a Magistrate the power to question the propriety of a judgment or sentence passed by a superior criminal authority such as a Sessions Judge."

This judgment followed the decisions of the High Courts of Calcutta, Bombay and Allahabad. The District Magistrate must realize that though in another capacity it is one of his duties to report to Government whenever he thinks that action should be taken by Government regarding an order passed by the Sessions Judge, as a District Magistrate he has not the authority and cannot refer direct to this Court the question of the propriety of an order passed by a criminal Court superior to himself, and there is all the difference of the world between his taking action on his own motion, as he has attempted to do in this case, and his moving Government and advising that action should be taken by the Government itself. On reading the orders however of the Magistrate and the Sessions Judge I take action myself under S. 439. This necessitates the serving of Wali, Qaim, Hassan, Mt. Wasai, Shahru and Yar Mohammad, under S. 439 (2). It is probable that it will achieve no result as they have been served on the present reference, but the direction in sub-S. (2), S. 439, is mandatory. The present reference is dismissed.

K.S. *Reference dismissed.*

A. I. R. 1933 Lahore 434

COLDSTREAM AND JAI LAL, JJ.

Bhagwana—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1403 of 1932, Decided on 16th February 1932.

Penal Code (1860), S. 300—Thrusting knife into abdomen of another—Fight not started by accused—Punishment.

A person who thrusts a knife into the abdomen of another must be presumed to have intended to inflict an injury which he knows to be likely to cause the death of that person. When the accused thrust a knife into the abdomen of the deceased in a party fight which was not started by the accused:

Held: that lesser punishment of transportation for life would be sufficient. [P 435 C 1, 2]

Shamair Chand—for Appellant.

Des Raj Sawhney—for the Crown.

Coldstream, J.—On 13th May 1932, there was an affray in the village of Mahram Nagar near Delhi in the course of which four men Sis Ram, Chhote, Khushali and Ghisa were stabbed. Sis Ram, Khushali and Ghisa died of their injuries. Four men were committed for trial at the Sessions, Bhagwana (Bhagwan Sahai) being charged under S. 302, Penal Code, with the murders of Sis Ram and Khushali, and Bhagwana's brother Rattan Singh with the abetment of the murders. Amin Chand and Nathwa were committed on the charge of murdering and abetting the murder of Ghisa. The complainants and the accused belonged to two rival village factions headed by Kure Lambardar and Dalip. On the morning of the 13th May, a case between Kure and Dalip was heard by the Naib Tahsildar of Delhi. Sis Ram had gone to this Court to give evidence for Kure and Bhagwana had been called as a witness for Dalip. Sis Ram and Bhagwana quarrelled in the Court compound and Bhagwana struck Sis Ram with a shoe and Sis Ram struck Bhagwana with his umbrella.

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1. A I R 1924 Lah 437=81 I C 544=25 Cr L J 928=5 Lah 11.

The prosecution case is that soon after sunset when Sis Ram was sitting in front of his house in Mehram Nagar smoking Bhagwana arrived there from Delhi with his bicycle. The quarrel was revived and the two men came to grips. Bhagwana then stabbed Sis Ram in the abdomen with a jack knife. Chhote ran out of his house to his brother's rescue and was stabbed on the arm and back, while Rattan Singh held him by the waist. Then Khushali, a barber, arrived on the scene. He was stabbed in the abdomen. Meanwhile Amin Chand had come to the place and stabbed Ghisa, one of Kure's adherents while Ghisa was held by Nathwa. Ultimately Bhagwana was disarmed and ran away. Agreeing with the four assessors the Sessions Judge disbelieved the evidence incriminating the accused other than Bhagwana and acquitted Amin Chand, Rattan Singh and Nathwa. He accepted the verdict of two assessors who found Bhagwana guilty and sentenced him to death.

Bhagwana has appealed through Mr. Shamair Chand who has taken us through the record and argued the appeal. His contention is that the evidence is untrustworthy and having been disbelieved against the other accused should not have been accepted against his client, and that if Bhagwana stabbed Sis Ram and Khushali, the record indicates that he did so in the exercise of the right of private defence. The defence evidence put forward by Bhagwana is in support of the story that he was set upon by Kure, Chhote and Sis Ram and that Kure struck him with a knife and snatched Rs. 300 from his pocket. He was then belaboured with lathis and became unconscious. I may mention that Rattan Singh made a report the same evening at the Delhi New Cantonment Thana, saying that at 6 p. m., he has seen Kure, Sis Ram, Chhote, Ghisa and others attacking his brother Bhagwana in the village. He himself had been attached, but had escaped and he feared that his brother might be killed. It is not disputed that the knife produced by the complainants was the weapon with which Sis Ram and Khushali were killed.

I agree with the learned Sessions Judge that the defence evidence is not convincing. It has been rightly rejected. The evidence proves beyond any doubt that it was Bhagwana who stabbed Sis Ram and Khushali. A person who thrusts a knife into the abdomen of another must be presumed to have intended to inflict an injury which he knows to be likely to cause the death of that person. The only question is whether the record justifies the plea tha Bhagwana acted in self-defence or whether the circumstances apparent bring his offence within any of the exceptions to S. 300, Penal Code. The medical evidence proves that Bhagwana was struck with some force on the side of his head. But, as pointed out by the Sessions Judge, this injury was inflicted, according to Bhagwana's own statement, after the knife had been used. I have no doubt that Bhagwana's injury was received after Sis Ram and Khushali had been stabbed.

While Bhagwana's story of a concerted attack and robbery must be rejected and it cannot be held satisfactorily proved that any of the exceptions to S. 300, Penal Code, are applicable, the evidence goes to show that Bhagwana did not, as stated by Sis Ram, suddenly stab Sis Ram without any preliminary quarrel, but rather that he injured Sis Ram and Khushali in the course of a hand-to-hand fight. Mt. Ram Devi, P. W. 3, Sis Ram's and Chhote's mother, declares that she saw the fight begin and her story is that when Bhagwana arrived on the spot with his bicycle Sis Ram caught hold of him and the two began to fight and Bhagwana stabbed Sis Ram. Then Chhote caught Bhagwana and was stabbed. After this a number of persons seem to have joined in. Bhagwana was no doubt in a great rage by this time and when Khushali approached him he too was stabbed.

Khushali's statement was that he heard a tumult and on going to the place found a fight going on between Bhagwana, Chhote and Sis Ram. He saw Bhagwana stab both opponents. Then he himself was stabbed. On consideration of the whole evidence I believe that Bhagwana stabbed the deceased in a party fight in which several men took part and which is not proved to have been started by him. Upholding the conviction, I would accept the appeal so far as to commute the sentence to one of transportation for life.

Jai Lal, J.—I agree.

K.S. *Sentence commuted.*

A. I. R. 1933 Lahore 435

TEK CHAND AND MONROE, JJ.

Emperor

v.

Sidhu Mal and *another*—Accused.

Criminal Appeal No. 744 of 1932, Decided on 8th March 1933.

Punjab Small Towns Act (1921), S. 4-A—Failure of person elected or nominated to take oath does not affect existence of committee.

Failure of a person who has been elected or nominated to the committee to take the oath of allegiance does not affect the existence of the committee. Such person is a member of the committee even though he has not been taking part actually in the meetings: *A I R* 1923 *Mad* 360; 39 *Cal* 304 and 39 *Mad* 700, *Ref.* [P 437 C 1]

C. H. Carden Noad—for the Crown.

M. C. Sud—for Accused.

Tek Chand, J.—This is an appeal preferred by the Local Government against the order of Munshi Mohammad Bakhsh, Magistrate, Third Class, Palampur, District Kangra, acquitting the respondents of an offence under S. 38, Punjab Small Towns Act. The case was started on a complaint filed by the Small Town Committee for alleged contravention of S. 35 (ll) and (m) of the Act by constructing a projection in front of their house without the permission of the Committee. The Magistrate after recording the evidence on the merits acquitted the respondents on the short ground that the Small Town Committee was "not in existence" on 20th June 1931, when the complaint was lodged on its behalf.

The relevant facts are few and simple and are not in dispute. In 1924 a Small Town Committee was established at Palampur under the provisions of the Punjab Small Towns Act. The Committee was to consist of five members, of whom four were to be elected by the inhabitants and one appointed by the Commissioner, Jullundur Division, the term of office of each member being three years. Early in 1931 elections were duly held and the Commissioner by Notification Nos. 3042-3, dated 24th April 1931, published in the Punjab Government Gazette, Part 1-B, on 8th May 1931, in pursuance of the provisions of sub-S. (3), S. 4, Punjab Small Towns Act, notified that the four persons named therein had been duly elected members of the Committee and that Rev. C. R. H. Wilkinson, had been appointed a member by him. It appears that Rev. Wilkinson was either not in India at the time of the Notification, or he left the country very soon after, without taking the oath of allegiance or entering upon his duties as a member of the Committee. As he did not return to Palampur for some time, the Commissioner by Notification No. 5681, dated 4th September 1931, published in the Punjab Government Gazette, dated 11th September 1931, Part 1-B, cancelled his appointment as a member with effect from the date of the publication of the notification and in his place appointed Lala Parduman Chand Sud. On these facts the trial Magistrate has held that the Committee was not in existence between the 8th May, and 11th September 1931, as excluding Rev. Wilkinson the number of its members was less than five, which is the minimum fixed under S. 4 (1) of the Act, and consequently no complaint on behalf of the Committee could be lodged in a Court of law.

After examining the judgment and hearing both counsel I have no doubt that the view taken by the Magistrate is erroneous. S. 3, Small Towns Act, lays down the procedure by which the Local Government is authorized to declare a particular area to be a "Small Town" for the purposes of the Act, and S. 4 (1) provides that there shall be established for each "Small Town" a Committee to be known as the Town Committee, consisting of such number of members, not less than five, as the Local Government may fix. Sub-S. (2) authorizes the Local Government to fix the proportion of elected members and sub-S. (3) directs that the appointment and election of members shall be notified by the Commissioner in the Punjab Government Gazette. On the publication of such notification the constitution of the Committee is complete and if any casual vacancy in the personnel of the Committee arises thereafter, it shall be filled according to the procedure described in S. 8. In S. 5 it is laid down that every Committee shall be a body corporate by the name of the Town Committee of the small town and shall have perpetual succession and a common seal, and may sue and be sued in its corporate name. The term of office of each member is fixed as three years by S. 6, which also provides that on the completion of the term the outgoing member shall, unless the Local Government otherwise directs, continue in office until the election of appointment of his successor is notified. From these provisions of the law it is clear that it is the statute and the notifications issued thereunder, which constitute the Committee and the fact that there are one or more vacancies in the number of members constituting it does not make it an invalidly constituted corporation: cf. ***Venkata Rama Aiyar* v. *Hamid Sultan*** (1). The Committee is not dissolved by the death resignation, removal or withdrawal of one or all the

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1. A I R 1923 Mad 360=70 I C 987.

members, but is a continued entity, the personnel only being reconstituted: *Raghunandan* v. *Bhibuti* (2) and *Sitha Rama Chetty* v. *Subramania Aiyar* (3).

The learned Magistrate appears to have been impressed by the provision of S. 4-A, which requires every person who is elected or nominated to be a member, to take the oath of allegiance before taking his seat, and lays down that if he omits or refuses to do so, his election or appointment, as the case may be, shall be invalid and his place on the Committee will be filled in the manner laid down in Cl. (11) of the section. But this does not and cannot effect the existence of the Committee. It only creates a vacancy just as would occur on the death, resignation or removal of a member, though the mode of filling the vacancy in this case would be somewhat different. It is conceded that if one of the five members suddenly died after he had taken the oath, the Committee would not cease to exist, nor would the surviving members be incapacitated from performing their duties or holding meetings of the Committee, provided three members who form a quorum are present. It seems to me that the position is exactly the same, if a person, who has been properly elected or appointed and whose election or appointment has been duly notified in the Gazette, omits or refuses to take the oath.

Mr. Mehr Chand Sud for the respondents, frankly admitted that Rev. Wilkinson, became a member of the Committee, on 8th May 1931, when the Notification of his appointment was published in the Gazette, and that at any time after that date he could take the oath and attend the meetings of the Committee until the 11th September when the aforesaid Notification was cancelled. It cannot be said therefore that between these two dates the Committee consisted of less than five members, though one of them might not have been actually available for taking part in its meetings. I have no doubt that the finding of the Magistrate, that the Committee was "not in existence" at the time when the complaint was filed is manifestly wrong. I would accordingly accept this appeal, set aside the order of acquittal and remit the case to him for disposal in accordance with law.

Monroe, J.—I agree.

K.S. *Appeal accepted.*

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2. (1912) 39 Cal 304=12 I C 147.
3. (1916) 39 Mad 700=32 I C 211.

A. I. R. 1933 Lahore 437

TEK CHAND, J.

Haribans Prasad Ayodhya Prasad—Appellants.

v.

The National Sugar Mills, Delhi and *another*—Respondents.

Misc. First Appeal No. 1059 of 1930, Decided on 29th March 1932, from order of Dist. Judge, Delhi, D/- 26th May 1930.

Companies Act (1913), S. 185—Court has summary power to pass interim order in respect of property to which prima facie company is entitled—Civil P. C. (1908), Ss. 151, and 94, O. 39 and O. 40.

Under S. 185, Companies Act, the Court has summary power to take steps to preserve pendente lite the property which prima facie appears to belong to the company. [P 439 C 1]

And apart from the Companies Act, the Court has ample power ex debito justitiae to pass interim orders for protection and preservation of the subject-matter in litigation under Ss. 94 and 151, O. 39 and O. 40, Civil P. C. [P 439 C 2]

Where the managing agents of a company admitted to be in possession of money belonging to the company, but claimed a lien over it;

Held: the Court had ample powers to ask them to deposit the amount in Court until the adjudication of their claim as lien-holders: 31 *Mad* 123, *Dist.* [P 439 C 1]

Kishan Dayal, *Shamair Chand* and *Ajit Prasad*—for Appellants.

Jagan Nath Aggarwal — for Respondents.

Judgment. — The National Sugar Mills Co. Ltd., was incorporated as a Joint Stock Company under the Companies Act, on 7th October 1920. The object of the Company was to construct Mills for the manufacture of sugar and do diverse other industrial and commercial business. Originally the Head Office of the Company was at Ghaziabad in the United Provinces, and the Managing Agents were Messrs. Chakara Varti and Company. Two or three years later, the appellants Messrs. Haribans Prasad and Ayodhia Prasad, who are brothers, took over the Managing Agency, and the Head Office of the Company was shifted to Delhi. The nominal capital of the Company was 50 lacs of rupees, of which 30 lacs is stated to have been issued. The amount actually paid up was however Rupees 1,10,000, odd. Till 1927 no progress appears to have been made in setting up a sugar mill; not even a site therefor had been acquired. Accordingly, on 19th April 1927, an application for the compulsory winding up of the Company was presented by a share-holder in the Court of the District Judge, Delhi, and on 25th May 1927, a provisional Liquidator was appointed. An appeal against this order was dismissed by the High Court on 1st October 1927. On 19th March 1929, the District Judge passed an order that the Company be officially wound up, and on 6th May 1929, he appointed Mr. P. R. Mehra, as Official Liquidator. Against these orders the Managing Agents preferred an appeal to this Court, which was dismissed on 23rd October 1929.

In the meantime the Official Liquidator had applied to the District Judge under S. 235, Companies Act, for proceedings being taken against the Managing Agents for alleged acts of misfeasance and breach of trust having been committed by them in respect of the sum of Rs. 47,667-7-9, which was the cash in their hands in May 1927 (when the provisional Liquidator was appointed), as shown in the books maintained by the Managing Agents themselves. He also applied under S. 195 for holding a private examination of the Managing Agents in respect of their dealings with the funds and assets of the Company which were in their possession.

The appellants admitted that in May 1927, the sum of Rs. 47,667-7-9, was the balance in their hands, but they pleaded that they had lawfully retained it, as they claimed a lien on it in respect of the sum of Rs. 2,03,000, which was due to them as remuneration at the rate of Rs. 3,000 per mensem from 1st April 1924, when they were appointed Managing Agents, up to 23rd October 1929, when their appeal against the order of the District Judge for the compulsory winding up of the Company was dismissed by the High Court. In addition to this, they claimed a further lien for Rs. 14,027-11-0, as expenditure incurred by them on behalf of the Company, but not entered in its books at the time, and Rs. 2,523-4-0 as litigation expenses for defending and opposing the application for the liquidation of the Company. In order to support their contentions, the appellants applied for inspection of the books of the Company which were in the possession of the Liquidator. This application came up for hearing before Mr. Niamat Khan, Officiating District Judge on 5th April 1930, and was granted by him. The learned Judge however passed an order on the same day, directing the appellants to produce in Court the sum of Rs. 47,667-7-9, aforesaid, another sum of Rs. 8-7-0 and certain furniture of the Company which were in their possession, "without any prejudice to their rights in the property and the cash." It was specifically ordered that their objections will be considered before the property and cash was made over to the Liquidator.

In accordance with this order the appellants produced the furniture in Court at the next hearing, but refused to hand over the cash, alleging that they claimed a lien over this sum for the amount of their remuneration and the expenses incurred by them on behalf of the Company, and that the Court had no jurisdiction to pass a summary order for the production of the money until it had adjudicated upon the merits of their claim. This objection was argued at great length before Mr. Middleton, who, treating the order of Mr. Niamat Khan as having been passed under S. 185, Companies Act, entered into an elaborate discussion of the claim of the appellants on the merits, and dismissed the appellants' objections, directing them to pay forthwith the sum of Rupees 47,675-14-9 into the Imperial Bank of India to the account of the Official Liquidator.

Against this order the Managing Agents have preferred an appeal to this Court and I have heard both counsel at length. The first contention raised by Mr. Kishen Dayal is that at this stage of the proceedings the learned Judge ought not to have gone into the claim of the appellants as lien-holders in such great detail, nor should he have expressed himself so strongly on the merits, thus dismissing their objection to all intents and purposes, before they had a chance of establishing their allegations. In my opinion, there is some justification for this complaint. It appears from the record that the appellants had filed a lengthy written statement in support of their objection, and this gave rise to several points, which had not yet been put in issue, nor had the parties been given time to produce evidence in support of their respective cases. The only question before the Court at this stage was whether Mr. Niamat Khan was justified in passing the interim order requiring the appellants to deposit the amount in question in the Court till the adjudication of their claim as lien-holders.

For this purpose, it seems to me, it was not necessary for the learned Judge to enter into an elaborate examination of the appellants' claim and pronounce himself so emphatically on the merits. Under S. 185, all that the Court has to see is: (1) whether the person against whom the order is sought to be made is a contributory, trustee, receiver, banker, agent, or officer of the company; (2) whether such person has in his hands any money, property or documents to which the company is prima facie entitled; and (3) whether in the circumstances it is just and convenient that he should be directed to deliver, transfer or surrender it.

In this case, there is no question that the appellants, being the Managing Agents, were officers of the Company, and the appellants' own statement was sufficient to make out a prima facie case as to the money in question being the property of the Company. It was not denied that in May 1927, when the provisional Liquidator was appointed to take charge of the assets of the Company, the books of the Company showed a cash balance of Rs. 47,667-7-9, in the hands of the appellants as Managing Agents. Nor is there any dispute about the small sum of Rs. 8-7-0 being the property of the Company. The appellants however seek to retain the amount on the allegation that they have got a lien on it for remuneration at the rate of Rs. 3,000 per mensem, though they admit that they never drew this remuneration during the time that the Company was in existence. They claim a further lien for certain expenses alleged to have been incurred by them on behalf of the Company, though it is conceded that this expenditure is not entered in the books of the Company. It may be, that the appellants will succeed eventually in establishing their claim, but there can be no manner of doubt that on their own admissions, and in view of the fact that the appellants live mostly in Calcutta and elsewhere, outside the jurisdiction of the Court, it was absolutely necessary to take steps for the interim preservation and protection of the amount involved. The learned Officiating District Judge, Mr. Niamat Khan, was therefore fully justified in ordering that the amount be kept in custodia legis till the decision of the dispute, when it will be made over to whichever party is found entitled to it.

It was argued that S. 185 does not apply to a case in which a lien is claimed on the property of the Company, even though the claimant is an officer of the Company. But the section does not lay down any such absolute bar. It gives the Court summary power to take steps to preserve pendente lite the property which prima facie appears to it to belong to the Company, and protect it from misappropriation or waste by persons who stand, or have stood, in a fiduciary position towards it. The Court has a discretion to take summary action in the matter, and, as observed by Lindley in his Treatise on the Law of Companies, Vol. 2, p. 940, the Court will exercise this discretion "wherever it can do so without injustice." In my opinion, no injustice is likely to be caused to any party if the order of Mr. Niamat Khan is made absolute. Mr. Kishen Dayal relied strongly on *Chidambaram Chettiar* v. *Tinnevelly Sarangapani Sugar Mills Co. Ltd.* (1), but the facts of that case were materially different from those of the case before me. There, the claimant was not an officer of the Company, but was a mortgagee in possession of a certain sugar factory, who had advanced moneys for its working expenses on condition that he was to be placed in possession of the factory until the money advanced by him with interest was paid off, and was also to receive a commission on the proceeds of the sugar sold. The status of the claimant in that case as a secured creditor had been admitted by the Company before it went into liquidation and possession had been actually delivered to him before he had advanced the money for working the factory. On these facts it was held, and rightly if I may say so with all respect that S. 185 was inapplicable. But, as stated above, the circumstances of the present case, as admitted by the appellants themselves, are very dissimilar and it cannot be said here that the summary powers of the Court were unjustly exercised by Mr. Niamat Khan.

It may also be pointed out that, apart from S. 185, Companies Act, the Court possesses ample powers ex debito justitiae to pass interim orders for protection and preservation of the subject-matter in dispute, pending the result of the litigation. See in this connexion Ss. 94, 151 and O. 39 and O. 40, Civil P. C., read with R. 95 of the rules framed by this Court under the Companies Act. Mr. Kishen Dayal, while admitting that the circumstances of the case are such that some steps should be taken to safeguard the money suggested that the ends of justice would be met by ordering the appellants to furnish security for payment of the amount in dispute, in the event of their claim as lien-holders being disallowed after investigation. But in view of the past conduct of the appellants I am not prepared to accede to this request.

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1. (1908) 31 Mad 123=18 M L J 251.

It appears, that on 13th June 1930, an ad interim order was passed by this Court granting a stay of the order of the lower Court, on condition of the appellants furnishing security for Rupees 47,000 odd. The appellants do not own any property in the Punjab or at Delhi and offered security of immovable property in the United Provinces, and it took several months for the property to be valued and the deed of hypothecation executed on the requisite court-fee and registered. Indeed it is alleged by Mr. Jagan Nath that this security bond is incomplete even now. Mr. Kishen Dayal disputes the correctness of the assertion and states that the bond was registered in November 1930. I do not however think it necessary to enquire into the matter at this stage. It will suffice to say that that security-bond, even if it was properly executed, will lapse today with the decision of this appeal, and it will take several months before another bond of this kind can be properly executed. The appellants have had the disputed money in their possession for nearly five years now, and they must put it in the custody of Court pending decision of the dispute.

For the foregoing reasons, I accept the appeal to this extent, that in lieu of the order of the District Judge, dated 26th May 1930, directing the appellants to pay the sum of Rs. 47,675-14-9, into the Imperial Bank of India, Delhi, to the account of the Official Liquidator, I order the appellants to deposit within one month from this date the aforesaid sum in the Imperial Bank of India, Delhi, to the credit of the District Judge, Delhi. The amount shall be kept in a fixed deposit in the name of the District Judge, and on the adjudication of the claim of the appellants as lien-holders it shall be paid to whichever party is found entitled to it. Having regard to all the circumstances I leave the parties to bear their own costs in this Court. Both counsel have been directed to cause their respective clients to appear before the District Judge, Delhi, on 4th April 1932, when the learned Judge will fix a date in the following week for framing the necessary issues. He shall then adjourn the hearing to a suitable date in the month of May 1932, when evidence for both parties shall be recorded from day to day.

K.S. *Order accordingly.*

A. I R. 1933 Lahore 440

TEK CHAND AND COLDSTREAM, JJ.

Sedh Mal—Defendant—Appellant.

v.

Murli Dhar-Salig Ram—Plaintiffs—Respondents.

First Appeal No. 868 of 1930, Decided on 15th March 1933, from decree of Senior Sub-Judge, Delhi, D/- 4th February 1930.

(a) Civil P. C. (1908), O. 37, R. 3—Suit on hundis—Defendant failing to show that hundis were without consideration—Leave to defend should not be granted.

Where in a suit on hundis, the defendant himself showed that the hundis were not without consideration:

Held: that he could not be granted leave to defend the suit. [P 441 C 1]

(b) Civil P. C. (1908), S. 34—Hundis not carrying interest—Future interest need not be allowed—Interest.

In a suit on hundis which do not carry interest it is a sound and judicial exercise of discretion not to allow future interest. [P 441 C 1]

Shamair Chand and *Krishan Swarup*—for Appellant.

Gauri Shankar and *Kirpa Ram Bajaj*—for Respondents.

Tek Chand, J.—The plaintiff brought a suit under O. 37, Civil P. C., to recover Rs. 7,600, on foot of four hundis which had been drawn by the defendant in favour of the plaintiff on 30th May 1929, and which were payable on different dates. The amount secured on the hundis did not carry any interest. The defendant applied under R. 3, O. 37, for leave to appear and defend the suit on the merits. The learned Subordinate Judge refused this prayer and has passed a decree for Rs. 7,600 in favour of the plaintiff against the defendant. From this decree the defendant has preferred a first appeal in this Court and the only ground urged is that in the circumstances of the case leave to defend should have been granted to him. The plaintiff has filed a cross-appeal urging that the lower Court should have allowed him future interest from the date of the suit till realization of the amount decreed.

The defendant admitted the execution of the hundis and in the application which he presented under R. 3 he stated that there were dealings of sale and purchase of grain between the parties and that on 30th May 1929, the plaintiff represented to him that on going into the accounts, Rs. 7,600 was due by him to the plaintiff and as he had not got sufficient cash at the time, he executed the hundis in question. He accordingly pleaded that the hundis were "fictitious" and that he had not received any cash consideration therefor. He also urged that the suit was incompetent as the defendant himself had brought a suit for rendition of accounts against the plaintiff which was pending at the time in the Court of another Subordinate Judge at Delhi. Along with this he filed a copy of the plaint in the suit for rendition of accounts which he had instituted against the plaintiff. It is admitted in para. 9 of that plaint, that it was agreed between the parties that the present defendant should draw up hundis for Rs. 7,600, in favour of the present plaintiff and that the amount should be credited to his account. The plaintiff in his replication stated that he had given credit to the defendant for Rs. 7,600, in the account.

It will thus appear that on the defendant's own showing the hundis were not without consideration and that his application did not fall within the purview of R. 3, O. 37. In my opinion, the lower Court was justified in refusing to grant the defendant leave to defend the suit. I have no doubt that the suit has been properly decreed and that the defendant's appeal is without force, and must be dismissed with costs. As stated already, the hundis in question did not carry interest. In these circumstances the learned Subordinate Judge appears to have exercised his discretion in a sound and judicial manner in not allowing future interest. The cross-appeal by the plaintiff also fails and must be dismissed with costs.

Coldstream, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 441

BHIDE, J.

Sher Mohammad—Judgment-debtor—Appellant.

v.

Bhagwan Das—Decree-holder — Respondent.

Misc. Second Appeal No. 1651 of 1932, Decided on 15th March 1933, from order of Addl. Dist. Judge, Lyallpur, D/- 9th August 1932.

Punjab Alienation of Land Act (13 of 1900), S. 16—Land belonging to member of agricultural tribe—Collector ordering execution of lease for satisfaction of decree acts only as ministerial officer—Civil P. C. (1908), S. 47.

In execution of a decree an application was made to attach certain land. The matter was referred to the Collector with a view to arrange for temporary lease as the land belonged to a member of an agricultural tribe. The Collector suggested that portion of the land be leased for two years. This was not accepted by the decree-holder at first and his application was consigned to the record room. But he applied under S. 151, Civil P. C., for restoration and the Court without issuing notice to judgment-debtor passed order that the land be leased for two years and the records were sent to the Collector for necessary action. The judgment-debtor filed objections by an application under S. 47, Civil P. C., but it was dismissed on the ground that the Court had become functus officio after the order passed on receipt of Collector's proposal:

Held: that the Collector was acting only as a ministerial officer, that as mutation was not affected by the Collector, the decree could not be said to have been satisfied and that it was open to the judgment-debtor to raise the objections: *A I R* 1928 *Lah* 475, *Rel on*; *A I R* 1931 *Lah* 141 and *A I R* 1929 *Lah* 121, *Dist.* [P 442 C 1]

Acchru Ram—for Appellant.

S. C. Manchanda—for Respondent.

Judgment.—In the course of execution proceedings relating to a decree dated 20th April 1915, an application was made on 19th October 1928 for the attachment of certain land. The matter was referred to the Collector with a view to arrange for a temporary lease, as the land, being the property of a member of an agricultural tribe, was not liable to be sold. The Collector reported on 21st February 1929, that some of the land belonging to the judgment-debtor might be leased for two years in satisfaction of the decree. The decree-holder however refused to agree to the proposal of the Collector with the result that the application for execution was consigned to the record room on 21st February 1929. A little later however on the same day, the decree-holder applied for the case being restored under S. 151, Civil P. C., on the ground that a fresh application for execution would have been barred under S. 48, Civil P. C. The Court acceded to this request and restored the application without issuing any notice to the judgment-debtor. It then proceeded to pass an order that the land be leased for two years in accordance with the proposal of the Collector and the decree be held to be satisfied. The record was accordingly sent to the Collector for necessary action being taken. But on 13th June 1930, the judgment-debtor put in an application objecting to the restoration of the case under S. 151, Civil P. C., as referred to above and followed the same by another application dated 24th June 1930, in which he urged that the land which the Collector had recommended for lease was different to the one which had been attached and that no proceedings should have been taken on the application of the decree-holder dated 19th October

1928, inasmuch as it was barred under the provisions of S. 48, Civil P. C. This application, which purported to be filed under S. 47, Civil P. C., was dismissed by the executing Court and the decision was upheld by the Additional District Judge on the ground that the Court had become functus officio after it had passed the order dated 21st February 1929, by which the proposal of the Collector was accepted and the record was sent to him for necessary action being taken.

In support of this decision the learned Additional District Judge has only relied on two authorities, namely *Kartar Singh* v. *Zorawar Singh* (1) and *Lajja Ram* v. *Munshi Ram* (2). Neither of these authorities appears to me to be in point. In the former case, an application had been made by the judgment-debtor for restitution of property alleged to have been delivered in excess of what had been sold and it was held that the application was not one relating to execution, discharge or satisfaction of the decree. In the present case no such question arises. In *Kartar Singh* v. *Zorawar Singh* (1) the land did not belong to a member of an agricultural tribe and was liable to be sold. The proposal of the Collector was made under S. 72, Civil P. C., and it was held that after the civil Court had decided to authorize the Collector to provide the satisfaction of the decree, the subsequent proceedings are to be taken by the Collector and the civil Court became functus officio thereafter. This case is clearly distinguishable as in the present instance the land of the judgment-debtor could not be sold in view of the provisions of S. 16, Punjab Alienation of Land Act. As pointed out in *A. I. R.* 1928 *Lah.* 475, in cases of the present type where land is not liable to be sold and a lease is ordered for the satisfaction of the decree, the Collector acts merely as a ministerial officer. In the present instance it is admitted that although the record had been sent to the Collector, no mutation had yet been sanctioned and possession had also not been delivered. It was only after the delivery of possession that it could have been said that the decree had been fully satisfied. It was therefore clearly open to the judgment-debtor when he filed the applications dated 13th June 1930, and 24th June 1930, to raise objections to the order passed by the Court on 21st February 1929. As pointed out already, no notice even had been issued to the judgment-debtor before the case was restored under S. 151, Civil P. C., and he had no opportunity of objecting to the restoration of the case.

I must accordingly accept this appeal and setting aside the orders of the Courts below remand the case to the executing Court for disposal of the objections raised by the judgment-debtor in his two applications referred to above. Costs will follow the final decision.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 442

TEK CHAND AND MONROE, JJ.

Mukand Lal—Plaintiff—Appellant.

v.

Malhotra Bank, Hafizabad—Defendant—Respondent.

Second Appeal No. 182 of 1932, Decided on 8th March 1933, from decree of Dist. Judge, Gujranwala, D/- 2nd November 1931.

Co-operative Societies Act (1912), S. 42 (6) —Civil Court has jurisdiction to decide whether certain person is member of Bank or not—Liquidator is given power only to determine contribution to be made by member.

Only a person who by becoming a member and adhering to known rules must be treated as having given up his right of access to the civil Court. The liquidator is given the power to determine the contribution to be made by a member; but he is not given power to determine whether a particular person is a member or not. And if anyone disputes his membership, the dispute can be decided by a civil Court: *A I R* 1918 *All* 419 and *A I R* 1920 *Bom* 62, *Dist*; *A I R* 1931 *Nag* 48, *Rel on.* [P 443 C 1, 2]

S. L. Puri—for Appellant.

Ghulam Mohyuddin—for Respondent.

Judgment. — The defendant-respondent was appointed liquidator of the Malhotra Bank of Hafizabad, a co-operative society and in the course of winding up, holding that the plaintiff was a member of the Bank, ordered him to pay the sum of Rs. 225. The plaintiff brought a suit in the Court of the Subordinate Judge of the Hafizabad Tahsil, for a declaration that the liquidator's order was null and void on the ground that the plaintiff was not a member of the Bank; the learned Subordinate Judge held that the plaintiff was not a member of the Bank and that the liquidator's order was ultra vires: the District Judge on appeal set aside the order of the lower Court and dismissed the suit, holding that the civil Courts had no jurisdiction to try the fact whether the plaintiff was a member of the Bank or not: this case

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1. A I R 1929 Lah 121=113 I C 778.
2. A I R 1931 Lah 141=131 I C 274.

now comes before us in second appeal at the instance of the plaintiff and the only issue to be decided is whether the finding of the learned District Judge is correct. This finding is based on S. 42 (6), Co-operative Societies Act, which provides that:

> "save in so far as is hereinafter expressly provided, no civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered Society under this Act."

The contention for the liquidator is that this very sweeping provision takes away the power of the civil Courts to decide the question whether the plaintiff was a member of society. Prima facie the proposition is an unreasonable one it is one thing to say that a person who by becoming a member of a society and adhering to known rules must be treated as having given up his right of access to the civil Courts, but a very different thing to say that everyone without any consent should be subject to the decision of the liquidator. The provisions of sub-S. (6) cannot be read in isolation from the substantive provisions of the earlier sub-sections which define the powers of a liquidator: ; he is given power to determine the contribution to be made by a member, but he is not given power to determine whether a particular person is a member and if anyone disputes his membership, the dispute must be decided by some tribunal before any question of contribution can arise. The learned District Judge has discussed the authorities and has quoted in support of his view: *Mathura Prasad* v. *Sheo Balak* (1) and *Ganpat Ram Rao* v. *Krishna Das Padmanabh* (2), and deeming these decisions to be in conflict with *A. I. R.* 1931 *Nag.* 48, admittedly a decision on the point before him, has refused to follow the latter in which *Ganpat Ram Rao* v. *Krishna Das Padmanabh* (2) was cited and distinguished. In *Mathura Prasad* v. *Sheo Balak* (1) there was no controversy about the membership of the plaintiffs "persons who were members of the society and had received advances": the question at issue was the nature of the plaintiffs' liability on the basis of their membership. In *Ganpat Ram Rao* v. *Krishna Das Padmanabh* (2) the fact of membership was not questioned and in referring to *Mathura Prasad* v. *Sheo Balak* (1), Macleod, C. J., said:

> "though the liquidator may be probably wrong in passing an order, still if the order was one within S. 42 of the Act, the civil Court has no option but to enforce it"

and he added:

> "of course, if the liquidator passes an order which does not come within S. 42 that is a different matter altogether."

It was not contended before us that power to determine the question of membership is given by S. 42 and, in my opinion, such a power is not given by the section either expressly or by implication: so that if *Ganpat Ram Rao* v. *Krishna Das Padmanabh* (2) is applied to the present case, it defeats, not supports the defendant's contention. Therefore while the two cases cited, dealing with disputes between members and the liquidator, cannot be treated as binding authorities in the present case, the learned Judge's dicta supports the plaintiff's case. In *A. I.R.* 1931 *Nag.* 48, the findings of the lower Courts were to the effect that the plaintiffs were not members: in second appeal, this finding of fact was adopted by Findlay J. C., and he held that no order for contribution could be made against the plaintiffs by the liquidator: in the course of his judgment, he said:

> "Here the liquidator has assumed jurisdiction over the plaintiffs, who were not and have never been members of his Society. Were I to put on the provision contained in S. 42 (6) the construction I have been asked to put by the appellant, an extraordinary state of affairs would arise. The liquidator could proceed against any body and everybody irrespective of the fact that he had never been a member of the Society and yet the civil Courts would have no jurisdiction to give relief."

Findlay J. C.'s discussion expressed the extravagance of the defendant's contention, and in my opinion, the issue of membership .when raised, can be decided by the civil Courts. In the present case the learned District Judge, having held that he had no jurisdiction did not consider the merits of the case. I would hold that he had jurisdiction and would accept the appeal and refer this case to him to be tried on the merits. The court-fee on this appeal will be refunded and other costs of this appeal ought to be costs in the suit.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 443

ADDISON AND AGHA HAIDAR, JJ.

Mt. Umran and *another*—Appellants.

v.

Khushi and *another*—Respondents.

First Appeal No. 2860 of 1927, Decided on 14th November 1932, from decree of Senior Sub-Judge, Gujrat, D/- 2nd August 1927.

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1. A I R 1918 All 419=42 I C 968=40 All 89.
2. A I R 1920 Bom 62=57 I C 423=44 Bom 582.

Custom (Punjab)— Ancestral Land—Land recorded in names of brothers jointly in equal shares—Presumption is that it is ancestral.

A village was abandoned but was refounded in the year 1808 A. D. Both in 1857 and in 1868 the four sons of *N* were recorded as holding jointly in equal shares:

Held: that the land must be held to have been acquired by *N* and not by his sons and that it was ancestral in the hand of *N*'s grandson.
[P 444 C 1, 2]

Mehr Chand—for Appellants.

Mukand Lal Puri and *Bishen Narain*—for Respondents.

Addison, J. — Muhammad Bakhsh died on 3rd February 1904, and was succeeded by his widow, Mt. Umran, defendant 1. She had made a gift of the land in suit to her daughter, Mt. Saro, defendant 2, by a registered deed dated 24th March 1927. The plaintiffs, who are the near collaterals of Muhammad Bakhsh, have sued for a declaration that as the land is ancestral it should be held that after the death of Mt. Umran their reversionary rights would not be affected by the gift. The defendants denied the ancestral nature of the property. They further pleaded that the mother gifted the property to her daughter according to an oral will of her husband Muhammad Bakhsh and that the daughter had been kept as a khanadamad in accordance with Muhammad Bakhsh's wishes and directions. The Court below has held that the property is ancestral, that there was no oral will of Muhammad Bakhsh and that there was no question of a khanadamad being appointed in the present case. The suit was therefore decreed and against this decision the defendants have preferred this appeal.

The only matter argued before us was that it had not been proved that the property was ancestral *qua* the plaintiffs. In my judgment there is ample evidence of this. In the pedigree table of 1868 there are certain remarks regarding the foundation of the village which are very important. These remarks show that the village was abandoned, but was refounded in the year 1808 A. D. Both in 1857 and in 1868 the four sons of Neka , namely, Jaida, Saida, Fazla and Gauhar are recorded as holding jointly in equal shares. Muhammad Bakhsh was the son of Jaida, and the present plaintiffs are the sons of Saida and Gauhar. Seeing that the fathers of Muhammad Bakhsh and the plaintiffs were alive in 1868 it must be held that it was their father Neka and not they who acquired, the land when the village was refounded in 1808. There is no escape from this conclusion and the result is that it was properly held that the land was ancestral, i. e., that Neka occupied it. I would therefore dismiss the appeal with costs.

Agha Haidar, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 444

BHIDE, J.

Sardar Ali Shah—Defendant—Appellant.

v.

Gehne Shah—Plaintiff — Respondent.

Second Appeal No. 1074 of 1932, Decided on 25th January 1933, from decree of Dist. Judge, Ludhiana, D/- 17th June 1932.

Mahomedan Law—Takia—Status of Sajjadanashin is higher than that of muttawali.

The status of a Sajjadanashin is higher than that of a Muttawali. He is the head of the institution and as such is not only the teacher of religious doctrines and rules of life, but also the manager of the institution and the administrator of its charities. The Muttawali, on the other hand, is merely in charge of the secular affairs of the institution. He is a manager or a superintendent, but has no beneficial interest in the endowment and is not connected with the preaching of religious doctrines. The Sajjadanashin has all the powers of a Muttawali when there is no separate Muttawali, when a separate Muttawali is appointed, these powers will naturally be exercised by the Muttawali. The Sajjadanashin is however still the head of the institution by virtue of his office.
[P 446 C 1]

Nand Lal—for Appellant.

J. N. Aggarwal and *J. G. Sethi*—for Respondent.

Judgment.—There is a Mahomedan shrine known as Takia Shah Shohda in Ludhiana Town to which considerable property is attached. The Sajjadanashin and the Muttawali of this shrine are elected by the "Bhek." The last incumbent, who combined in himself both these offices was Jhandu Shah. He is said to have mismanaged the property and a suit was about to be instituted for his removal, but in the meantime he died. After his death, Sardar Ali Shah was appointed Sajjadanashin while Gahne Shah was appointed Muttawali of the shrine. There has been a good deal of litigation with respect to these appointments, but Sardar Ali Shah and Gahne Shah have been eventually declared as the Sajjadanashin and the Muttawali respectively. Their rights inter se have however not yet been determined and this was made clear in the order of Addison, J., in Civil Revision No. 235 of 1931. At the time of appointment of Sardar Ali Shah and

Gahne Shah as Sajjadanashin and Muttawali respectively, an agreement was drawn up as regerds their powers; but differences arose as to the interpretation of this document and suits were instituted by both against each other, praying for an injunction restraining the opposite party from interference with what they claimed to be their exclusive rights. These suits were decreed in part by the trial Court. Both parties appealed to the District Judge, who accepted the appeals of Gahne Shah and granted him the relief prayed for by him, while he dismissed the appellant's suit. From this decision the present appeals (Nos. 1074 and 1075 of 1932) have been preferred by Sardar Ali Shah, the Sajjadanashin. The sole point for determination in these appeals is the rights inter se of the appellant and the respondent as the Sajjadanashin and the Muttawali respectively of Khankah Shah Shohda. These rights must be determined in this case mainly on the basis of the agreement between the parties referred to above which has to be interpreted in the light of Mahomedan law on the subject. The relevant portion of the agreement runs as follows:

> "I, Sain Sardar Ali Shah, chela of Sain Jhandu Shah, have been appointed Gaddi Nashin and I, Sain Gahni Shah, chela of Sain Jhandu Shah, have been appointed cashier, i. e., Muttwali (custodian) of the Khankah. We agree that we will keep the property, attached to the Khankah as wakf as of old and run a langar for fakirs and the poor. We will manage the entire property of the gaddi in the best way for the original objects of the wakf. We will propagate the teachings and doctrines of the Madaria sect like our predecessors. For all these purposes and the entire management we shall remain under the supervision of Sain Sardar Ali Shah. If in some matter difference of opinion arises between us, the successors, the matter shall be referred to Pir Mohammad, resident of Hassowal, and Sain Chandi Shah of Ludhiana. If they do not like to give their opinion, the matter shall be referred to the leaders of the Bhek (fraternity) and the panchayat. The Gaddinashin shall not be competent to remove the Muttawali on account of the latter's misconduct and disobedience without the consent of the Bhek and the panchayat of the proprietors of the villages concerned. Hence, we have executed this agreement in favour of the Bhek, so that it may serve as an authority. Today the Bhek and leading persons have tied turbans on our heads, on the aforesaid terms. We shall in every way abide by these terms. Hence, we have executed this agreement so that it may serve as an authority."

It would appear from the above that although both the Sajjadanashin and the Muttawali were made responsible in a general way for the carrying out of the object of the trust and for its proper management Sardar Ali Shah alone was vested with "power of supervision" (nigrani). The appellant's contention is that "nigrani" (supervision) necessarily implied control and that the respondent is no more than a mere subordinate, who is bound to manage the properties attached to the Khankah according to the orders or instructions of the appellant. The respondent, on the other hand, contends that he stands on an equal footing with the appellant and is in any case not subject to the control of the appellant as regards the secular management of properties of the Khankah which vests solely in him as the Muttawali. The decision of this issue rests mainly on the interpretation of the clause relating to "supervision," which occurs in the agreement referred to above. The clause runs as follows:

> "*Aur in jumla aghraz aur intizam wa sarinjam ke liye Sain Sardar Ali Shah ke zer nigrani rehenge.*"

This has been translated above as follows: "And for all these purposes and for the whole management we shall remain under the supervision of Sardar Ali Shah." The wording is not happy, but the meaning seems to be clear enough. Sardar Ali Shah alone is given the power of supervision and it was obviously intended that Gahne Shah in the discharge of his duties as a Muttawali, should be subject to the "supervision" of appellant. The contention of the respondent that he stands on an equal footing with the appellant cannot therefore be accepted. The agreement however does not unfortunately define the precise scope of this power of supervision and the question is not free from difficulty. To decide this question we must ascertain what are the duties and the status of the Sajjadanashin and the Muttawali respectively. The agreement does not specify the duties of the Sajjadanashin and the Muttawali, and in the absence of such specification, we must look to the Mahomedan law for the purpose. The distinction between the status and duties of a Sajjadanashin and a Muttawali was considered by the Calcutta High Court in *Piran* v. *Abdul Karim* (1). The view taken therein was followed by that Court again in *Secy. of State* v. *Mohideen* (2) and was cited with approval by their Lordships of the Privy Council in *Vidya Varuthi* v. *Balusawami Aiyar* (3). A Division

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1. (1892) 19 Cal 203.
2. (1900) 27 Cal 674.
3. A I R 1922 P C 123=65 I C 161=48 I A 302=44 Mad 837 (P C).

Bench of this Court had also occasion to consider the distinction in a case to which the appellant and the respondent in this case were parties and which is reported as *Gahne Shah* v. *Maula Shah* (4). The gist of the leading authorities on the subject has been summarized as follows in the latter ruling: vide p. 635 of 125 *I. C.*:

> "Suffice it to say that the Sajjada is the head of the institution, the superior of the endowment the teacher of religious doctrines and rules of life and the manager of the institution and the administrator of its charities. He is not only a Muttawali but also a spiritual preceptor and curator of the shrine where his ancestor is buried. The Muttwali has charge of the secular affairs of the endowment, a mere manager or superintendent appointed to administer the affairs of the endowment and only a procurator having no beneficial interest."

It will be clear from the above that the status of a Sajjadanashin is higher than that of a Muttawali. He is the head of the institution and as such is not only the teacher of religious doctrines and rules of life, but also the manager of the institution and the administrator of its charities. The Muttawali, on the other hand, is merely in charge of the secular affairs of the institution. He is a manager or a superintendent, but has no beneficial interest in the endowment and is not connected with the preaching of religious doctrines. It will be thus observed that the Sajjadanashin has all the powers of a Muttawali, when there is no separate Muttawali. When a separate Muttawali is appointed, these powers will naturally be exercised by the Muttawali. The Sajjadanashin is however still the head of the institution by virtue of his office and the agreement between the parties referred to above, in so far as it gives powers of supervision to the Sajjadanashin, seems to be in keeping with the relative position of the Sajjadanashin and the Muttawali under Mahomedan law. The agreement however makes it clear that the Sajjadanashin will not have the power to remove the Muttawali from office for misconduct or disobedience and in case of a difference of opinion, the matter must be referred to the referees named in the agreement and eventually to the bhek and the panchayat of the proprietary body, if necessary. It seems to me therefore that subject to this qualification, the management of properties by the respondent, as a Muttawali, must be considered to be subject to the "supervision" of the Sajjadanashin. This supervision must necessarily involve a certain amount of control,—though of a limited character. For instance, for the exercise of this right of supervision, it may be necessary for the Sajjadanashin to inspect accounts, or acquaint himself with the details of the management and to see how it is working. He would therefore be, I think, within his rights, in requiring the respondent to submit accounts or to furnish necessary information; and to issue suitable directions, when necessary.

To hold that "nigrani" (supervision) does not imply even such control, would be to reduce the Sajjadanashin to the position of a mere spectator and such an interpretation would not, in my opinion, be in keeping either with the spirit of the agreement or the relative status of the Sajjadanashin and the Muttawali under Mahomedan law.

The learned counsel for the respondent urged that the appellant had himself admitted in Ex. P-1, an application filed by him in a previous case, that the respondent Gahne Shah was the sole manager of the institution. But it has been pointed out by the trial Court that this admission was made by the appellant owing to deception practised on him and was withdrawn subsequently. In the circumstances the admission cannot be attached any importance. Ex. P-16 to which reference was made by the learned counsel for the respondent, also does not appear to be of any significance, so far as the point now in dispute is concerned. The question which calls for decision in the present case must therefore be decided, as stated already, on the basis of the agreement between the parties and the Mahomedan law. (The judgment then considered certain matters which are not necessary to this report and concluded). I accept both the appeals in part and grant a decree in each of the suits brought by the appellant and the respondent as follows: That Gahne Shah as the Muttawali of the Khankha is entitled to manage all the properties (including offerings) attached to the Khankah. Sardar Ali Shah, the Sajjadanashin is not entitled to interfere directly with the details of the management; but he shall be entitled to exercise supervision over the management of the said properties and to do such acts as may be necessary for that purpose, e. g., to call for information, accounts, etc., and also to issue such directions thereupon as he may consider necessary to safeguard the interests of the Khankha. Gahne Shah shall be bound to carry out the directions so

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4. A I R 1930 Lah 728=125 I C 633.

issued unless he considers them improper, in which case he shall have the right to refer the matter for decision to the referees named in the agreement dated 27th October 1922, and in the last resort to the bhek, etc., as provided in that agreement. In the suit instituted by Gahne Shah he is also granted in addition an injunction against Sardar Ali Shah that the latter shall not interfere with the management except by way of supervision in the manner stated above. In view of all the circumstances I direct that both the parties shall bear their costs throughout in both the suits.

V.S. *Appeals partly allowed.*

A. I. R. 1933 Lahore 447

CURRIE, J.

Hazura Singh — Judgment-debtor — Appellant.

v.

Kishan Singh and *another* — Decree-holders—Respondents.

Misc. First Appeal No. 789 of 1932, Decided on 11th January 1933, from decision of Senior Sub-Judge, Ferozepore, D/- 5th April 1932.

(a) Practice—New ground cannot be taken at time of argument of appeal.

A ground which is not taken in the lower Court nor even in the grounds of appeal cannot be raised at time of argument. [P 447 C 2]

(b) Hindu Law—Debt—Son proved to have received assets from father—Onus is on son to prove the amount of assets received from father—Evidence Act (1872), S. 106 — Civil P. C. (1908), S. 52.

Where property in the hands of a son are sought to be proceeded for debts of the father, if it is proved that the son has received certain assets from the father, onus is on the son to give details information regarding the property received: 3 *Mad* 359; 12 *I C* 253; 35 *I C* 224 and *A I R* 1924 *Mad* 466, *Ref.* [P 447 C 2]

Jagan Nath Aggarwal, Asa Ram Aggarwal and *Kartar Singh*—for Appellant.

Mehr Chand Mahajan—for Respondents.

Judgment.—This judgment will dispose of Civil Appeals Nos. 789, 790 and 791 of 1932. Indar Singh, the father of the appellant, Hazura Singh, was a man of some substance in the Muktsar Tahsil, but apparently in financial difficulties. Three decrees had been obtained against the appellant, Hazura Singh, and Mt. Chand Kaur, his stepmother on account of debts due from Indar Singh. The decrees were to be realized from the property of Indar Singh in the hands of Hazura Singh and Mt. Chand Kaur. These decrees were held by Kishen Singh and others for Rs. 13,167 plus Rs. 1,304 costs, by Fateh Chand, Rs. 8,500 plus Rupees 784 costs and Harditta Mal-Mehr Chand Rs. 13,000 plus Rs. 1,321 costs. These decree-holders applied that Hazura Singh should be made personally liable under these decrees on the ground that considerable property belonging to Indar Singh had come to his hands and he had not applied it properly. The learned Senior Subordinate Judge came to the conclusion that Hazura Singh ought to account for Rs. 35,037-13-6, and only gave him credit for Rs. 1,800 paid to one Dhannu Singh on account of a debt. The appellant's counsel urges that the property in the hands of Mt. Chand Kaur who apparently has received, 250 ghumaons or one-fifth of the property of her deceased husband, was also liable and should be proceeded against. This ground however was never taken before the Senior Subordinate Judge and even now it does not appear in the grounds of appeal. Mt. Chand Kaur is not a party to these proceedings. I am not prepared to consider it now.

The next point raised is that Hazura Singh cannot be made personally liable as there is still property of Indar Singh which can be proceeded against. In this connexion it is urged that the decree-holders could realize their decrees by proceeding against certain self-acquired immovable property of Indar Singh situated at Muktsar. It appears that there were 100 ghumaons of land at Muktsar which were the self-acquired property of Indar Singh, but prior to his death he had already mortgaged 50 ghumaons. It is clear that this property is not liable to attachment and sale though Hazura Singh can be called to account for the income he receives from it. There is nothing to show that there is any other property against which the decree-holders could proceed. I would now consider the various items discussed by the learned Senior Subordinate Judge. It may be noted here that Hazura Singh's position throughout was that he had received no property belonging to his father. He however did not put himself in the witness-box though he was specially in a position to give evidence as to the facts which were peculiarly within his own knowledge, and as Mr. Mehr Chand Mahajan urges, the onus lay heavily on him to give detailed information regarding the property that he had received since it had been established that he had received certain assets from his father:

see *Magaluri Garudiah* v. *Narayana Rungiah* (1), *Ranchode Das* v. *Krishna Das* (2), *Rajah of Kalahasti* v. *Prayag Dossjee Varu* (3) and *Angavalathammal* v. *Janaki Ammal* (4). (After discussing the evidence, the judgment concluded). I therefore accept the appeal to the extent of modifying the order of the learned Senior Subordinate Judge by reducing the amount for which the judgment-debtor will be personally liable from Rs. 33,237-13-6 to Rs. 17,653-11-6. As the appeal has only been very partially successful I leave the parties to bear their own costs.

K.S. *Order modified.*

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1. (1881) 3 Mad 359.
2. (1911) 12 I C 253.
3. (1916) 35 I C 224.
4. A I R 1924 Mad 466=79 I C 894.

A. I. R. 1933 Lahore 448

TEK CHAND, J.

Prabhu Das Suri and *another*—Plaintiffs—Appellants.

v.

The Law Reporters, Ltd.—Defendants—Respondents.

Misc. First Appeal No. 1554 of 1932, Decided on 7th February 1933, from order of Addl. Dist. Judge, Lahore, D/-31st August 1932.

Civil P. C. (1908), O. 39, R. 1—No irreparable injury to plaintiff by non-issue of temporary injunction — Plaintiff's interest amply protected otherwise—Temporary injunction was rightly refused.

In a suit for injunction restraining the infringement of copyright and damages the plaintiff sought for issue of a temporary injunction restraining the defendants from selling their books, pending the disposal of the suit. The injury with which the plaintiffs were threatened was not irreparable, and the Judge had amply safeguarded their interests by directing the defendants to keep separate and regular accounts of the sale of their book which they were ordered to produce in Court, if and when called upon to do so:

Held: that the interests of justice did not require the issue of a temporary injunction. [P 449 C 2]

Shamair Chand and *Qabul Chand*—for Appellants.

Nawal Kishore and *Charanjiva Lal Aggarwal*—for Respondents.

Judgment.—This is a plaintiffs' appeal under O. 43, R. 1 (r), against the order of the Additional District Judge, Lahore, refusing an application for grant of a temporary injunction. The relevant facts are that the plaintiffs are the proprietors, printers and publishers of a monthly legal journal known as the "Lahore Law Times," which has been publishing inter alia judgments in revenue cases decided by the Financial Commissioners, Punjab, in 1921, and subsequent years. The annual subscription of the journal is Rs. 5. In August 1932 the defendants compiled, printed and published a book called "Current Punjab Case Law, Part C, Revenue Rulings (Consolidated) 1914-1931." The price originally fixed by the defendants for the book was Rs. 10 per copy, but it was reduced later on to Rs. 8. Shortly after the publication of the defendants' book, the plaintiffs brought a suit in the Court of the Additional District Judge, Lahore, alleging that the defendants had infringed their copyright by copying from the plaintiff's journal a large number of judgments of the Financial Commissioners for the year 1921-1931, and praying for issue of a perpetual injunction restraining the defendants from infringing the plaintiffs' copyright and directing them to render account of copies of the "Revenue Rulings" published by them, and pay to the plaintiffs the price of the copies sold and deliver the copies which are still in their possession. The suit has not proceeded beyond the preliminary stages; even the written statement has not been filed. Along with the plaint, the plaintiffs filed an application under O. 39, R. 2, S. 151, Civil P. C., for issue of a temporary injunction restraining the defendants, from selling any copies of their book till the decision of the suit. The learned Additional District Judge has dismissed this application being of opinion that

> "it was difficult for him at this stage to grant the temporary injunction without going further into the merits of the case."

He has however passed an order directing the defendants to keep regular accounts of the publication and sale of their book and to produce them in Court, if and when required, for inspection and audit, if necessary. The defendants have submitted to this order but the plaintiffs have preferred a miscellaneous appeal in this Court. In arguing the case Mr. Shamair Chand for the appellants and Mr. Nawal Kishore for the respondents have addressed me largely on the merits of the dispute between the parties. For obvious reasons, it is not desirable, even if it were possible, for me to express an opinion on the merits at this stage of the litigation, and I purposely refrain from discussing them here.

In order to determine whether the interest of Justice require that a temporary injunction in the terms prayed for should issue at this stage, it is necessary to bear in mind a few facts which are not in dispute. The first point worth noticing is that besides the rulings of the Financial Commissioners and the head notes, which the defendants are alleged to have copied from the plaintiffs' publication, the Lahore Law Times, contains a variety of other material, e. g., Circular Orders of the High Court, Notifications issued by the Punjab Government; Notifications issued by the Government of India; Statutes of the Imperial Parliament concerning British India; Acts of the Indian Legislature; Acts of the Punjab Local Legislative Council; Regulations; and Ordinances issued by the Governor-General. Admittedly none of this material has been incorporated in the defendants' book, which purports to be a consolidated reprint of revenue rulings only. Secondly, the Lahore Law Times has published revenue judgments of the Financial Commissioners only, and these for the years 1921 to 1931. The defendants' book, on the other hand, purports to contain the revenue rulings of the Financial Commissioners, as well as those of the Punjab Chief Court and the Lahore High Court, from 1914 to 1931. A further fact to be borne in mind is that the issues of the Lahore Law Times from which piracy is alleged to have been committed are of past years and the suit is not concerned with the issues of the journal for the current year. Therefore the defendants' publication will affect (if at all) the sale of the "back numbers" of the plaintiffs' journal. The record contains no indication as to the number of copies of the "back numbers" of the Lahore Law Times sold in the current year or recent years, nor have the plaintiffs led any other evidence, from which the extent of the loss which is likely to be caused to them, could be estimated.

Again, it is common ground between the parties that within a couple of months of the publication of the defendants' book, the plaintiffs themselves brought out a book called the "Lahore Law Times Revenue Rulings for 1914-1931" which is a reprint of the Financial Commissioners' Revenue Rulings for 1921 to 1931, and also contains their rulings from 1914 to 1920. The price of this book is Rs. 5 which is lower than that of the defendants' book. It is conceded that with this book in the market the actual damage to the plaintiffs, which was likely to be caused by the defendants' publication, will be substantially reduced. On these facts I have no doubt that the plaintiffs have failed to make out a case for issue of a temporary injunction restraining the defendants from selling their books, pending the disposal of the suit. The injury with which the plaintiffs say they are threatened is not irreparable, and the learned Additional District Judge has amply safeguarded their interests by directing the defendants to keep separate and regular accounts of the sale of their book which they shall produce in Court, if and when called upon to do so. In my opinion the order of the learned Judge is eminently just and reasonable and must be maintained. I accordingly dismiss this appeal, but having regard to all the circumstances leave the parties to bear their own costs in this Court.

Before concluding this judgment I wish to make it clear that nothing contained in this judgment shall be taken as an indication of the opinion of this Court on the merits of the dispute between the parties, which have yet to be determined by the trial Court on such evidence as the parties might produce before it. I wish also to remark that this decision shall not debar the plaintiffs from applying, and the trial Court for granting, a temporary injunction at a later stage of the litigation if in the light of fresh materials which may be brought on the record it thinks it necessary to do so in order to protect the rights of the parties. In my opinion the case is one which should be decided with as little delay as possible. I therefore direct counsel for both parties to cause their respective clients to appear before the Additional District Judge, Lahore, on 13th February 1933, when the learned Judge shall fix an early date for the filing of the written statement by the respondents and the framing of issues. The evidence in this case shall be recorded on a convenient date in March or April when the hearing shall proceed from day to day. The Assistant Registrar shall take steps to transmit the record to the Additional District Judge, Lahore, with as little delay as possible.

M.N. *Appeal dismissed.*

A. I. R. 1933 Lahore 449

TEK CHAND AND COLDSTREAM, JJ.

Qasim Ali—Appellant.

v.

Kalyan Das and *another* — Respondents.

Second Appeal No. 1628 of 1931, Decided on 16th March 1933.

Limitation Act (1908), Arts. 11 and 120—Attachment of property in execution of decree—Objection to attachment on basis of gift-deed in favour of objector—Order that attachment was not properly effected and that property should be released — Subsequent formal order accepting objection of claimant —Suit to declare gift as fictitious and fraudulent is not suit under O. 21, R. 63, Civil P. C. and is governed by Art. 120 and not by Art. 11, Lim. Act—Civil P. C. (1908), O. 21, R. 63.

An attachment of property effected in execution of a decree was held not to have been effected in accordance with law and the property was released. An objection to the attachment filed by a claimant on the basis of a gift deed in his favour was subsequent to the above order formally accepted. More than a year after this order a suit was filed to declare the gift-deed as fictitious and fraudulent:

Held: that the suit was not one under O. 21, R. 63, Civil P. C., and as such Art. 11, Lim. Act, did not apply.

Held further: that the provisions of Art. 11 do not apply unless there has been an attachment in the manner provided by the Code, that as there was no valid attachment, Art. 11 did not apply and that the suit was governed by Art. 120: *A I R* 1928 *P C* 139, *Rel on.* [P 450 C 2]

Mehr Chand—for Appellant.

Shamair Chand—for Respondents.

Tek Chand, J.—This appeal arises out of a suit instituted by plaintiff-respondent for a declaration that the gift of property in dispute, by defendant 1, Ladika alias Jafar Ali in favour of his minor son Qasam Ali, defendant 2, made by means of a registered deed dated 20th March 1925 had been effected with a view to defeat and delay the creditors of defendant 1, and was null and void and ineffectual against them. The suit was decreed by the Subordinate Judge and on appeal the learned District Judge has confirmed the decree. Qasam Ali, defendant 2, has preferred a second appeal in this Court and the only question argued on his behalf is that the suit was barred by time. The relevant facts are that the plaintiff, Kalian Das, obtained a decree against Ladika, defendant 1, for Rs. 7,419-11-0, on the basis of a mortgage. The decree provided that if the decretal amount could not be realized in full from the mortgaged property, the decree-holder shall be entitled to recover the balance from the other property of defendant 1. A sum of Rs. 3,684, only was realized by the sale of the mortgaged property and proceedings were started to have the other property of the judgment-debtor sold. On 25th April 1928, the executing Court ordered attachment of the property in suit and a warrant was issued. It appears however that the attachment was not effected in the manner prescribed by law, and on 11th October 1928, the executing Court held that no attachment had in fact taken place and ordered that the property be released. In the meantime, Qasam Ali the minor son of the judgment-debtor Ladika, had filed an objection urging that the property, for the attachment of which orders had been passed, did not belong to the judgment-debtor, but had been transferred by him to the objector by means of the deed of gift executed and registered on 20th March 1925. The executing Court passed an order formally accepting the objection on the two-fold ground that there had been no proper attachment and that the objector had become the owner under the gift-deed aforesaid.

It is contended on behalf of the appellant that the present suit, which was brought on 6th January 1930, was barred by time under Art. 11, Limitation Act, as it had been instituted more than one year from the date on which his objection was allowed by the executing Court. In my opinion this contention is without force and has been rightly rejected by the Courts below. In the first place, the suit does not purport to be, nor is it in fact, one under O. 21, R. 63, Civil P. C., and therefore the provisions of Art. 11 to not apply. Secondly, the executing Court had held that no valid statement of the property in dispute had been effected in accordance with law, and had ordered its release. For this reason also the case is not governed by Art. 11. It has been ruled by their Lordships of the Privy Council that the provisions of that article do not apply unless there has been an attachment in the manner prescribed by the Civil Procedure Code, even if an order for attachment has been made, and the claim or objection proceeded upon the belief that there had been an actual attachment: *Muthiah Chetty* v. *Palaniappa Chetty* (1). The suit is one for declaration by a creditor to have it declared that the transfer by defendant 1 in favour of defendant 2 was fictitious and was effected to defraud and delay the general body of the creditors of the so-called donor and is governed by Art. 120, under which it is well within time. The learned counsel for the appellant did not challenge before us the finding of the Courts below on the merits. I hold therefore that the plaintiff's suit has been rightly

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1. **A I R 1928 P C 139=109 I C 626=55 I A 256=51 Mad 349 (P C).**

decreed and that this appeal is without force and must be dismissed with costs.

Coldstream, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 451

TAPP, J.

Nathu Ram and *others*— Plaintiffs—Appellants.

v.

Mt. Dhan Devi—Defendant—Respondent.

Second Appeal No. 813 of 1932, Decided on 21st November 1932, from decree of Addl. Dist. Judge, Ferozepore, D/- 8th March 1932.

(a) Pardanashin Lady—Definition of—Woman who is not inexperienced and who appears in Courts and before Registration and Revenue Officers is not pardanashin lady.

A pardanashin lady is "a woman of rank living in seclusion, shut in the zenana, having no communication except from behind the parda with any male person save a few privileged relations and dependants;" but a lady who is not an inexperienced woman and who appears in Court and before Registration and Revenue Officers is not a pardanashin lady: *A I R* 1929 *Lah* 309, *Ref.* [P 451 C 2]

(b) Pardanashin Lady—Document executed by—Essentials for validity stated.

In the case of a document executed by a pardanashin woman and which is challenged, it must be shown that the executant was in a position to obtain disinterested and independent advice. [P 451 C 2]

(c) Civil P. C. (1908), S. 100—Finding that lady is not pardanashin is one of fact.

A finding that a lady is not a pardanashin lady is a finding of fact and cannot be challenged in second appeal. [P 452 C 1]

Fakir Chand and *Ram Lal Anand*—for Appellants.

Shamair Chand and *Mohammad Amin*—for Respondent.

Judgment. — This second appeal arises out of a suit brought by Nathu Ram, plaintiff-respondent, for a declaration that he was the owner of 20 kanals 8 marlas of land and a half-share in the compound of a well with other appurtenant rights by virtue of a gift made by Mt. Dhan Devi, defendant-appellant, in favour of his son, Milkhi Ram, out of natural love and affection. Milkhi Ram having died without issue on 20th February 1928, the property devolved by inheritance on his mother who transferred her rights in the property by a registered deed to the plaintiff, her husband. Mt. Dhan Devi inter alia denied having made any gift and pleaded that she was pardanashin and that if such a gift had been made it was under undue influence. The trial Court having held that there was no valid gift and that undue influence had been exercised dismissed the suit. On appeal the learned Additional District Judge set aside this dismissal and decreed the suit, leaving parties to bear their own costs.

The lower appellate Court in a well considered judgment has dealt with all the facts and it is unnecessary to recapitulate these. Suffice it to say that the oral and documentary evidence leaves no room for doubt as found by the learned Judge of the appellate Court, that Mt. Dhan Devi did make a gift of the property in suit in favour of Milkhi Ram some time prior to her application of 24th June 1925, for mutation of names. This was for some reason or another very considerably delayed by the revenue authorities and on coming up for attestation on 23rd February 1928, three days after the death of Milkhi Ram, Mt. Dhan Devi seized the opportunity of resiling from it. Mutation was finally refused on 27th May 1928, but this cannot in any way affect the act of Mt. Dhan Devi as declared in her application of 24th June 1925, and ratified by her in her statement of that date before the Tahsildar and again in the presence of the Revenue Officer on 9th December 1926, when the mutation came up for attestation, but was deferred for the attendance of certain other persons.

The only other question arising for consideration is whether the gift was brought about by any undue influence. On this point and as to whether Mt. Dhan Devi can be regarded as a pardanashin the lower appellate Court has found in the negative. In its opinion the finding of the trial Court on the question of undue influence appeared to be based more on sentiment and conjectures than upon a proper consideration of the evidence. A perusal of the judgment of the trial Court enables me to endorse this opinion. It has been laid down that in the case of a document executed by a pardanashin woman and which is challenged, it must be shown that the executant was in a position to obtain disinterested and independent advice. In the present case the claim of Mt. Dhan Devi to be a pardanashin has not been established. On the contrary the learned Additional District Judge has found that she is not an inexperienced woman and has appeared in Courts and before Registration and Revenue Officers. Such a woman would hardly fall within the category of "a woman of rank living in seclusion, shut in the zenana, having no communication except from behind the parda with any male person save a few privileged relations and dependants": *Fayas-ud-din* v. *Kutab-ud-din* (1). It may also be observed that the conclusion of the lower appellate Court that Mt. Dhan Devi is not pardanashin is a finding of fact. In my judgment the view taken by the lower appellate Court is correct and should not be disturbed. The appeal is accordingly dismissed with costs.

K.S. *Appeal dismissed.*

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1. A I R 1929 Lah 309=116 I C 899=10 Lah 761.

A. I. R. 1933 Lahore 452

BROADWAY, J.

Udmi Ram—Defendant—Petitioner.

v.

Durga Das—Plaintiff—Opposite Party.

Civil Revn. Petn. No. 612 of 1932, Decided on 27th March 1933.

(a) Oaths Act (1873), S. 10 — Defendant agreeing to decree being passed if plaintiff takes oath in presence of six specified persons —Only five persons present—Defendant is entitled to object to administration of oath without sixth person.

Where defendant agrees to a decree being passed against him in case plaintiff takes oath in presence of six specified persons but only five of such persons are present, he is entitled to object to the administration of the oath in the absence of the sixth person. And the objection being perfectly valid one no inferences can be drawn against the defendant. [P 453 C 1]

(b) Provincial Small Cause Courts Act (9 of 1887), S. 25—Small Cause suit—Judge departing from usual procedure for conduct of such suit cannot fall back on provisions of such procedure to suit his convenience—Practice.

If a Judge of Small Cause Court chooses to depart from the procedure laid down for the conduct of cases in such a Court, he should not fall back on the provisions of that procedure in order to suit his own convenience.

In a small cause suit the Judge framed an issue and placed the onus on the plaintiff. When both plaintiff and defendant had closed the case and the judgment was to be delivered, the Judge changed the onus on to the defendant and asked him whether he had any objection to the same. The defendant replied that he had no objection but that he should be allowed to examine his remaining witnesses in case the onus was shifted. The Judge shifted the onus on to the defendant but without allowing him to examine his witnessess decreed the suit:

Held: that the defendant should be allowed to examine his witnesses. [P 453 C 1]

Shamair Chand—for Petitioner.

Gobind Ram Khanna — for Opposite Party.

Judgment.—This petition for revision has arisen out of a suit brought by one Durga Das, a pleader of Hissar, for the recovery of Rs. 20 from the defendant, Udmi Ram, on the allegation that this amount represented the balance of a fee which Udmi Ram had undertaken to pay him to conduct certain litigation. The plea set up by Udmi Ram was that he had paid the fee in full; that he had made certain further payments which the plaintiff refused to account for and that the suit was a counterblast on the part of the plaintiff on Udmi Ram threatening to make an application under the Legal Practitioners Act. The suit was of a small cause nature and was heard by the Small Cause Court Judge, Hissar. On the date fixed for hearing instead of proceeding to deal with the case as a small cause, the presiding officer thought fit to settle an issue the onus of which was obviously placed on the plaintiff to prove how much money was still outstanding and due to him. The defendant later on at the next hearing produced certain evidence and after some of his witnesses had been examined, a proposal was made that the plaintiff should take an oath in the presence of six other legal practitioners, who were named, and that if he on that oath said that the money was due, the defendant would pay the amount then and there. The Court then adjourned the case and appointed a member of the Bar as Commissioner for the administration of the oath. At the appointed time out of the six legal practitioners named, only five were present and the defendant objected to the absence of the sixth and said that the administration of the oath in the presence of five only would not be a compliance with the agreement arrived at. The oath was therefore not administered. At the following hearing an order was passed to the effect that there were no other witnesses for the defendant present and therefore his case should be closed. The plaintiff also closed his case and the Court was proceeding to judgment. The Court then came to the conclusion that the issue had been wrongly settled and therefore asked the defendant if he had any objection to the alteration of the issue so as to place the onus on him to prove that he had made the payment. The defendant replied that he had no objection, but that if the onus were shifted, he should be allowed to produce his remaining witnesses. The presiding officer of the Court refused to allow any further evidence and shifting the onus on to the defendant, proceeded to decree the suit.

It is against this decree that this petition has been lodged and in support of it Mr. Shamair Chand has pointed out that the case being a small cause, it could have been decided at the first hearing without framing any formal issue, but that inasmuch as the Court had departed from the ordinary procedure prescribed for the conduct of small cause cases, it was incumbent on him, in the circumstances of this case, to allow the production of the evidence after failure to administer the oath. He also commented on the view expressed by the learned Judge, Small Cause Court in relation to the objection taken by the defendant to the oath being administered in the presence of five out of the six persons named. I may say at once that this objection was a perfectly valid one and that the oath could not have been administered in the absence of the sixth gentleman without the consent of the defendant, so that as that would have been a breach of the conditions on which the oath was to be taken, no inferences against the defendant should therefore have been made. In my judgment the Court below acted wrongly in not allowing the defendant to produce the evidence he desired to produce when he was asked if he had any objection to the change of the onus in the case. If a Judge of Small Cause Court chooses to depart from the procedure laid down for the conduct of cases in such a Court, it is obvious that he should not fall back on the provisions of that procedure in order to suit his own convenience. I therefore accept this petition, set aside the decree and remand the case to the Judge, Small Cause Court at Hissar, in order that the defendant may be allowed to produce the evidence that was refused on 8th August 1932. The case will proceed as from that date. Costs will follow the event.

K.S. *Petition accepted.*

A. I. R. 1933 Lahore 453

BROADWAY, C. J. AND ABDUL QADIR, J.

Durga Datt-Jagan Nath—Defendants—Appellants.

v.

R. J. Wood & Co. Delhi—Plaintiffs—Respondents.

First Appeal No. 1722 of 1926, Decided on 19th December 1932, from final decree of Sub-Judge, First Class, Delhi, D/- 31st March 1926.

(a) Contract—C. I. F. contract—Payment to be made by purchaser against tender of documents—Documents not tendered and goods tendered refused by purchaser — Purchaser is not guilty of breach.

When payment is to be made against the tender of documents and not against the tender of goods and when none of the relevant documents is tendered at the time of the payment but only the goods are tendered, the purchaser commits no breach of the contract in not taking up the goods: *A I R* 1925 *Lah* 74 and *A I R* 1930 *Lah* 640, *Ref*; *Manbre Saccharine Co Ltd* v. *Corn Products Co Ltd*, (1919) *I K B* 198, *Rel on.* [P 454 C 1]

(b) Evidence Act (1872), S. 92 (4)—Oral agreement to vary terms of document.

When a contract is not required by law to be in writing and has not been registered, an oral agreement can be set up to vary the terms of the contract. [P 455 C 1]

(c) Contract—Seller allowed by agreement to substitute for shipping documents his own invoice and such agreement acted on by parties—Agreement is lawful.

Where by the agreement between the parties, it was agreed the vendors should convey the goods at a partcular place and the payment was to be made on the presentation of their own invoice in place of the shipping documents and the parties had been acting upon this agreement for a long time;

Held: that the agreement was a lawful one and that it was not a normal C. I. F. contract: *A I R* 1930 *Lah* 379, *Ref*. [P 455 C 1, 2]

Shamair Chand and *Kanshi Nath Aggarwal*—for Appellants.

Mehr Chand Mahajan and *Hem Raj Mahajan*—for Respondents.

Broadway, C. J. — Messrs. R. J. Wood & Co. of Delhi, are a firm of merchants of imported goods from London and had had dealings extending over a considerable period with Messrs. Durga Datt-Jagan Nath, cloth merchants of Delhi. The present appeal has arisen out of a suit brought by the plaintiff firm against Messrs. Durga Datt-Jagan Nath, for recovery of Rs. 19,000, with interest for failure to take delivery of goods ordered on two indents Nos. 164, dated 12th December 1919, and 212, dated 9th February 1920. The defendants contested their liability, but the trial Court, on 22nd June 1925, held that they had been guilty of a breach of contract and passed a preliminary decree adjourning the case for an examination of the accounts in order to arrive at the amount of compensation to which the plaintiff firm was entitled. This preliminary decree was appealed against by Messrs. Durga Datt-Jagan Nath, and was set aside by a Division Bench of this Court on 25th February 1926, the case being returned to the trial Court to be disposed of in accordance with law. The trial Court then proceeded to examine the accounts and passed a decree in favour of the plaintiff firm against the defendants for Rs. 15,730, with interest thereon at six per cent per annum from the date of suit till date of realization. Defendants were also directed to pay to the plaintiff firm the sum of Rs. 1,662-8-0 as costs. It is against this decree that the present appeal had been filed and, on behalf of the appellants, we have been addressed by Mr. Shamair Chand while Mr. Mehr Chand Mahajan, has supported the decree on behalf of the respondent firm.

The learned counsel have taken us through all the oral and documentary evidence on the record and it has been urged by Mr. Shamair Chand for the appellants that the contracts forming the basis of the suit being what are known as C. I. F. contracts, it was absolutely essential that the sellers, i. e., the respondent firm, should have tendered the draft referred to in Cl. (1) together with the relative shipping documents, which was admittedly not done and that therefore the tender of the goods themselves was not a legal and valid tender and that therefore the respondent firm was the party who broke the contract. He also contended that, having regard to the words used in para. 1 and 3 of the said indents, there had been no such breach of contract on the part of the appellants as gave the respondent firm the right to re-sell the goods, and, finally, he urged the resale took place after such inordinate delay as to disentitle the respondent firm from claiming any damages whatever. In support of his first contention the learned counsel for the appellants cited inter alia, *Hira Lal* v. *Gowardhan Das, A. I. R.* 1925 *Lah.* 74, *Gopal Chand Sham Lal* v. *Jacob Behrens & Sons, A. I. R.* 1930 *Lah.* 640 and *Manbre Saccharine Co. Ltd.* v. *Corn Products Co. Ltd.* (1) in which it has been laid down that, when payment was to be made against the tender of document and not against the tender of goods and when none of the relevant documents were tendered at the time of the payment, but only the goods were tendered, the purchaser committed no breach of the contract in not taking up the goods. This proposition was conceded by Mr. Mahajan for the plaintiff firm, who however urged that their contracts were not normal C. I. F. ones inasmuch as the parties had agreed that the respondent firm should release the goods at the Indian Port and bring them up to Delhi and that the goods themselves should be tendered in Delhi when payment was to be demanded.

It was urged that this agreement modifying the terms of the original contract was evidenced by the past dealings between the parties, dealings which had extended over many years, and was also evidenced by facts proved in connexion with the particular transactions in question. In this connexion it is necessary to point out that the goods ordered were "shirtings" known as D. 1, the monopoly of which was held by the respondent firm. By Indent No. 164 the appellants had agreed to purchase five bales of these shirtings of the August shipment and five bales of the same of September shipment. Under Indent No. 212, the appellants had agreed to purchase six bales of October shipment, five bales of November shipment and seven bales of December shipment. In the case of each of these shipments the respondent firm carried the goods to Delhi and then forwarded their own invoice to the appellants asking them to make payment and take delivery of the goods. In the case of the six bales of the October shipment the goods were paid for and delivery taken. In connexion with Indent No. 164 the first consignment, i. e., the August shipment, was actually shipped in June. The invoice was forwarded to the appellants in July 1920. The covering letter Ex. P-20 shows that they were to make payment to the National Bank of India within godown due date, the godown due date being 30 days sight. The appellants replied (Ex. P-33) acknowledging the receipt of the said invoice and pointing out that the bales had been shipped prior to the time contracted for and asked for an extension of the due date in terms of the contract. Time was accordingly extended by the respondent firm on 2nd August 1920. (Ex. P-27). The appellants wrote again to the respondent firm asking to be informed as to what the exact due date was (Ex. P-34) and were informed by Ex. P-28 that the due date was 30th September 1920. Admittedly the invoices relating to the remaining consignments were received by the appellants who however did not apparently take any further steps in the matter and it was urged on behalf of the respondent firm that all their correspondence in connexion with the first consignment of five bales and their subsequent acceptance of the invoices in connexion with the other consignments had recognized the existence of the agreement modifying the actual terms of the contract, and that they were therefore bound to make the payments and their failure to do so formed a breach of

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1. (1919) 1 K B 198=88 L J K B 402=35 T L R 94=24 Com Cas 89=120 L T 113.

contract on their part. That, under prov. 4, S. 92, Evidence Act, such an oral agreement as is set up in this case was not prohibited appears to be clear. The contracts in question were not required by law to be in writing and had not been registered and could therefore be legally varied by an oral agreement modifying their terms.

The existence of this agreement has been set up by Mr. Sheriff, the Delhi head of the respondent firm, who has sworn that, in all the dealings between the parties extending over many years, it had been agreed that the respondent firm should have the goods conveyed to Delhi and the payment should be demanded by the presentation of an invoice. There is no contradiction of this statement on behalf of the appellants, not one of the several partners having gone into the witness box and further when called upon to produce their old books, either through one of the partners or some responsible employee of their firm, all they did was to put into the witness box one Jhandu Mal, who claimed to work for them for a long time and to have dealt with their indent business, but at the same time showed a remarkable ignorance of the dealings between the parties and stated that he had been unable to procure those old books and was unable to identify the signatures on the various indents. It has been urged with some force by Mr. Mahajan for the respondent firm that the absence of these books, which have obviously been deliberately withheld, raises a presumption that had they been produced they would have supported his clients' case and would have shown beyond question that, although the contracts were duly entered on these indent forms, it had been agreed between the parties, and the agreement had been acted upon throughout, that delivery should be made of the goods in the manner in which the delivery was tendered in the case of these transactions. A reference to para. (1) of the indent shows clearly that the sellers could, in case of need, substitute for the draft and relevant shipping document their own invoice and this alternative was taken advantage of by the respondent firm in the case of these transactions. In accordance with this they alleged, and I think have proved the agreement referred to already. That such an agreement is lawful and that an invoice could be legally tendered is supported by the findings in *Ratan Lal Sultan Singh* v. *Tek Chand Chuni Lal, A. I. R.* 1930 *Lah.* 379.

In these circumstances, I consider that it has been shown in this case that the contracts in question were not normal C. I. F. contracts and that the procedure carried out by the respondents was in conformity with the settled practice of the parties and the tender of the goods was valid and lawful. Mr. Sheriff has sworn definitely to the variation of the terms of the indents in this respect and has sworn further that this was the practice. To these definite allegations there is no rebuttal of any kind and the absence from the witness box of all the partners in the appellants' firm, and their deliberate withholding of their account books, are strong indications that they realized that they were not in a position to deny or contradict the statement made by Mr. Sheriff. I agree therefore with the trial Court in holding that the appellants committed breaches of these contracts. I also agree that these breaches gave the respondent firm the right to sell the goods in accordance with the terms of the indent.

The offer to deliver the goods themselves was a valid tender under the contracts and the refusal to take delivery entitled the respondent firm to take action under the third clause of the indents. The trial Court has recognized that the re-sales were delayed. The delay however has been explained by Mr. Sheriff who has stated that the delay was due to the non-co-operation movement, which had seriously affected the price of piecegoods coming from England, and that had the sales been made earlier, the loss would have been much greater. Here again, none of the appellants have ventured to go into the witness box to refute the statement and I find myself in agreement with the learned Subordinate Judge in holding that the explanation offered is one worthy of acceptance. There is absolutely no rebuttal of their explanation, and the statements made were easy of refutation if they were not in consonance with facts. I would therefore hold that the re-sales were valid. The learned counsel for the appellants attempted to urge that the prices were higher, but he was obviously hampered by the absence of any material on the record on which to base his contention. Admittedly, the appellants had had considerable dealings in these "shirtings" and their books would have shown the rates prevalent. These books they have deliberately withheld and their reason for so doing must clearly be that no refutation of Mr. Sheriff's statement could be found in them. In my judgment the findings arrived at by the trial Court are correct and I would therefore dismiss the appeal with costs.

Abdul Qadir, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 456

TEK CHAND AND COLDSTREAM, JJ.

Bachan Singh — Defendant — Appellant.

v.

Dharam Arth Bank, Nabha and *another*—Plaintiffs—Respondents.

First Appeal No. 1589 of 1927, Decided on 21st March 1933, from decree of Senior Sub Judge, Ludhiana, D/- 30th April 1927.

(a) Evidence Act (1872), S. 92 (3)—Money advanced on execution of promissory note and on certain conditions previously agreed upon—Promisor can prove circumstances in repudiation of his liability—Negotiable Instruments Act (1881), S. 120.

Though S. 120, Negotiable Instruments Act, precludes the maker of promissory note from denying the validity of the note, where money is not advanced as a simple loan unconditionally upon the promissory note, but is advanced after the note had been executed and on certain conditions previously agreed upon, the promisor is entitled to prove circumstances in repudiation of his liability. [P 457 C 1, 2]

(b) Civil P. C. (1908), O. 29, R. 1— State Bank of Native State which is not corporation cannot sue in British Indian Court through its secretary or manager.

A State Bank in a Native State which is not a corporation as distinct from the State or Maharaja cannot sue in a British Indian Court through its secretary or manager. [P 457 C 2]

(c) Civil P. C. (1908), Ss. 84, 85 and 87—Person appointed to prosecute or institute suit in British Indian Court on behalf of State has locus standi to continue or file suit.

When the Ruler of the State has severed his connexion with the State, the Government can appoint a person to prosecute or institute suit in British Indian Courts and such person has locus standi to continue or file suits, and the fact that such an appointment is made after a plaint has been put into Court will not render it ineffective provided that it is put into Court within the period of limitation: 25 *All* 635, *Ref.* [P 458 C 1]

(d) Benami—Promissory note executed by benamidar for purchase of property for State —Ruler severing connexion with State—Administrator appointed to file or continue suits cannot recover money from benamidar.

For the purchase of property for the Ruler of a State, a promissory note was executed by the appellant to raise the amount for the purchase and the loan was advanced by the State Bank knowing the object for which it was advanced. The Ruler severed his connexion with the State and the administrator who was appointed to file or continue suit on behalf of the State filed a suit on the promissory note against the benamidar:

Held: that no suit would, lie on behalf of the State for the recovery of the debt acknowledged by the promissory note, the money having been applied to the purchase of the property for the State and that the State had no claim upon its benamidar for a return of money. [P 458 C 2]

J. N. Aggarwal, J. L. Kapur and *Jhanda Singh*—for Appellant.

Badri Das and *Shamair Chand*—for Respondents.

Coldstream, J. — On 8th October 1921, in accordance with an arrangement between the present appellant, Sardar Bachan Singh, a lawyer of Ludhiana, then employed as Chief Judge of the Nabha State, and the Maharaja of Nabha, Sardar Bachan Singh, executed a promissory note in favour of the Dharam Arth Bank of Nabha for Rs. 25,500. On the 20th October, an entry was made in the Bank's cash book recording the grant of a loan carryng no interest to Sardar Bachan Singh for the purchase of a bungalow called "Glenelg" in Mussoorie on conditions previously agreed upon in the case of "The Nut" and "Oak Lodge" (two houses in Mussoorie). It was noted that the money had been made over to Sardar Bachan Singh for tranmission to the vendor at Calcutta. On 2nd November 1921, the bungalow Glenelg was bought. The conveyance deed in favour of Sardar Bachan Singh was registered five days later. On 12th June 1922, the title-deeds were made over to the officer in charge of the State Banks. In July 1923 the Government of India announced that the Maharaja of Nabha had been permitted to sever his connexion with the State, the administration of which would be taken over forthwith by the Government of India. In September of the same year the services of Sardar Bachan Singh were dispensed with by the State authorities. For the administration of the State the Government of India appointed Mr. Wilson Johnstone. On 15th May 1925, a suit was instituted in Ludhiana by the Dharam Arth Bank (through the Controller of Banks, Nabha State) and the Administrator of the State (Mr. Wilson Johnstone) against Sardar Bachan Singh to recover Rs. 25,500, on the basis of the promissory note and the cash book entry, and Rs. 4,500, interest by way of damages, on the allegation that the defendant had not mortgaged the bungalow Glenelg with possession to the Bank as he had promised to do, but recovered the rent himself.

Sardar Bachan Singh pleaded that neither of the plaintiffs had a locus standi to sue, the Bank being merely a State Department and not a corporation authorized by law to sue in the British Indian Courts and the Administrator not being the Prince or Ruler of the Nabha State, that the purchase of Glenelg was a benami transaction, the real purchaser being the Maharaja who had advanced the price and that he, the defendant-appellant, had fulfilled his part of the agreement by handing over the title-deeds, that the promissory note was inadmissible in evidence and could not in any case alone form the basis of the suit as brought, that the claim for damages was untenable, and that the matter had been referred to arbitration. The appellant also claimed to be entitled to set off various sums of money alleged to be due to him by the State. The suit was tried by the Senior Subordinate Judge of Ludhiana who decided that the Bank and the Administrator were competent to sue, that the promissory note was admissible in evidence, that the loan was not a benami transaction and that S. 120, Negotiable Instruments Act, precluded the defendant from repudiating liability on the promissory note, that the defendant could not set off his claims against the State and that there was no proper reference to arbitration. He decided in favour of the plaintiffs on the question of damages. On all these findings he decreed the suit with costs allowing interest during pendency of the suit and future interest.

Against this decree Sardar Bachan Singh has filed the appeal before us. His counsel states that his client has now no claim to prefer against the State, nor does he attack the finding that the promissory note is evidence and that there was no enforceable reference to arbitration. His contentions are, firstly, that neither of the plaintiffs has any locus standi, secondly, that the action as laid is misconceived inasmuch as it is clearly established that the note was executed in pursuance of an arrangement which constituted a condition precedent to the attaching of any obligation under the contract evidenced by the note and which the law allowed to be proved (prov. (3), S. 92, Evidence Act), even though S. 120, Negotiable Instruments Act, precluded the appellant from denying the validity of the note. The appellant, it was argued, had carried out the contract agreed upon and the obligation contingent on his failure to do so did not arise. In the circumstances no suit lay upon the promissory note and the only reliefs, if any, which the State could ask was specific performance of the contract by delivery of possession of the property purchased, the title-deeds of which had already been handed over to the State authorities in pursuance of the agreement. I may here note that on 23rd November 1926, shortly before the hearing of the evidence concluded, Sardar Bachan Singh executed a deed renouncing his rights in the suit property in favour of the Maharaja.

In reply Mr. Badri Das for the decree-holders admits, in view of the plaintiffs' own allegations in the plaint, where the cause of action was stated to have accrued on 20th October, that the suit is one based not on the promisory note alone, but on the note taken with the entry in the cash book and that therefore the appellant was at liberty to prove circumstances in repudiation of his liability. The evidence makes it abundantly clear that the money was not advanced as a simple loan unconditionally upon the appellant's promissory note, but that it was advanced after the note had been executed and on certain conditions previously agreed upon between the Maharaja and Sardar Bachan Singh as to its disposal. The question whether the Dharam Arth Bank Nabha is competent to sue in the British Courts as a corporation is not free from difficulty. It is not a body registered or incorporated in on British India and had it not been a foreign corporation, a suit on its behalf could have been entertained only if the procedure laid down in O. 29, R. 1, or O. 1, R. 8, Civil P. C., had been followed, that is to say, the suit could only have been lodged as one on behalf of all the members of the corporation or, with the Court's permission, by some of the members as representatives of all. It is however contended for the respondents that the Bank is an independent institution established by the State law and given power to institute suits in the State Courts, and that the procedure laid down in O. 29, R. 1, Civil P. C., is applicable to such foreign corporations. (After discussing the evidence, the judgment proceeded). As a whole the evidence appears to me to be insufficient to prove that the Dharam Arth Bank was a corporation as distinct from the State or the Maharaja and competent to sue in the British Indian Courts through its Secretary, Director or Principal Officer.

As regards the locus standi of the Administrator I have no doubt that Mr.

Wilson Johnstone as the representative of the Maharaja was competent to institute the suit. S. 84, Civil P. C., states that a Foreign State may sue in a Court in British India and the provisions in S. 87 that a Ruling Chief may sue in the name of his State will not preclude suits on behalf of the State when the Ruler has severed connexion with the State, for it would be unreasonable to hold that when the powers of a Ruling Chief are in abeyance the State loses its right of recourse to the British Indian Courts. The circumstances of the case appear to me to have been provided for by S. 85 of the Code which lays down that the Government may by special order appoint a person to prosecute a suit on behalf of a Ruling Chief, if so requested by any person competent in the opinion of Government to act on his behalf. Here the necessary request was made by the Nabha Darbar (whom we must assume to be a person competent in the opinion of Government to make the request, for the question of the competency of the person making the request is left to the sole discretion of Government), and the Government on 19th August 1925, appointed the Administrator of the State (who as representative of the Government of India was ruling the State) to prosecute such suits as it might be necessary to prosecute from time to time. The fact that such an appointment is made after a plaint has been put into Court will not render it ineffective, provided that it is put into Court within the period of limitation.

This is not disputed by defendant's counsel: see *Maharaja of Rewah* v. *Swami Saran* (1). Ultimately Mr. Jagan Nath had to concede that his objection was merely to the form and order of the words in the heading of the plaint, his contention being that instead of the plaintiff being described as the Administrator and Resident of Nabha, the plaintiff should have been stated to be the Nabha State, or Nabha Darbar, through the Administrator. But if there was a mistake here, it was merely a misdescription which the Court may at any time allow to be rectified. No possible prejudice could be caused by it to the defendant who clearly understood from the beginning that the claim was being made against him on behalf of the State administration and not on behalf either of the Administrator or the Government of India. Mr. Jagan Nath in the course of his argument on this point cited *Girdhari Das* v. *Powlett* (2) and *Venkatrao Raja* v. *Madhavrav Ram Chandra* (3). In neither of these cases does it appear that the plaintiff had been appointed under the provisions of S. 432 (now 87), Civil P. C., and it is therefore unnecessary for me to express my agreement or disagreement with the view laid down in those judgments.

Coming to the merits, the appellant's plea that the suit as framed will not lie upon the contract sued upon appears to me to have force. It is clearly manifest, from the plaintiffs' own evidence, that the appellant was no more than a benamidar for the Maharaja who was anxious to acquire property in Mussoorie and did not wish to have it acquired in his name, possibly because he was forbidden by the rules of the Political Department from purchasing such property without the sanction of the Government of India, or perhaps because the price would be inflated against a would—be purchaser known to be a Ruling Chief. (After considering the evidence, the judgment continued). It follows inevitably that no suit will lie on behalf of the State for the recovery of the debt acknowledged by the promissory note, the money having been applied to the purchase of the property for the State for which purpose it was advanced. It is possible that the State had a good cause of action for seeking other relief such as a decree for possession of the property, but it is clear that it has no claim upon its benamidar for a return of the money. On this conclusion it becomes unnecessary to consider whether the appellant discharged his obligation by handing over the title-deeds of the house to the State authorities. The claim to damages and interest goes with the claim to the principal on which it is admittedly dependent. The result is that the appeal must be accepted and the suit dismissed with costs throughout.

Tek Chand, J.—I agree.

K.S. *Appeal accepted.*

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1. (1903) 25 All 635=1903 A W N 189.
2. (1879) 2 All 690.
3. (1887) 11 Bom 53.

A. I. R. 1933 Lahore 458

BHIDE, J.

Tilok Chand Charan Das—**Plaintiffs—Appellants.**

v.

Mahandu—**Defendant—Respondent.**

Second Appeal No. 1618 of 1932, Decided on 9th February 1933, from decree of Addl. Dist. Judge, Lyallpur, D/- 21st July 1932.

(a) Contract Act (1872), S. 12—"Unsoundness of mind" does not depend on belief or unbelief of witnesses but depends on inference to be drawn from evidence.

The question whether a contract is invalidated by unsoundness of mind does not depend merely on belief or unbelief of the witnesses before the Court, but depends largely upon inferences to be drawn from the evidence: *A I R* 1927 *Cal* 889. *Foll.* [P 459 C 2]

(b) Civil P. C. (1908), S. 100—Finding as to person being of unsound or sound mind within meaning of Contract Act not based on direct evidence can be challenged in second appeal—Contract Act (1872), S. 12.

A finding that a person is of unsound mind at the time of execution of a document is a finding of fact; but where the finding is based not on direct evidence but on inference drawn from evidence it is open to challenge in second appeal; *A I R* 1924 *All* 116; *A I R* 1925 *All* 24 and *A I R* 1927 *Cal* 889, *Ref.* [P 459 C 2]

(c) Contract Act (1872), S. 12—Person having lucid intervals—Onus of proving unsoundness at time of execution of document is on person who challenges validity of document—Evidence Act (1872), S. 101.

Where a person is proved to have lucid intervals, the onus of proving that he was of unsound mind at the time of execution of a document lies on him who challenges the validity of the document. [P 460 C 2]

Ram Lal Anand I—for Appellants.

A. de Mello—for Respondent.

Judgment.—This was a suit for the recovery of Rs. 1,500, on the basis of bahi account. The suit was decreed by the trial Court, but was dismissed on appeal by the learned District Judge on the ground that the defendant Mahandu was of unsound mind at the time when he signed the entry in the bahi account as regards the last balance, on which the suit was based. From this decision a second appeal has been preferred. The finding of the learned District Judge, that the defendant was of unsound mind at the time of the execution of the bahi entry is a finding of fact, but the learned counsel for the appellant has challenged it on four grounds, namely: (1) That the finding being based on expert evidence only is liable to be questioned in second appeal. (2) That the finding is inconsistent with another finding of the learned District Judge himself. (3) That the learned District Judge has overlooked or misconstrued certain other important pieces of evidence. (4) That the learned District Judge has overlooked the fact that there is no evidence to show that the defendant was of unsound mind at the time when he executed the bahi entry.

In support of the first contention reliance has been placed on a Single Bench ruling of the Allahabad High Court: *Mt. Altafan* v. *Ibrahim* (1) in which it was held that when a finding is based on the opinion of experts it is not necessarity a finding on facts proved or directly demonstrated and may be interfered with in second appeal. This view was upheld by a Division Bench on Letters Patent appeal: vide, *Muhammad Ibrahim* v. *Altafan* (2). In *Ram Sundar Saha* v. *Kali Narain Sen*, *A. I. R.* 1927 *Cal.* 889, it was held by a Division Bench of the Calcutta High Court that the question whether a contract is invalidated by unsoundness of mind does not depend merely on belief or unbelief of the witnesses before the Court, but depends largely upon inferences to be drawn from the evidence. That was a case of a first appeal, but the principle laid down supports the contention of the appellant in this respect. In the present instance the precise question which called for decision was whether the defendant was of unsound mind at the time when he executed the balance entry in question on 11th February 1929. There was no direct evidence on this point and the learned District Judge's finding as to whether the defendant was of unsound mind on 11th February 1929, is really based on inferences drawn from the evidence. The question whether the defendant was or was not of sound mind has to be determined in the light of provisions of S. 12, Contract Act. That section lays down that

> "a person is said to be of soundmind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interest."

The expression "soundness of mind" has thus a technical sense for the purpose of determining the validity of a contract. The learned District Judge's finding in this respect was based on inferences drawn from the expert testimony and certain other evidence and the question for consideration in this appeal is whether the learned District Judge was right in law in drawing the inference that the defendant was not of "sound mind" in the sense of the definition of that expression in S. 12, Contract Act. In this aspect of the question, the finding of the learned District Judge is, in my opinion, open to challenge in second appeal. Before proceeding to examine the learned District Judge's finding, it will be convenient to state a few facts. It appears

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1. A I R 1924 All 116=75 I C 502.
2. A I R 1925 All 24=83 I C 27=47 All 243.

that the account, which resulted in the balance entry in suit, was originally in the name of Dina, defendant's son. The account began sometime in January 1928 and after certain transactions the balance of Rs. 1,100 was acknowledged by the defendant in consideration of his son being discharged from the debt. Interest was agreed to be paid at Rs. 2 per cent per mensem. The learned District Judge has found the execution of balance entry and the agreement as to interest to be proved. The previous accounts of Dina were produced and it has not been found that there was anything suspicious about this entry or any attempt to overreach the defendant. The present suit was instituted on 6th October 1930. Defendant appeared in response to the summons of 25th November 1930, and was conducting the case for sometime. The only plea put forward at first was that he was of unsound mind at the time when the balance entry in question was executed. Later on, in June 1931, the plea was put forward that the defendant was even then insane and that a guardian ad litem be appointed for him. This plea was challenged by the plaintiff, who alleged that the defendant was merely feigning insanity. An issue was framed on the point and evidence was led and eventually the learned Subordinate Judge, who tried the case, came to the conclusion that the defendant was merely feigning insanity. No guardian ad litem was appointed. Eventually the learned Subordinate Judge found that it was not proved that the defendant was of unsound mind at the time when the bahi entry in suit was executed. He accordingly decreed the plaintiff's claim.

On appeal, the learned District Judge agreed with the trial Court's findings as to the execution of the entry, but held that the defendant was of unsound mind at the time and hence the contract was void. The finding of the learned District Judge in this respect appears to be based mainly on three pieces of evidence, viz., (a) the testimony of Colonel Wadia, Civil Surgeon, who examined the defendant in the course of this suit, (b) the evidence of the president and the treasurer of the Local Co-operative Bank who found the defendant to be of unsound mind in 1924 and transferred the account standing in his name to that of his wife; (c) the fact that the account was originally in the name of Dina and was then transferred to the name of the defendant. (After discussing the doctor's evidence, the judgment proceeded). The opinion of the president and the treasurer of the Co-operative Bank as regards the condition of the defendant has to be taken with caution. Even if they thought it advisable to transfer the account to the name of defendant's wife, it does not necessarily follow that the defendant was of unsound mind in the sense indicated by the provisions of S. 12, Contract Act. But whatever the condition of the defendant may have been in 1924, we have it in evidence that defendant was conducting a suit even in 1928. The petition writer who drafted the plaint in that case was produced as a witness and he has deposed that he did so at the instance of the defendant himself. Further, the trial Court has noted that even in the earlier stages of the present suit the defendant gave rational answers and was conducting his suit in a proper manner. It seems therefore clear from the evidence on the record that even if it be assumed for the sake of argument that the defendant was of unsound mind in 1924, he had certainly lucid periods thereafter. There is therefore no warrant for any finding that defendant was insane since 1924, as the learned District Judge seems to have held. The onus lay heavily on the defendant to prove that he was of unsound mind on 11th February 1929, when he executed the balance entry in question, but there is no satisfactory evidence at all to show this.

The learned District Judge seems to consider that the very fact that the account which originally stood in the name of defendant's son was transferred to his name was suspicious and was an indication of plaintiff's knowledge of defendant's insanity. I am unable to accept this view. The learned District Judge was apparently of opinion that the defendant was made to sign the balance entry because the property stood in his name. That may be so, but I do not think the plaintiffs would have cared to do so at the risk of losing their money altogether, if the defendant were insane at the time. I have already referred to the fact that the defendant was conducting a suit in 1928. I think that the probability rather is that defendant was of a sound mind in those days and hence the plaintiff thought it advisable to have the account transferred to his name. After carefully considering the evidence on the record, I am of opinion that trial Court's decision was sound. I accordingly accept this appeal and restore the

the decree of the trial Court. Plaintiffs will get their costs throughout.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 461

JAI LAL, J.

Jiwan Das—Plaintiff—Appellant.

v.

Hakumat Rai — Defendant—Respondent.

Second Appeal No. 1677 of 1932, Decided on 7th March 1933, from decree of Dist. Judge, Attock, D/- 23rd July 1932.

(a) Civil P. C. (1908), S. 100—Finding of fact.

The conclusions of fact arrived at by the lower Court cannot be challenged in second appeal. [P 461 C 2]

(b) Tort—Malicious prosecution—Suit for compensation—What plaintiff should prove stated—Criminal Court judgment can be looked into only to prove acquittal.

In order to obtain a decree for compensation for malicious prosecution plaintiff should prove not only the factum of his acquittal but in addition that the charge was false to the knowledge of the defendant or that it was malicious and without reasonable and probable cause; and the judgment of the criminal Court can be looked at merely to establish the fact of acquittal but the grounds of acquittal cannot be looked at by the civil Court: *A I R* 1926 *Bom* 306 and *A I R* 1932 *Bom* 259, *Dist*; *A I R* 1929 *All* 265, *Ref*; *A I R* 1926 *P C* 46, *Expl* and *Rel on*. [P 461 C 2; P 462 C 1]

Bhagat Govind Das—for Appellant.

Barkat Ali—for Respondent.

Judgment. — The respondent, Hakumat Rai is an Octroi Superintendent in the employ of the Municipal Committee, Pindigheb. On his report that he had been assaulted by the appellant, Jiwan Das, the latter was prosecuted under S. 353, Penal Code, but was acquitted. Thereupon Jiwan Das instituted a suit against Hakumat Rai for recovery of compensation for malicious prosecution. The trial Court decreed the suit in part, but on appeal to the District Judge the suit was dismissed in toto. The learned Judge has found that though the appellant was acquitted by the Criminal Court, he had not proved that there was malice on the part of the respondent in starting the prosecution or that there was absence of reasonable and probable cause for the charge. In the course of his judgment the learned Judge also discussed the question whether the evidence led by the appellant was sufficient to satisfy him that the report made by the respondent was false and answered the question in the negative. From this judgment of the District Judge a second appeal has been presented in this Court, and it seems to me that the objection taken by the respondent's counsel that it is concluded by the findings of fact arrived at by the lower appellate Court has force.

The appellant's counsel however contends that in view of the judgment of their Lordships of the Privy Council in *Balbhaddar Singh* v. *Badri Shah* (1), the whole case law on the subject, as it previously existed in this country, must be deemed to have been altered and that once it is proved by a plaintiff in a suit for compensation for malicious prosecution that he was prosecuted at the instance of the defendant and that he was acquitted by the Criminal Court it must be assumed that the plaintiff is innocent and therefore his prosecution was malicious and without reasonable and probable cause. In support of this contention the learned counsel further referred to a judgment of a learned Judge in Chambers of the Allahabad High Court: *Muhammad Daud Khan* v. *Jai Lal*, *A. I. R.* 1929 *All.* 265. Certain observations made by the learned Judge in that case seem to support the contention of the appellant's counsel: but if the law laid down by the learned Judge is as contended by the appellant's counsel then I must respectfully dissent from his view. But it appears to me that the learned Judge did finally observe that the statement of the prosecutor, i. e., the defendant in the suit for compensation, was false. Whether he came to that conclusion independently of the finding of the Criminal Court does not clearly appear from his judgment. If he came to that conclusion from the mere fact of the acquittal of the plaintiff, then, in my opinion, he went against the clear authorities of all the High Courts in this country, which I do not think have been reversed by their Lordships of the Privy Council by their judgment mentioned above, that in a suit like the present the judgment of the Criminal Court can be looked at merely to establish the fact of acquittal, but the grounds for acquittal cannot be looked at by the Civil Court.

There may be cases in which an cused has been acquitted not because the case has been found to be false, but because it has been found to be unproved and therefore in my opinion, the mere acquittal of the accused in a criminal case does not absolve the plaintiff in a suit for compensation for malicious prosecution from his duty of prov-

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1. A I R 1916 P C 46=95 I C 329=29 O C 163=1 Luck 215 (P C).

ing independently of the acquittal that his prosecution was malicious and without probable and reasonable cause. That this is the law would also appear from the judgment of their Lordships of the Privy Council which has been relied upon by the appellant's counsel. In that case their Lordships merely differed from the view of the Chief Court of Oudh that in addition to acquittal the plaintiff must prove innocence. They did not controvert the proposition laid down by the Chief Court of Oudh that the plaintiff has to prove also malice and absence of probable and reasonable cause for the prosecution. It may be that in some cases the plaintiff can affirmatively prove by evidence produced in the Civil Court that apart from his acquittal by the Criminal Court the case against him was false. In that case there would be presumption and a very strong one, probably conclusive between the parties, that the prosecution was malicious and also was without probable and reasonable cause. To this however one further condition must be added that the prosecution must be proved to be false to the knowledge of the defendant. If the defendant alleged, as in the present case, that he was assaulted by the plaintiff and it is found that his allegation was false, then no doubt the Court must also find that he was actuated by malice in prosecuting the plaintiff and also that he had no reasonable or probable cause for his prosecution. There may however be cases in which the defendant prefers the charge merely on information received. There the mere falsity of the charge would not be sufficient and it would be necessary for the plaintiff to prove the two further elements which I have mentioned above. *Alam Khan Muhammad Khan* v. *Banemiya Rasul, A. I. R.* 1926 *Bom.* 306, also relied upon by the appellant's counsel does not seem to help him. In that case the learned Judges found on the evidence produced before them that the facts required to sustain an action for malicious prosecution had been established by the evidence produced in the Civil Court. The same remarks apply to another judgment of the Bombay High Court: *Chhagan Lal Sakerlal* v. *Municipality of Thana, A. I. R.* 1932 *Bom.* 259. The learned Judges in that case held that in suits of this description if actual malice in preferring the charge is not alleged or proved, it would be necessary for the plaintiff to aver and prove legal malice. But on the facts proved in the Civil Courts in that case the learned Judges found that the allegations of the plaintiff had not been substantiated. There is therefore in my opinion, no substance in the contention of the appellant's counsel that in a case like the present where the defendant has launched prosecution on facts which are alleged by him to be within his personal knowledge and the prosecution has resulted in the acquittal of the accused (the plaintiff), then all that the latter has to prove in order to obtain a decree for compensation for malicious presecution is the factum of his acquittal. In my opinion, in addition to this he must prove either that the charge was false or that it was malicious and without reasonable and probable cause. Without doing so he cannot succeed.

As in the present case the learned District Judge has found that there was no malice and further that the want of reasonable and probable cause had not been proved ,the plaintiff was not entitled to succeed. The finding of the District Judge that it had not been established that the report made by the defendant was false is apparently due to a contention by the plaintiff's counsel before him that on proving that the charge was false he was entitled to ask the Court to raise a presumption of the presence of the other two elements in his favour and I cannot agree with counsel that the learned Judge fell into a confusion and did not properly appreciate the points that were to be decided by him. The same remarks apply to the reference by the learned Judge to the subsequent proceedings in the Criminal Court. Apparently it was argued before him on behalf of the appellant that an acquittal must be deemed to be tantamount to the innocence of the accused, and that the Magistrate had found that the charge was false, the learned Judge met that argument by holding that the same Magistrate, who had acquitted the accused, subsequently considered that it was not possible to hold that the prosecution was malicious. In my opinion, the view of the learned Judge on the legal aspect of the case is correct and his conclusions of fact debar me from entertaining this appeal. I dismiss it with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 463

TAPP, J.

Hukam Chand — Defendant — Appellant.

v.

Bawa Ram Nath—Plaintiff— Respondent.

Second Appeal No. 288 of 1932, Decided on 30th November 1932, from preliminary decree of Dist. Judge, Multan, D/- 19th November 1931.

Civil P. C. (1908), O. 2, R. 2—Mortgage—Interest payable monthly—Principal payable on expiry of four years—Mortgagee given option to realize whole amount even before four years on default of interest for three months—Suit for interest alone for default committed before four years — Subsequent suit after four years for principal and interest is not barred by O. 2, R. 2.

A mortgage provided that interest was payable monthly and that the principal amount was payable only after four years. It further provided that the mortgagee was entitled, if he so chose, to sue for the whole amount in case of default to pay interest for three months. On default being committed by the mortgagor the mortgagee filed a suit before expiry of four years for interest alone. The mortgagor deposited the amount in Court and suit was dismissed. Subsequently after the expiry of the four years, the mortgagee filed a suit for the principal and the interest.

Held: the suit was not barred by O. 2, R. 2 as the plaintiff had two distinct causes of action to sue for the principal amount, viz., one on expiry of four years and the other on default of payment of interest, the latter of which he had the option either to take advantage of or waive: *A I R* 1930 *Lah* 124 and *AIR* 1928 *Lah* 269, *Rel on*; *AIR* 1922 *P C* 23 and *A I R* 1922 *P C* 412, *Dist.*

[P 463 C 1, 2; P 464 C 1]

Faqir Chand—for Appellant.

Achhru Ram—for Respondent.

Judgment.—The sole question for determination in this appeal which arose out of an action for recovery of principal and interest due on a mortgage is whether the present suit is barred under R. 2, O. 2, Civil P. C., by reason of the suit having been previously brought for recovery of interest alone. The question has been fully discussed, and all the authorities bearing on the point are duly set out, by the learned District Judge and I entirely agree with the view taken by him in disagreement with the trial Court that R. 2, O. 2, has no application on the facts. The mortgage in question was effected on 14th January 1926, by Hukam Chand, defendant-appellant in favour of Bawa Moti Nath, the Guru of the plaintiff-appellant for a consideration of Rs. 1,200. The relevant clauses of the deed are, 3, 4 and 6 and these stipulated that interest at 9 per cent per annum was to be paid monthly; that the principal money would be payable on the expiry of four years, that redemption could only take place after two years, and that if interest remained unpaid for three months, the mortgagee would be entitled to charge compound interest on such arrears and would also have the right, if he chose to ignore the period of four years, to realize the whole amount due on account of both principal and interest. This last stipulation is contained in Cl. 6. Interest was duly paid for the years 1926 to 1928, and as it was not paid for 1929 the mortgagee brought a suit for recovery of Rs. 108, on account of interest due for that year on 10th January 1930. The defendant admitted the claim and paid the amount into Court; the plaintiff's suit was therefore dismissed.

The present action was brought on 1st May 1931, and having carefully examined all the authorities cited by Mr. Fakir Chand in support of his contention that the present suit was barred under R. 2, O. 2 as the right to recover the principal money had accrued to the plaintiff when he brought the first suit on 10th January 1930, I am of opinion that these authorities are clearly distinguishable. When the plaintiff brought his previous suit, the period of four years on the expiry of which the principal money was recoverable, had still a few days to run. In *Mahomed Hafiz* v. *Mirza Mahomed* (1) and *Kishan Narain* v. *Pala Mal* (2), both decisions by their Lordships of the Judicial Committee and on which reliance has been chiefly placed, the period of the mortgage had expired when the first suit was brought. This, in my judgment, is the chief feature which distinguishes the present case from the above two cases and the other decisions relied on. It was also urged that the plaintiff in seeking a decree in his first suit against the person and property of the mortgagor and including in the latter the equity of redemption was claiming realization of the amount due on account of interest from the mortgaged property. In my opinion this contention has no force as no charge was created by the mortgage on the equity of redemption. This remained the unencumbered property of the mortgagor.

The facts in the present case seem to me to be identical with those contained

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1. A I R 1922 P C 23=65 I C 79=49 I A 9=44 All 121 (P C).
2. A I R 1922 P C 412=72 I C 187=50 I A 115=4 Lah 32 (P C).

in *A. I. R.* 1928 *Lah.* 269. In the reported case the first suit was brought before the expiry of the fixed period and the mortgagee there, as here had the option of suing for recovery of the principal money before the expiry of the fixed period if there was a default in the payment of interest and this default occurred. Mr. Fakir Chand further laid stress on the word "entitled" in sub-Rr. 1 and 3, R. 2 and urged that under Cl. 6 of the mortgage-deed the plaintiff was entitled to sue for recovery of the principal money. This word however cannot be divorced from the words "cause of action" occurring further on. Under the deed the plaintiff clearly had two distinct causes of action in respect of the principal money one which arose on the expiry of the four years and the other, of which the exercise was left to his option, on default arising in the payment of interest for more than three months. This clause was in favour of the mortgagee and he was not bound to enforce it. As observed by his Lordship the Chief Justice in *Vasu Ram* v. *Mahomed Bakhsh* (3). It is a well established principle of law that a person cannot be compelled to take advantage of a forfeiture clause, but can waive his right to do so. Plaintiff undoubtedly did so, as in para. 2 of his plaint in that suit he stated that the period of four years not having yet expired the principal money was not recoverable. In his written statement in that suit the defendant admitted the correctness of this pleading. I hold therefore that the decision by the lower appellate Court is correct and the appeal is accordingly dismissed with costs.

K.S. *Appeal dismissed.*

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3. A I R 1930 Lah 124=121 I C 80.

A. I. R. 1933 Lahore 464

ADDISON AND BHIDE, JJ.

Ram Singh and *others*—Defendants — Appellants.

v.

Shop Tek Chand-Niamat Rai and *others*—Plaintiffs—Respondents.

First Appeal No. 2734 of 1927, Decided on 9th March 1933, from decree of Senior Sub-Judge, Ferozepore, D/- 11th August 1927.

Contract Act (1872), S. 62—Bond executed by *A* for debt due by *B*—Subsequent settlement by which *B* is to pay some instalments and execute mortgage and in case of default to be liable as before—Payment of some instalments but default committed in carrying out terms of settlement—*A's* liability under bond is not revived.

A executed a bond for a debt due by *B*. But subsequent to this a settlement was effected by which *B* was to pay part of debt in certain instalments and execute a mortgage for balance and in default *B* was to continue to be liable as before. *B* paid some instalments but failed to carry out the terms of settlement.

Held: under the terms of the settlement, that *A's* liability under the bond was absolved by the settlement and that it was not revived on *B's* default as there was no term in the settlement to that effect: *A I R* 1931 *Lah* 80, *Dist.*

[P 465 C 1]

Achhru Ram and *Badri Das*—for Appellants.

J. N. Aggarwal and *M. L. Batra*—for Respondents.

Bhide, J.—This appeal arises out of a suit for recovery of Rs. 8,500, on the basis of a bond. The bond was executed by one Ram Singh in consideration of a debt due from his brother Gurdit Singh, and was payable in two instalments. Default having been made in the payment of the instalments, the plaintiffs sued for recovery of the amount of the bond together with interest as stipulated therein. The defendant admitted having signed the bond, but pleaded that it was not duly attested as certain differences arose between the parties and the contract was therefore not complete. It was further pleaded that there was a fresh settlement between the parties about a year later by which the defendant was absolved from his liability and consequently no suit was maintainable on the bond in question. The learned Subordinate Judge has found the issues in favour of the plaintiffs and passed a decree for Rs. 6,372, with proportionate costs. From this decision defendant appeals.

As regards the first point, viz., whether the contract embodied in the bond in suit was completed or not, Gurdit Singh who was produced as a witness, has deposed that along with the bond a mortgage-deed was also to be executed and that as certain difficulties arose in connexion with the latter, the transaction fell through and the bond was not attested by witnesses. This statement also received support from the evidence of Nihal Singh lambardar. The scribe and the attesting witnesses have no doubt deposed that the bond was duly attested at the time, but the point for consideration is whether the bond and the mortgage were intended to take effect together and whether as a result of the mortgage transaction being dropped, the bond also ceased to be effective. Admittedly no other document was taken either from Gurdit Singh or Ram Singh with regard to the amount in lieu of which the mortgage was to be effected and in the circumstances I am inclined to believe the statement of Gurdit Singh that the whole transaction fell through. However even if it be held that the contract embodied in the bond was complete, it seems to my mind clear that it was superseded by the fresh settlement evidenced by Ex. D-1 and that by the latter settlement Ram Singh was discharged from his liability. The execution of Ex. D-1 is admitted on behalf of the plaintiffs. The document clearly recited that a settlement had been made with Ram Singh and Gurdit Singh with regard to the money due to the plaintiffs, including the amount due on the bond on which the present suit is based. Under the terms of this settlement Gurdit Singh agreed to pay the amount in certain instalments and also to mortgage some of his land for a portion of the consideration. It was stipulated that if the terms agreed to were duly carried out by Gurdit Singh, a receipt in full discharge of the debt (which was kept in deposit with Shibbu Ram-Shadi Ram) should be given to him. If however the terms were not carried out, Gurdit Singh was to remain liable as before.

Some of the instalments were paid according to the terms of Ex. D-1, but admittedly all the terms were not carried out and the main point for decision in this suit was whether the liability of Ram Singh on the bond was revived as a result. On this point the document seems to my mind to be perfectly clear and unambiguous. It is clearly stated in Ex. D-1 that if the condition were not duly fulfilled, the amount was to stand against Gurdit Singh as before. There is nothing whatever in the document to justify the contention of the learned counsel for the plaintiffs that Ram Singh's liability was also to revive. It was urged that there was no reason why the plaintiffs should have given up their claim on the basis of the bond. Plaintiffs may however have had their reasons for perferring the terms of Ex. D-1 and accepting the liability of Gurdit Singh only. In any case the point cannot be attached much weight in view of the clear terms of Ex. D-1. The learned counsel for the plaintiffs has referred to ***Najaf Shah* v. *Rangu Ram*** (1) and other rulings of the same type but these do not seem to have any bearing on the facts of the present case. In this case there was not only a novation of the contract, but the fresh contract also provided for the consequences of its breach.

I would accordingly hold that the present suit on the basis of the bond executed by Ram Singh is not maintainable and accepting the appeal dismiss the plaintiffs' suit. I would allow the defendant costs of this appeal, but in view of all the circumstances, leave the parties to bear their costs in the trial Court. As a result, I would dismiss the cross-objections with costs.

Addison, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 465

TAPP, J.

Thakar Singh—Plaintiff—Appellant.

v.

Sant Singh and *others*—Defendants—Respondents.

Misc. Second Appeal No. 597 of 1932, Decided on 22nd December 1932, from order of Dist. Judge, Jhang, D/- 7th January 1932.

(a) Hindu Law—Partition—Parties to suit.

In a suit for partition instituted by a member of a joint Hindu family which has previously partitioned the sons of a divided coparcener may be proper parties, but they are not necessary parties if their interests are represented in the suits by their father: 1 *Pat.* 361, *Foll.* [P 466 C 1, 2]

(b) Partition—Common properties not joint—Suit for separate items can be brought.

A suit for partition of common properties, and not joint properties is not liable to be dismissed on the ground that the suit did not include all the common properties available for partition: 46 *Mad* 844, *Foll.* [P 466 C 1, 2]

Fakir Chand and *Chandra Gupta*—for Appellant.

Mohammad Amin (*Malik*)—for Respondents.

Judgment. — The plaintiff, Thakar Singh, brought a suit out of which this appeal arises for partition of his one-third share in a house situate in Maghiana, Tahsil and District Jhang. He impleaded as defendants his brother Sant Singh and the two sons and grandson of a deceased brother Bhagwan Singh. The defendants pleaded that the plaintiff should have included in his suit for partition another house which was jointly owned by the parties and also impleaded plaintiff's two sons and the three sons of Sant Singh, defendant, as defendants. In the trial Court this plea prevailed and the suit was dismissed. On appeal however the learned District Judge held that the dis-

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1. A I R 1921 Lah 80=66 I C 47=2 Lah 328.

missal of the suit was wrong and plaintiff should have been afforded an opportunity of amending his plaint both in regard to parties and as to the inclusion of the second house. He accordingly accepted the appeal and remanded the case to the trial Court for compliance with his order. The plaintiff was also directed to bear the costs of appeal. Mr. Fakir Chand on behalf of the plaintiff-appellant, contends that, though the sons of the defendant, Sant Singh and the sons of the plaintiff might be proper parties, they are not necessary parties, and that it was not necessary to include the second house in the suit as neither of the houses was joint family property, but common property. For his first contention he relied on *Digambar Mahto* v. *Dhanraj Mahto* (1) and *A. I. R.* 1929 *Pat.* 741. He also cited *Atma Ram* v. *Banku Mal* (2). In the earlier Patna decision it was held that in a suit for partition instituted by a member of a joint Hindu family the grandsons may be proper parties, but they are not necessary parties if their interests are represented in the suits by their father. To much the same effect is the later Patna decision while in the decision of this Court referred to above it was held that in cases relating to contracts by or on behalf of a joint Hindu family the manager effectively represents all the other members. Now in the present case it is admitted that there was a partition in 1905 between the plaintiff Thakar Singh and his brothers and in the circumstances Thakar Singh, the plaintiff, and the other defendants are not co-parceners. It is therefore doubtful whether the sons of Sant Singh are even proper parties. In any case it seems to me that the rights of the sons of Sant Singh and also those of the sons of the plaintiff are sufficiently represented and protected by their respective fathers.

For his second contention the learned counsel for the appellant relied on *Pakkiri Kanni* v. *Manjur Sahab* (3) in which it was held that a suit for partition of common properties, and not joint properties, is not liable to be dismissed on the ground that the suit did not include all the common properties available for partition. In the Madras case it was observed that they had not been shown that the objection founded on what is usually described as the plea of partial partition is available when a suit for division of common property, not joint property, is in question. After referring to certain authorities in which an opinion was expressed against the expediency of suits for partition of common property in which the whole of the property available for partition was not included, the learned Judges further observed that they had not been shown any decision that such suits are actually unsustainable. They pointed out also that it was always open to the defendant in such a case, if he thought himself prejudiced by the exclusion of any property, himself to bring a suit in respect of it and have it tried with the suit already pending.

Now it seems clear from the facts given above that the plaintiff and the defendants do not constitute a co-parcenary and the house in suit and the second house do not constitute co-parcenary property. They are common property. In view of the above facts and in accordance with the authorities cited above I hold that, while the two sons of the plaintiff and the sons of the defendant, Sant Singh, may be proper parties they are not necessary parties to the suit and that the second house, of the greater portion of which plaintiff is in possession and Sant Singh of a smaller portion, need not be included in the suit. For the reasons given above the plaint does not require amendment and setting aside the order of the lower appellate Court I order that the suit be proceeded with on the plaint as presented to the Court. I leave the parties to bear their own costs in this Court and the lower appellate Court.

M.N. *Order accordingly.*

A. I. R. 1933 Lahore 466

TEK CHAND AND MONROE, JJ.

Ilahi Baksh—Defendant— Appellant.

v.

Ghulam Nabi—Plaintiff—Respondent.

First Appeal No. 1092 of 1927, Decided on 24th November 1932, from decree of Senior Sub-Judge, Lyallpore, D/- 11th April 1927.

(a) Custom (Punjab)—Inheritance—Jats of tahsil and district Gujranwala—Daughters and daughters' sons succeed to self-acquired property of sonless proprietor in preference to collaterals.

By the custom among Jats of Gujranwala district daughters and daughters' sons succeed to self-acquired property of a sonless proprietor in preference to his collaterals; and the right of a daughter's son to succeed to his maternal grand-

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1. A I R 1922 Pat 96=67 I C 156=1 Pat 361.
2. A I R 1930 Lah 561=125 I C 369=11 Lah 598.
3. A I R 1924 Mad 124=75 I C 334=46 Mad 844.

father is not contingent upon his mother having survived her father and actually inherited his property: 31 *I C* 693; *A I R* 1922 *Lah* 217; *A I R* 1920 *Lah* 460 and 84 *P R* 1917, *Ref.* [P 468 C 1]

(b) Custom (Punjab)—Riwajiam of Gujranwala District published in 1914 is incorrect record of custom.

The riwajiam of Gujranwala District published in 1914 is an imperfectly compiled document and does not correctly record the customs prevailing in the district in several important particulars:

Held: in this case that it did not correctly represent the custom relating to succession to the self-acquired property of a sonless proprietor: 84 *P R* 1917, *Foll.* [P 467 C 2]

Shamair Chand, *Muhammad Amin* (*Malak*) and *Qabul Chand*—for Appellant.

J. L. Kapur and *M. C. Sud*—for Respondent.

Tek Chand, J.—One Dad, a Waraich Jat of Mauza Butala Jhanda Singh in the Tahsil and District of Gujranwala, acquired the land in dispute in the Lyallpur District. He died many years ago leaving him surviving a widow Mt. Thandi, and three daughters, Mt. Talia Bibi, Mt. Karam Bibi and Mt. Rabia Bibi. On his death mutation was effected in the name of Mt. Thandi and she remained in possession till her death on 8th March 1925. The three daughters pre-deceased their mother: two of them had died childless while the third, Mt. Karam Bibi, left a son, Ghulam Nabi, plaintiff. On Mt. Thandi's death, Ghulam Nabi took possession of the land, but Ilahi Bakhsh brother of Dad contested his right to succeed to the property. The Revenue Authorities favoured the claim of Ilahi Bakhsh and sanctioned mutation in his favour. Ghulam Nabi has accordingly sued in the Civil Court for a declaration that he, as the daughter's son of Dad, is the rightful heir to his self-acquired property, and was in lawful possession of the land. The defendant resisted the suit on the ground, that according to the custom prevailing among the Jats of Gujranwala District, collaterals of a sonless proprietor had a right to succeed to his self-acquired property in preference to his daughter or pre-deceased daughter's son. The learned Senior Subordinate Judge has held that the alleged custom has not been established and has decreed the suit.

The defendant has appealed to this Court and on his behalf reliance has been placed upon the answer to question 47 of the Riwajiam of the Gujranwala District published in 1914. This question and the answer were considered at great length by a Division Bench of the Chief Court in *Wazira* v. *Maryan* (1) (pp. 332-335), where, after a careful consideration of the various entries in the Riwajiam and the manner in which it was prepared, it was clearly demonstrated that it was an imperfectly compiled document and did not correctly record the customs prevailing in the district in several important particulars. Mr. Shamair Chand has confessed his inability to show that this criticizm was unjustified, and all that he has urged before us is that some of the general observations in the judgment in that case, relating to the value to be attached to an entry in a Riwajiam if it is unsupported by instances, are no longer good law in view of the recent decisions of the Privy Council and this Court. This is no doubt true, but these later decisions do not in any way affect the authority of that decision, so far as it held that the cryptic answer, supposed to have been given by villagers, most of whom were illiterate, to an ill-expressed question in which no less than ten different problems had been confused did not correctly represent the custom relating to succession to self-acquired property of a sonless proprietor in the Gujranwala District.

But even if the answer is to be taken as including in its purview the custom on this particular point, I am of opinion that the initial presumption arising in favour of its correctness has been amply rebutted by the evidence on the record. In addition to the case reported as *Wazira* v. *Maryan* (1), which is a valuable instance in point, we have the judgment of Khan Bahadur Sheikh Amir Ali, District Judge, Gujranwala, dated 23rd April 1919, (Ex. P-4) where it was held that according to the custom prevailing among the Jats of Gujranwala Tahsil, daughters succeeded to the self-acquired property of their father in preference to his near collaterals. Further, the plaintiff has proved the following four instances of such succession by the oral testimony of the persons concerned: (1) Fazal Din, father of Ghulam Nabi, (P. W. 3), succeeded to the self-acquired property of his maternal grandfather to the exclusion of near collaterals of the deceased. (2) Mt. Resham Bibi, wife of Ahmad Khan, (P. W. 6), got the property of her father in preference to his collaterals of the third degree. (3) Dasondhi, father of Rehmat Khan, (P. W. 8), inherited the self-acquired land of his maternal grandfather in the presence of his near collaterals.

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1. (1917) 84 P R 1917=42 I C 358.

(4) The son, of Mehar Dad, (P. W. 11) succeeded to the land of their maternal grandfather, Gehna Chima and excluded his brother Shah Muhammad.

In addition, we find that a number of Jat witnesses have deposed that custom permits succession of daughters or their sons to self-acquired property in preference to near male agnates. Of these, special mention may be made of Rehmat Khan, son of Jalaluddin, (P. W. 7) lambardar, who has stated that he will not succeed to the self-acquired property of his sonless brother as the latter has got a daughter alive. As against this not a single well-ascertained instance of daughter's exclusion from succession to their father's self-acquisitions has been proved by the defendant-appellant. I hold therefore that the appellant has failed to prove this part of his case. Mr. Shamair Chand however urges that, even if daughters succeed to such property, a predeceased daughter's son is not an heir, and he has referred us to question 50 of the Riwajiam which runs as follows:

> "If there be no daughters, no daughter's sons succeed. If so, is the property equally divided amongst all the sons of several daughters or are the shares proportioned to the number of daughters who leave sons?
>
> *Answer* 50.—When the daughter has been allowed to succeed, her sons inherit. All the sons of several daughters receive shares according to the number of daughters who leave sons."

Mr. Shamair Chand contends that this answer means that the daughter's son inherits, only in those cases in which his mother had actually succeeded to her father's property. In my opinion this interpretation is not warranted by the language used. It seems to me clear, that what the answer, as recorded, was intended to convey is that a daughter's son succeeds only in tribes among whom, and to property to which, the right of the daughter to succeed to her father's property is recognized by custom. It does not, and cannot, mean that the right of a daughter's son to succeed to the property of his maternal grandfather is contingent upon his mother having survived her father, and actually inherited his property. It is significant that on this point also not a single instance .oral or documentary, has been cited in which a pre-deceased daughter's son had been excluded by collaterals in succession to self-acquired property. In this connexion, it might be of interest to refer to *Miran Baksh* v. *Mehr Bibi* (2), *Gobinda* v. *Nandu* (3) and *Chambeli* v. *Bishna* (4), where the same question was raised in cases relating to other districts, but was answered in favour of the predeceased daughter's son. In my opinion the plaintiff's suit has been rightly decreed and I would dismiss the appeal with costs.

Monroe, J.—I agree.

K.S. *Appeal dismissed.*

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2. (1915) 31 I C 693.
3. A I R 1922 Lah 217=74 I C 644=5 Lah 450.
4. A I R 1920 Lah 460=78 I C 778.

A. I. R. 1933 Lahore 468

ADDISON AND AGHA HAIDAR, JJ.

Mt. Hayat Bibi—Appellant.

v.

Mohabat Khan and *others* — Respondents.

First Appeal No. 447 of 1927, Decided on 31st January 1933.

(a) Custom—(Punjab) GujranwalaDistrict—In presence of sons widows do not succeed.

According to the Customary law of the Gujranwala District compiled in 1914, in the presence of sons widows do not succeed. They have only a right of maintenance. [P 469 C 2]

(b) Civil P. C. (1908), O. 32, R. 7—Compromise against recorded custom by which property belonging to minor is given to widow is not for benefit of minor.

In allowing a compromise the Court is to exercise judicial discretion as to the propriety, in the interests of the minor, of the proposed compromise.

Where a Court sanctioned a compromise by which certain portion of property was given to widows who were only entitled to maintenance and to which the minor was entitled to succeed wholly under the recorded custom:

Held: the compromise was not for the minor's benefit and that the Court did not exercise the discretion properly. [P 469 C 2]

N. C. Pandit and *Tek Chand*—for Appellant.

Ghulam Mohiyud Din and *Mohsin Shah*—for Respondents.

Addison, J.—The following pedigree table is necessary in this case:

Mt. Rahmat Bibi=Maula Dad = Mt. Hayat Bibi, (defendant 1).
|
Mt. Resham Bibi = Muhammad Din=Mt. Hayat Bibi, (defendant 2).
|
Mohabbat Khan (plaintiff).

Maula Dad died in 1916. Mutation of his land was effected in the name of his son Mohammad Din. Mt. Hayat Bibi, the second wife of Maula Dad, appealed to the Collector against this order and was successful in obtaining mutation in her name to the extent of one-half, thus leaving Muhammad Din with one-half. Muhammad Din died within eight months of his father's death before he could sue in the Civil Court to establish his right to succeed to his father to the exclusion of his step-mother, but Mt. Resham Bibi brought a suit on behalf of her minor son Mohabbat Khan against the two Mt. Hayat Bibis for a declaration that Mohabbat Khan was entitled to all the land and that the two step-mothers, Mt. Hayat Bibi, were only entitled to maintenance in the usual way. This suit was instituted on 13th June 1919. By this time mutation had been effected on Muhammad Din. Of this one-half share, the half-share recorded in the name of one-half went to Mohabbat Khan and one-half to the second Mt. Hayat Bibi, his step-mother, just as had been done on the death of Maula Dad. On 30th October 1919, a compromise petition was put in according to which the first Mt. Hayat Bibi was to retain one-half of the land while the other one-half was to be recorded in equal shares in the names of Mohabbat Khan and of his step-mother, the second Mt. Hayat Bibi. This was exactly what was recorded in the revenue papers and all that was added in the compromise was that the two widows would have no right of alienation. Without that condition the widows had already very little right of alienation; that is, in any case they could only alienate the land for necessity which would have been very difficult to prove, seeing that the land is a very large area. A separate petition was also put in to the Judge to sanction the compromise on behalf of the minor and below this application he has recorded an order dated 30th October 1919, in the following words: "As the compromise would benefit the minor, I allow it."

On the same day he recorded the statements of Mt. Resham Bibi and the first Mt. Hayat Bibi and adjourned the case to the next day to allow the second Mt. Hayat Bibi to be present. On the 31st October, the second Mt. Hayat Bibi also attended and Sardar Narain Singh, the counsel appearing on behalf of the minor plaintiff, put in a petition stating that the compromise was, in his opinion, against the interests of the minor and should not be sanctioned. The Judge merely placed this petition on the record and decreed the suit in terms of the compromise. The present suit has been brought on behalf of the same minor Mohabbat Khan, through another guardian. In it a decree has been passed to the effect that the decree of 31st October 1919, had no effect and that the plaintiff was entitled to a declaration that he was the sole owner of the land in dispute. Against this decision the elder Mt. Hayat Bibi, has preferred this appeal. The second Mt. Hayat Bibi no longer claims anything except the widow's right to be maintained. Accordingly to the Customary law of the Gujranwala District, compiled in 1914, in the presence of sons, widows and unmarried daughters do not succeed. This is the answer to question 33. Certain instances are set out where step-mothers have succeeded along with sons, but the general rule is as given above. Further, though the question was put in issue in the present suit as to whether the widows were entitled to succeed, no evidence to rebut the presumption raised by the entry in the Riwajiam has been produced.

It is true that the Judge has purported to follow the provisions of O. 32, R. 7, Civil P. C., and he did record the brief order mentioned earlier to the effect that he allowed the compromise as it benefited the minor. This is not however sufficient. The Court must exercise a judicial discretion as to the propriety in the interests of the minor of the proposed compromise. In this case I have not the slightest hesitation in agreeing with the trial Judge that the Court did not exercise a judicial discretion when it sanctioned the compromise. Not only was the compromise against the recorded custom of the District, but the pleader who was appearing for the minor plaintiff pointed out to the Judge that the compromise was not for the minor's benefit. Even now there is no evidence to rebut the Customary law of the district. In such circumstances it cannot be held that the Judge exercised a judicial discretion when he sanctioned the compromise. All he apparently wanted was to have this case removed from his pending record and though it is not practicable to lay down a definite or hard and fast rule as to what particular material a Judge may call for before he is satisfied that the compromise is for the benefit of the minor, yet this is a case where it is obvious that the Judge did not exercise a judicial discretion as to the propriety of the compromise. In this respect I am in agreement with the trial Court.

As there is no evidence to rebut the statement of custom recorded in the Customary law of the district there is no question, but that the plaintiff has been properly held to be the sole owner, the widows merely having the usual right to be maintained. A technical objection however was taken to the decree passed on the ground that the plaint did not ask for the cancellation of the decree dated 31st October 1919. This is true, but in the pleadings the defendants drew attention to that decree and contended that the present suit could not proceed because of the decree in that suit. The usual issues were then framed and by its decree the trial Court actually declared that the first decree had no effect and that on the merits of the case the plaintiff was entitled to a declaration that he was the sole owner of the land subject to the widow's right of maintenance. This shows that the plaint was looked upon as having been amended; otherwise such a decree could not be given. I would therefore repel this technical objection as the case was tried as if it were for a declaration that the first decree was obtained by reason of the gross negligence of the plaintiff's guardian. Had I thought it necessary, I would even now have allowed the plaint to be amended as the parties have clearly understood what the suit was. For the reasons given I would dismiss the appeal with costs.

Agha Haidar, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 470

JAI LAL, J.

Commercial Credit Corporation, Ltd.—Plaintiff—Appellant.

v.

Mohammad Idris— Defendant—Respondent.

Second Appeal No. 1493 of 1932, Decided on 8th March 1933, from decree of Dist. Judge, Delhi, D/- 11th June 1932.

Contract Act (1872), S. 55—Sale—Hire purchase system—Vendor cancelling contract—No breach of agreement by hirer—Vendor is not entitled to recover on basis of agreement —Negotiable Instruments Act (1881), S. 43.

On a contract of hire-purchase, a motor car was given to the defendant for Rs. 2,100. Rs. 1,000 was to be paid in advance and the balance was to be paid in instalments in the course of eight months and the property in the car was to pass to the hirer only on the full payment of the amount. The hirer paid Rs. 50 cash and a cheque for Rs. 950 and took the car but intimated after two days that the car was defective and that he had stopped payment of the cheque till the matter was settled. The owner threatened the hirer with criminal action and had the car seized through his agent. Then he filed a suit on the cheque:

Held: that no breach was committed by the hirer but that the agreement was cancelled by the owner when he seized the car, that the cheque not being supported by consideration S. 43, Negotiable Instruments Act, applied and that the owner was not entitled to recover either on basis of agreement or on the cheque: *Brooks* v. *Beirnstein*, (1909) 1 *K B* 98 and *A I R* 1929 *Mad* 884, *Dist.* [P 471 C 1; P 472 C 1]

Kishan Dayal—for Appellant.

Ram Saran—for Respondent.

Judgment. — On 18th November 1929, the respondent, Mohammad Idris purchased from the appellant, the Commercial Credit Corporation Limited, a second-hand car for Rs. 2,100, on what is ordinarily understood to be a hire purchase system. Rs. 1,000 was to be paid in advance and the remaining Rs. 1,100 was to paid by instalments spread over 8 months and on the payment of the full amount the property in the car was to pass to the hirer, the respondent, but till the whole of the amount was paid it was to remain the property of the owner, the appellant, who was entitled to take possession of the car if there had been any breach of the conditions which were to be performed by the hirer. On the happening of this contingency the hirer was liable to pay to the owner all the instalments which were payable by him upto the date of the breach and he was also liable for damage, if any, to the car while in his possession. The motor-car sold in this case was handed over to the respondent at Delhi on the 18th November. He had to take it to Kathgodam and it appears that when he was driving the car to Kathgodam he noticed a leak in the radiator which had been repaired with cement from the inside. It took him three days to reach Kathgodam owing to the compulsory stoppages in the way due to the defect in the radiator. He also discovered, or at least he alleges that he discovered, that the tyres had been changed between his approval of the car and its actual delivery to him. He had paid to the owner as follows: Rs. 50 in cash and Rs. 950 by means of a cheque.

On arrival at Kathgodam he wrote to the owners at Delhi on 24th November 1929, intimating to them the defects found by him in the car and informing them that till the matter was settled with him he had stopped the payment of the cheque. The owners thereupon threatened him with criminal action and offered to take back the car on his paying them Rs. 200 for the use of the car in the meantime and this offer was immediately followed up by instructions by the owners to their agent to seize the car. It appears that the agent could not succeed in arriving at an amicable settlement with the hirer and consequently he seized the car on 28th November 1929. It is not clear whether between the 24th and the 28th the hirer made any use of the car. The owners then instituted a suit for the recovery of Rs. 950, on the basis of the cheque.

This suit was decreed by the trial Court, but has been dismissed by the District Judge on appeal and the owners have presented this second appeal. I have heard Mr. Kishan Dayal, advocate on his behalf at some length. The contention of Mr. Kishan Dayal is that the view taken by the learned District Judge is wrong as the suit being on the basis of a negotiable instrument, even if it be assumed that there was a partial failure of consideration, by virtue of S. 45, Negotiable Instruments Act, should have been decreed because in order to ascertain in money the extent of failure of consideration a collateral inquiry would be necessary. This contention of the learned counsel in my opinion is devoid of force. The view of the learned District Judge is, and in my opinion it is the correct view, that by taking back the car the plaintiff did not exercise his option given to him by the agreement of putting an end to the contract on the breach on the part of the hirer of the conditions of the agreement of hire and purchase. Obviously there had been at that stage no such breach by the hirer. On the other hand the conduct of the owners in seizing the car under the circumstances mentioned above amounted to a cancellation of the agreement, in other words to determine the arrangement made thereby. It may be that S. 39, Contract Act, has no direct application to the present case, as Mr. Kishan Dayal contended, but it is not necessary for the defendant to rely upon that section. The defendant relies upon the conduct of the appellants in putting an end to the contract by seizing the car which had the effect of absolving him from performing the contract.

To a case like the present in my opinion S. 43, Negotiable Instruments Act, applied. That section relates to a total failure of consideration and in this case there has been a total failure of consideration owing to the conduct of the appellants in seizing the car. It was open to the owners to hold the hirer to his contract and to take action if he made default in the payment of the instalments of the balance as specified in the agreement. They did nothing of the sort. Even if S. 45, had been applicable to the facts of this case in my opinion no collateral inquiry was necessary to determine the extent to which there had been a failure of consideration because on the facts pleaded and admitted by the parties it was merely a question of arithmetic. According to Mr. Kishan Dayal Rupees 1,000 had been paid by the hirer to the owners in advance for the use of the car for 8 months after which on the hirer performing all the conditions of the agreement the car was to become his property. Assuming that this contention is correct, the proportionate amount due to the owners for the ten days' use of the car would not have exceeded Rs. 50 which they had already received. In this connexion it must be remembered that the car had to become the property of the hirer on the payment of the full amount and therefore it does not necessarily follow that Rs. 1,000, was the hire for 8 months' use of the car. A substantial part thereof was also paid in consideration of the hirer becoming owner of the car after 8 months.

Brooks v. *Beirnstein* (1) and *Auto Supply Co. Ltd.* v. *Raghunatha Chetty* (2) are clearly distinguishable from the facts of the present case. In the first case it was held that if the hirer did not perform his contract the owner may take possession of the thing hired and claim hire for the time during which it remained in the possession of the hirer. As I have already stated no question of the hirer not performing his part of the contract arises in the present case. In the Madras case again it was held that when the hirer had broken the contract and the owner had taken possession of the article hired to him owing to the breach, the hirer is not entitled to the return of the same. In both these cases, therefore it had been found as a fact that the hirer had not performed his part of the contract. In the present case the finding of the learned District Judge is that the conduct of the plaintiffs in seizing the car did not amount to their exercise of any power given to them by the agreement, but it amounted to an abrogation of the contract. The case therefore is not one of forfeiture, but it is of cancellation of the contract and the

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1. (1909) 1 K B 98=78 L J K B 243=99 L T 970.
2. A I R 1929 Mad 884=121 I C 593=52 Mad 829.

plaintiffs are not entitled to claim anything by virtue of the agreement. They are also not entitled to claim on the basis of the cheque because there was a total failure of consideration. The view taken by the learned District Judge in my opinion is correct and I dismiss this appeal with costs.

K.S. *Appeal dismissed.*

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* A. I. R. 1933 Lahore 472

TAPP, J.

Bhola Nath—Defendant—Appellant.

v.

Behari Lal-Bulaqi Ram and *others*—Plaintiffs—Respondents.

Misc. First Appeal No. 1590 of 1931, Decided on 8th December 1932, from order of Sub-Judge, First Class, Delhi, D/- 22nd August 1931.

***Civil P. C. (1908), O. 21, R. 50—Decree against firm—Decree-holder can pursue any of the three courses regardless of their order.**

Rule 50, O. 21, Civil P. C., does not require the holder of a decree against a firm to first exhaust the remedy provided in Cl. (a) of the rule and then proceed under Cl. (b) and failing satisfaction under these two clauses proceed under Cl. (c). Under the rule he has three courses open to him, any of which he may pursue regardless of the order in which they are set out. [P 472 C 2]

Barkat Ali and *Gullu Ram*—for Appellant.

Kishan Dayal and *Mool Chand* — for Respondents.

Judgment. — Messrs. Behari Lal Bulaqi Ram, brought a suit against Rai Bahadur Nathu Mal, Mr. B. S. Puri, Mr. Chuni Lal, Mr. Manohar Lal and Colonel Bhola Nath, trading under the name and style of the Eastern Trading Company, for the recovery of Rs. 35,659-1-3, in the Court of the Subordinate Judge, Delhi. Rai Bahadur Nathu Mal died during the pendency of the suit and a decree for the amount claimed was passed against the remaining four persons "as partners of the Eastern Trading Company," on 30th June 1931. The decree-holders applied for transfer of the decree to Lahore for execution, but just prior to this application being made Colonel Bhola Nath, one of the judgment-debtors moved the Delhi Court to refuse any such application on the ground inter alia that the decree being against a firm it should be executed against the property of the partnership which to the value of some Rs. 50,000, was in the custody or possession of the decree-holders. The learned Subordinate Judge granted the application for transfer and on the certificate issued by him application for execution of the decree by arrest and attachment of the property of Colonel Bhola Nath has been made to a Lahore Court. Against the order of the Delhi Court the present appeal has been preferred by Colonel Bhola Nath and I would uphold the objection that no appeal lies against an order under S. 39, directing the transfer of the decree were it not for the fact that the learned Subordinate Judge at Delhi in making the order has observed that the decree is not against a firm, but against individuals and held that he cannot force the decree-holedr to take out execution first against the partnership property before seeking their remedy against the individual partners.

A great deal of the discussion before me has centred round the question whether the decree is against a firm or against individuals. In my opinion, it is quite unnecessary to decide this point for even if the decree has been granted against a firm there is nothing to prevent the decree-holders taking out execution against any one or more of the judgment-debtors who admittedly appeared in their own names and defended the suit. R. 50, O. 21, Civil P. C., does not require the holder of a decree against a firm to first exhaust the remedy provided in Cl. (a) of the rule and then proceed under Cl. (b) and failing satisfaction under these two clauses proceed under Cl. (c). Under the rule he has three courses open to him, any of which he may pursue regardless of the order in which they are set out. *Bombay Company Ltd., Karachi* v. *Kahan Singh* (1), cited by Mr. Barkat Ali does not lay down any proposition of law to the contrary and curtail or regulate the option of such a decree-holder.

In my opinion the authority in question merely requires that the holder of a decree against a firm who seeks to execute it against dormant partners under sub-R. (2) of the rule should first exhaust the remedies provided in Cls. (a), (b) and (c) of sub-R. (1). Finally it was urged that I should give a direction to the executing Court to exercise its discretion as to which of the remedies privided in Cls. (a) and (b) the decree-holders should be allowed to pursue. I decline to give any

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1. A I R 1931 Lah 736=134 I C 1026=13 Lah 327.

such direction. There is no force in the appeal and for the reasons stated I dismiss it with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 473 (1)

BROADWAY, J.

Niamat Rai—Petitioner.

v.

Hotu Ram and *others*—Opposite Parties.

Civil Revn. Petn. No. 641 of 1932, formerly Civil Appeal No. 1596 of 1932, Decided on 28th March 1933, from order of Dist. Judge, Dera Ghazi Khan, D/- 14th July 1932.

(a) Civil P. C. (1908), O. 21. R. 16—Order under O. 21. R. 16 by executing Court—Appeal is not competent.

An order passed by an executing Court under O. 21, R. 16 is not open to appeal. [P 473 C 2]

(b) Civil P. C. (1908), O. 21, R. 16—Decree in favour of several persons—Assignment of decree by one of them—Assignment passes only interest of assignor-decree-holder.

When one of several decree-holders assigns the decree, and an application to recognize the assignment is filed, the Court cannot recognize the assignment in respect of whole decree in favour of the assignee but only the interest of the assignor-decree-holder. [P 473 C 2]

Mehr Chand—for Petitioner.

M. L. Puri—for Opposite Parties.

Judgment. — Hotu Ram, his two brothers, Tillu Ram and Janji Ram and his two sons, Himta Ram and Bansi Ram, obtained a decree against Narain Das. Later on Himta Ram, son of Hotu Ram, executed a deed of assignment in favour of Lala Niamat Rai who had been Narain Das's counsel in the case, purporting to assign this decree to the said Lala Niamat Rai. Subsequent to this Lala Niamat Rai put in an application under O. 21, R. 16, Civil P. C., and the Court proceeded to examine Himta Ram and Narain Das and recognized the assignment in favour of Lala Niamat Rai. Against this order passed under O. 21, R. 16, Hotu Ram preferred an appeal to the District Judge objecting to the recognition of the assignment of the entire decree and urging that the decree in its entirety, at any rate, had not passed to Lala Niamat Rai under the assignment executed in his favour by Himta Ram. Objection was taken to the jurisdiction of the learned District Judge on the ground that no appeal was competent. The learned District Judge however held that an appeal did lie and proceeded to accept that appeal, holding that Himta Ram could not lawfully assign the decree in its entirety on behalf of the entire body of the decree-holders.

Against this decision the assignee, Lala Niamat Rai, has preferred this petition for revision and it has been urged that the learned District Judge had no jurisdiction to entertain the appeal as no appeal was competent. On the other side, it has been contended that the order of the executing Court was one falling within the purview of S. 47 (3), Civil P. C., and was therefore appealable. After hearing counsel I am inclined to the view that the petitioner's contention is correct and that the appeal to the learned District Judge was incompetent, but it seems to me that the order passed by the executing Court under O. 21, R. 16, was erroneous and I would therefore sitting as a Court of revision, modify that order so as to direct that the assignment by Himta Ram in favour of Lala Niamat Rai passed only Himta Ram's interest in the decree, whatever interest that may ultimately prove to be. The parties will bear their own costs in this Court.

K.S. *Order modified.*

A. I. R. 1933 Lahore 473 (2)

COLDSTREAM AND JAI LAL, JJ.

Badlu and *others*—Plaintiffs—Appellants.

v.

Mt. Umrao Kaur and *another*—Defendants—Respondents.

First Appeal No. 3198 of 1927, Decided on 19th January 1933, from decree of First Class Sub-Judge, Delhi, D/- 11th November 1927.

Custom (Punjab)—Succession — Delhi District —Collaterals precede daughter's son.

Collaterals succeed in preference to daughter's son in Delhi. [P 475 C 1]

Kishan Dayal and *Bhagwat Dayal* — for Appellants.

M. C. Mahajan and *Madan Mohan* — for Respondents.

Coldstream, J.—One Hazari, a Brahmin agriculturist of Hareoli in Delhi Tahsil, died on 15th January 1914, leaving a widow, Mt. Umrao Kaur, and an unmarried daughter, Mt. Labo. Mt. Umrao Kaur succeeded to his landed estate. Subsequently, she also took possession of the estate of her husband's brother, Mohar Singh, whose widow had died. On 24th May 1925, Mt.

Umrao Kaur adopted Hoshiar Singh, Mt. Lado's son, then about six months old declaring that she did so under her husband's direction. On 22nd October 1925, she executed a formal deed conveying to Hoshiar Singh the property which had belonged to her husband. On 8th January 1926, the appellants who are collaterals of Hazari in the tenth degree instituted the suit against Mt. Umrao Kaur and Hoshiar Singh from which this appeal arises, praying for a declaration that the gift of Hazari's land by Mt. Umrao Kaur to her daughter's son would not affect their reversionary rights. It was admitted at the trial that the family was governed by Customary law and that the land was ancestral and the Subordinate Judge held the adoption invalid, finding it not proved that Mt. Umrao Kaur had been authorized by her husband to make it. He dismissed the suit however on the ground that Hoshiar Singh was entitled to succeed to Hazari's property in preference to the plaintiffs and that the gift by Mt. Umrao Kaur merely accelerated succession to the estate.

Against this decision the collaterals have appealed through Mr. Kishen Dayal whose case is that the lower Court's finding regarding Hoshiar Singh's preferential right of succession is not justified upon the evidence and is contrary to the Customary law of the District, and that in any case the adoption being invalid his clients were entitled to a declaration that the gift made in October 1925, which did not pass the whole of Hazari's estate and therefore could not be regarded as a mere acceleration of succession, would not affect their rights. For the respondents, Mr. Mehr Chand Mahajan, while supporting the lower Court's decision that Hazari's distant collaterals were not entitled to sue in the presence of his daughter's son, disputes the correctness of the Subordinate Judge's finding that Mt. Umrao Kaur had not her husband's authority to adcpt a son to him.

There is no doubt that there was a formal adoption ceremony on 24th May 1925, which was followed by the deed of gift in October. But I think that the lower Court was right in deciding that Mt. Umrao Kaur failed to prove that she acted under instructions given her by her husband 11 years previously on his deathbed. Her story to explain why her husband did not himself adopt a son before he died was that she was pregnant at the time and her husband told her that if the child turned out to be a girl she was to adopt for him a son born of his daughter. Mt. Umrao Kaur's child was not born until more than 11 months after Hazari's death. So this story is extremely improbable. It is remarkable that so large a number of persons as have given evidence regarding the adoption ceremony should have been present when Hazari gave instructions to his wife, although they were not closely (if at all) related to him. Why they happened to come together to his bedside at the right moment is not explained ? I have no doubt that all this story is a fabrication.

As regards the rights of collaterals to succeed in preference to a daughter's son in Delhi, Mr. Kishen Dayal relies principally upon the riwajiam of the district reproduced in the Manual of Customary law prepared at the last settlement which evidence, he contends, concludes the matter in favour of his clients. The relevant portion of the riwajiam is in the answers to questions 60 and 63 where it is laid down that except in a few families where inheritance devolves according to Mahomedan law, a daughter is excluded from inheritance by the male kindred however distant (question 60) and that among Hindus daughters have no right to inherit (question 63). The evidence produced by the defendants which is merely the bare statements of witnesses, unsupported by instances, certainly does not discharge the onus of proving that riwajiam does not correctly describe the custom. To this Mr. Mehr Chand's only reply is that this portion of the riwajiam was not relied upon at the trial and that his clients are entitled to be given an opportunity to produce further evidence to meet what appears to be a new case. But the evidence makes it clear that the parties very clearly understood that the question whether distant collaterals excluded a daughter's son was a main issue for decision. The mere absence of a copy of the riwajiam from the record is immaterial: *Ata Muhammad* v. *Fateh Muhammad, A. I. R.* 1930 *Lah.* 900, for it is manifest that it was on the riwajiam that the plaintiffs relied in asserting their rights of succession as against a daughter's son. The plaintiffs, Baldewa and Badlu in the witness box expressly referred to the riwaj the latter explaining that by "general custom" he meant the riwajiam recorded at the settlement. This riwajiam of Delhi District has recently been accepted by this Court as authoritative evidence of

Customary law in *Mt. Ghogri* v. *Mt. Manbhari* (1). It is to be presumed that the parties produced the best evidence available at this trial and I do not think that the remand asked for by Mr. Mehr Chand is called for in the interests of justice. Having regard to what is stated in the riwajiam to be the custom and the failure of the defendants to produce any reliable evidence to the contrary I am of opinion that Mr. Kishen Dayal's argument must prevail and that the lower Court's finding that the collaterals have no locus standi must be reversed.

It follows that the gift to Hazari's daughter's son by Mt. Umrao Kaur cannot be regarded as a mere accelaration of succession. I would accordingly accept this appeal and decree the appellant's suit with costs throughout.

Jai Lal, J.—I agree.

M.N. *Appeal allowed.*

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1. A I R 1931 Lah 123=131 I C 347.

A. I. R. 1933 Lahore 475

DALIP SINGH AND AGHA HAIDAR, JJ.

Kartar Singh—Appellant.

v.

Gurdwara Parbandhak Committee and *others*—Respondents.

First Appeal No. 465 of 1930, Decided on 16th March 1933,

(a) Punjab Sikh Gurdwaras Act (8 of 1925), S. 16—Revenue records showing existence of gurdwara with langar and muafi attached to it should be relied on as against discrepant and contradictory oral evidence—Evidence.

Where the question to be decided was as to whether there was a gurdwara in a particular village and the revenue records showed that a gurdwara existed from earliest times, that the gurdwara was a place of worship for the Sikhs and that there was a langar and muafi attached to it and the oral evidence against this was discrepant and contradictory:

Held: the revenue records should be relied on as against the oral evidence. [P 476 C 1]

(b) Words and Phrases—Debra.

The word "debra" is generally used to describe a cremation place or death place. A birth place is never discribed as a debra. [P 476 C 1]

(c) Punjab Sikh Gurdwaras Act (8 of 1925), S. 18—Income from land being used for expenses of langar of gurdwara for long time—Presumption is that land is muafi.

Where the income from a land has been used for a long time for the expenses of the langar of a gurdwara, the presumption is that the land is muafi belonging to the gurdwara. [P 476 C 2]

(d) Punjab Sikh Gurdwaras Act (8 of 1925), S. 18—Mahants of gurdwara erecting buildings on land of gurdwara—Presumption is that such buildings pertain and attach to gurdwara.

Where the mahants of a gurdwara who are in possession of the lands of gurdwara as custodians for the benefit of the gurdwara erect buildings on such land, the presumption is that the buildings pertain and attach to the gurdwara. [P 476 C 2]

Nand and *Basant Krishna* — for Appellant.

Bhagat Singh—for Respondents.

Dalip Singh, J.—Under Government Notification the Gurdwara Dhera Daroli Bhai No. 173 was notified to be a Sikh Gurdwara. The usual consolidated list was published and the present appellant was one of the petitioners claiming certain property alleged to belong to the gurdwara. Some of his claim was decreed and no longer concerns us, but a portion of his claim relating to eight holdings in village Daroli Bhai together with the muafi rights attached to these holdings and certain buildings situated on one of the plots in the said eight holdings were held to be the property of the gurdwara and the petitioner's claim to them was dismissed. The petitioner has therefore come in appeal.

The first point arising in the appeal is whether the gurdwara actually scheduled in the Notification is the one to which the muafi and buildings, etc., were attached; in other words, whether the identity of the scheduled gurdwara has been established or not. On this point the case for the respondents was that the gurdwara in question was a gurdwara in connexion with the cremating place of Mata Damodri, wife of Guru Hargobind, the sixth Guru. The case for the petitioner was that the only gurdwara in mauza Daroli Bhai was a gurdwara situated inside the village and built to commemorate the birth of Baba Gurditta, son of Guru Hargobind. The special Tribunal held that the case of the petitioners was incorrect and that of the respondent-objectors was correct, and that the gurdwara was sufficiently identified. The petitioners produced a good deal of oral evidence to establish their case and at first sight this oral evidence no doubt looks imposing in comparison with the oral evidence produced by the objectors, but on being looked at more closely the oral evidence is discrepant, contradictory and in opposition to revenue entries from the earliest times onwards which clearly establish that there was a gurdwara in memory of Mata Damodri Ji situate in this village. This is a first point to be borne in mind. It is also clear from the revenue entries that this said gurdwara was a place of worship for the Sikhs and that there was a langar and muafi attached to it, obviously making it a place of importance. According to the case for the petitioner there was no gurdwara Mata Damodri Ji at all and there is only a samadh of Mata Damodri Ji at which there is no langar and where the Granth Sahib has never been opened and on Sikhs collect for worship. I would hold therefore that it is sufficiently proved as against the oral evidence by the revenue entries that there is a gurdwara of Mata Damodri Ji in this village.

The next question to determine is whether it is outside or inside the village. As regards that the special Tribunal relied on a history known as Gur Bilas wherein it was stated that Mata Damodri Ji was cremated outside the village. It has been contested before us that this history is inadmissible. It is quite unnecessary to decide this point because it is the case of the petitioners themselves that the samadh of Mata Damodri Ji is outside the village and ordinarily speaking the samadh would be erected at the place where the cremation took place. Secondly, the very word "debra," which probably owing to a printing error has been printed in the schedule as "dhera," is generally used to described a cremation place or death place and it is admitted by the petitioner himself as his own witness that a birth place is never described as a debra. Now, the case for the petitioners being that the gurdwara inside the village was to commemorate the birth of the son of Guru Hargobind and the gurdwara scheduled being scheduled as a "dera" or "dehra" it is clear that it must refer to some other gurdwara. The only other gurdwara it could refer to is the one which, according to the objectors, commemorates the death of Mata Damodri Ji. I would therefore hold that it is clearly proved that the gurdwara is outside the village. In fact the whole of the case of the petitioners has been an attempt to take advantage of the misprint with respect to the word "dehra."

The next point that was contended was that it was not proved that the land in dispute together with the muafi rights and the buildings thereon were proved to belong to the gurdwara. As regards this, it is unnecessary to say much except that the decision of the Tribunal referring to the documentary evidence on the point amply supports the conclusion arrived at. It is clear that from the very beginning this land was muafi granted for the purposes of the expense of the langar of the gurdwara and the ancestors of the petitioners have at various times and in various documents asserted that they were spending the income derived from the said land on the expenses of the langar. These admissions, made long before the suit, it has been contended, are inadmissible, but no authority was cited for this somewhat extraordinary proposition. No other argument was advanced as against them and they would undoubtedly shift the onus very heavily on to the petitioner to prove that he was the owner, and not the trustee, on behalf of the gurdwara. He has utterly failed to discharge any such onus. I would therefore hold that it is clearly proved that the land and the muafi belong to the gurdwara. The only point remaining is the question of the buildings. Now, the petitioner's predecessors-in-interest were trustees, according to themselves mahants, of the gurdwara, and were in possession of these lands as custodians for the benefit of the gurdwara. If knowing all the facts they proceeded to build on the land admittedly belonging to the gurdwara surely the presumption must be that the buildings were meant to pertain to and attach to and belong to the gurdwara. I therefore consider that the conclusion of the Tribunal on this point also is correct. I would therefore dismiss the appeal with costs.

Agha Haidar, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 476

SHADI LAL, C. J. AND BROADWAY, J.

Gujar Mal-Kundan Lal—Appellants.

v.

Nanak Chand Kalu-Mal and *others*—Respondents.

Letters Patent Appeal No. 136 of 1927, Decided on 20th February 1933.

Civil P. C. (1908), O. 47, R. 1—Appealable order—Revision filed and dismissed — Review sought for treating it as appeal—Point escaping every one's notice—Good ground for interference in appeal—Review was justified.

A Court entertaining a revision held that though there was a mistake of law in the judgment sought to be revised, that was no ground for revision. It escaped the notice of all concerned that an appeal could lie to the same Court. The applicant sought a review on that ground and the Court reviewed its order and treated it as an appeal and allowed it:

Held : that the Court having acted on the ground of there being a mistake or error, apparent on the face of the record, it was justified in granting the review: *A I R* 1922 *P C* 112, *Dist.*
[P 477 C 1, 2]

Mehr Chand Mahajan — for Appellants.

Jagan Nath Aggarwal and *Asa Ram Aggarwal*—for Respondents.

Shadi Lal, C. J.—The plaintiffs, who were dissatisfied with an order for rateable distribution under S. 73, Civil P. C., brought the action, which has given rise to this appeal, to compel a refund of the assets which according to them had been improperly distributed. Their suit was dismissed by the Subordinate Judge of the Third Class. Against the decree dismissing the suit, they preferred an appeal to the Senior Subordinate Judge, who concurred with the Court of first instance and dismissed the appeal. Thereupon, they preferred an application for revision to the High Court which was rejected by Jai Lal, J., who, while holding that the judgment sought to be revised was wrong in law, dismissed the application on the ground that an error of law did not amount to a material irregularity as contemplated by the law of revision. The plaintiffs then realized that the suit as instituted by them was not a small cause suit, but an unclassed suit, vide Art. 26, Provincial Small Cause Courts Act; and that a second appeal lay to the High Court. They accordingly made an application to the learned Judge for a review of his judgment rejecting the application for revision, and asking him to treat the latter application as a memorandum of second appeal. The learned Judge granted the review on the ground that there was a mistake or error apparent on the face of the record, and, after setting aside his order rejecting the application for revision he heard the case as a second appeal and granted a decree to the plaintiffs.

The defendants have preferred the present appeal under Cl. 10, Letters Patent, and it is urged before us that the Single Judge had no jurisdiction to grant the application for review. The learned counsel for the appellants places his reliance upon the judgment in *Chhajju Ram* v. *Neki* (1), which lays down the rule that "any other sufficient reason," which under O. 47, R. 1, constitutes a valid ground for granting a review, means a reason sufficient on grounds at least analogous to those specified immediately previously, and contends that in the present case the grounds for review did not satisfy that condition. But as pointed out above, the learned Judge granted the review, not on the ground of any other sufficient reason, but on that of mistake or error apparent on the face of the record. As explained by him, when he made the order rejecting the application for revision,

> "the pleaders on both sides and myself were under a misapprehension as to the nature of the jurisdiction that I was exercising, otherwise I would have granted the relief prayed for. In fact I had no jurisdiction to entertain the application for revision."

He followed the judgment in *Murari Rao* v. *Balavanth Dikshit* (2), in which the application for review was granted on the ground of error of law apparent on the face of the record. After hearing arguments on both sides, I am not prepared to dissent from the conclusion of the learned Judge and to hold that he was not justified in granting the review. The learned counsel for the appellants also contends that, as the suit was an unclassed one, and its value for purposes of jurisdiction was Rs. 332, the Senior Subordinate Judge had no jurisdiction to hear the appeal from the decree of the Court of first instance. This contention is well-founded and the learned counsel for the respondents frankly admits that the judgment of the Senior Subordinate Judge was coram non judice. I would accordingly accept the appeal; and setting aside the judgment of the Single Judge as well as that of the Senior Subordinate Judge, direct the latter to return, on or before 28th February 1933, the memorandum of appeal to the plaintiffs for presentation to the proper Court. The parties are directed to bear their own costs in this Court.

Broadway, J.—I concur.

M.N. *Appeal allowed.*

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1. A I R 1922 P C 112=72 I C 535=49 I A 144=3 Lah 127 (P C).
2. A I R 1924 Mad 98=76 I C 342=46 Mad 955.

✻✻ A. I. R. 1933 Lahore 477

HARRISON AND ADDISON, JJ.

Sardar Mohammad—Appellant.

v.

Labhu Ram—Respondent.

Misc. Second Appeal No. 1046 of 1931, Decided on 7th April 1933.

✻ ✻ Provincial Insolvency Act (1920), S. 51 (1)—Property sold in execution of decree pending insolvency petition and amount realized by decree-holder—Receiver applying to insolvency Court for refund of amount—Application rejected—Held that amount realized was assets realized within S. 51 (1)—Held also that insolvency Court could decide application under Provincial Insolvency Act (1920), S. 4.

A decree was being executed against a certain person who became an insolvent. Between the date of the admission of the petition of insolvency and the adjudication of the said petition certain property belonging to the insolvent was sold in execution of a decree by one *A*. The sale proceeds were handed over to *A*. The receiver then applied to the insolvency Court that *A* should be asked to refund the sale proceeds to the receiver under the provisions of S. 51. Both the lower Courts refused to entertain this application:

Held: that the assets were realized after the date of the admission of the petition so that under S. 51 (1) the Official Receiver was entitled to the assets realized by *A*: [P 478 C 2]

Held also: that S. 4 applied and the Insolvency Court had full power to decide the question which had arisen directly out of the insolvency proceeding before it: *AIR* 1930 *Lah* 39, *Diss from*. [P 478 C 2]

Jagan Nath Aggarwal—for Appellant.

Achhru Ram—for Respondent.

Addison, J.—On 3rd January 1929, Labhu Ram obtained a money decree against Ibrahim. He took out execution immediately. On 5th April 1929, Ibrahim petitioned to be adjudicated an insolvent and his petition was admitted on 12th April 1929. He was adjudicated an insolvent on 16th May 1930. When his petition was pending in the Insolvency Court, Ibrahim, applied both to the Insolvency Court and to the executing Court to stay execution proceedings. Both Courts refused to do so. Certain properties were then sold in execution of the decree and the decree-holder Labhu Ram realized some Rs. 15,000, when the insolvency petition was still pending. After Ibrahim had been adjudicated an insolvent the Official Receiver applied on 18th June 1930, to the Insolvency Court for an order directing Labhu Ram to pay him what he had realized in execution of his decree. The Insolvency Court and the lower appellate Court have held, following, *A. I. R.* 1930 *Lah*. 39, that it was not competent for the Insolvency Court to do so and that the only remedy the Official Receiver had was by way of instituting a regular suit. Against this decision this second appeal has been preferred and it has been referred to a Division Bench as Dalip Singh, J., before whom it came, was doubtful of the correctness of the authority mentioned. During the pendency of the insolvency petition the Official Receiver could take no action as he was not asked to deal with the estate until the petition was decided. If the proceedings had been pending in the executing Court when the petition was decided and the Official Receiver had started to act it was the duty of the executing Court under the provisions of S. 52, Insolvency Act, on application made to it to direct the property under attachment to be delivered to the Receiver. This could not be done as the property had been sold by that time. To this state of affairs S. 51 (1), Insolvency Act, applies. It runs as follows:

> "Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date of the admission of the petition."

The assets were realized after the date of the admission of the petition so that under this section the Official Receiver is entitled to the assets realized by Labhu Ram. Further, S. 4 (1), Insolvency Act, is as follows:

> "Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

In the present case there is a question as to whether the Official Receiver is entitled to the assets realized by Labhu Ram in execution of his decree against Ibrahim, and it arises in Ibrahim's case of an insolvency. It follows that S. 4, Insolvency Act, applies and the Insolvency Court has full power to decide the question and in fact should decide this question which arises directly out of the insolvency proceeding before it. With all respect I am unable to understand the reasoning of the learned Judge who decided *A. I. R.* 1930 *Lah*. 39. He said:

> "The proper course for the Official Receiver was to apply, under S. 52, to the executing Court and admittedly this was not done. The amount having been paid and there being no provision in the Insolvency Act authorizing the Insolvency Court to direct a refund, I do not see how the Court has got the power to direct the decree-holder to restore the amount."

I have already pointed out that S. 52 applied to a state of affairs antecedent to what is contemplated by S. 51 (1) of the Act. It is laid down in S. 51 (1) that the Official Receiver is entitled to the assets in question. It is enacted in S. 4 that the Insolvency Court shall have full power to decide all questions of any nature whatsoever arising out of the insolvency. Surely this was one of them. In my judgment it was the duty of the Insolvency Court to decide the question. I would accordingly accept the appeal and setting aside the orders of the Courts below would direct Labhu Ram to pay to the Official Receiver the sum of Rs. 15,190, realized by him in execution of his decree against Ibrahim. This order will have the force of a decree and the Official Receiver will have his costs throughout.

Harrison, J.—I agree.

V.S. *Appeal accepted.*

A. I. R. 1933 Lahore 479

BHIDE, J.

Lal Chand and *others*—Appellants.

v.

Gian Chand—Respondent.

Second Appeal No. 1021 of 1929, Decided on 31st January 1933.

(a) Limitation Act (1908), S. 7—Suit by joint Hindu family—Major manager—Competency to give discharge—S. 7 applies.

In a suit by the members of a joint family only one member of which was a major for over three years before, the suit, if the major was the manager of the family the fact that he was not competent to give discharge in the absence of any benefit to the family would not prevent S. 7 being applicable: 38 *Mad* 118 and *A I R* 1921 *Bom* 289, *Rel on* and *held not Overruled by A I R* 1926 *P C* 16. [P 480 C 1]

(b) Limitation Act (1908), S. 7— Suit involving immovable properties—S. 7 applies.

The word "discharge" as used in S. 7 is wide enough to include any form of quittance, whereby the rights and liabilities between two parties are put an end to and hence the section applies to cases involving immovable property also: *A I R* 1922 *Bom* 319 and *A I R* 1915 *Mad* 723, *Rel on*; *A I R* 1931 *All* 398, *not Foll.* [P 480 C 1]

(c) Limitation Act (1908), S. 7—Applicability to joint Hindu family—Managership and competency to give discharge must be proved.

It cannot be predicted of every Hindu family that an adult brother as soon as he becomes major, becomes the manager and therefore necessarily competent to give a discharge. Payment to one may not in every case operate as a discharge. This depends upon several questions of fact and a variety of circumstances varying with different families and unless the necessary facts are properly alleged and proved by the party who wants to deprive the person under disability of the benefit of S. 7, the claim cannot be thrown out as barred by limitation : *A I R* 1925 *Nag* 385, *Foll.* [P 480 C 2]

Mukand Lal Puri—for Appellants.

Fakir Chand—for Respondent.

Order.—The material facts for the purpose of this second appeal may be briefly stated as follows: The defendants in this case are the sons of one Daulat Rai, while the plaintiffs are the sons and grandsons of Devi Dayal who was a nephew (sister's son) of Daulat Rai. Plaintiffs claimed to be the owners of certain property ,which was alleged to have been given in trust to the defendants during plaintiffs' minority, but misappropriated by them in breach of the trust. Defendants denied that there was any trust and claimed that they were themselves the owners of the property. They also pleaded that the suit was time barred. The trial Court granted the plaintiffs a declaratory decree to the effect that they were the owners of two shops at Chuharkana and also an injunction restraining the defendants from interfering with the management of these shops, which were in the possession of certain tenants. The suit was dismissed in other respects. Both parties appealed. The learned District Judge dismissed the appeal of the defendants, but accepted the cross-appeal of the plaintiffs and granted them in addition a decree for account of the rents unlawfully realized by the defendants. From this decision, the defendants have preferred a second appeal.

The sole point, which the learned counsel for the appellants has argued is that of limitation. The learned District Judge found that the plaintiffs were members of a joint Hindu family. At the date of the suit some of the plaintiffs had attained majority while the others were still minors. The contention of the appellants was that as the manager of the family (plaintiff, Girdhari Lal), had failed to sue within three years after attaining majority, the whole suit was barred by virtue of S. 7, Limitation Act. The learned District Judge has rejected this contention on the ground that the manager of the family was not competent to give a valid discharge in the circumstances of this case as there was obviously no benefit to the family in not instituting a suit for the property in dispute and allowing it to remain in the possession of the defendants. The learned counsel for the appellant has urged that this view of the learned District Judge is erroneous and in support of this contention he has relied mainly on *Bapu Tatya* v. *Bala Ravji* (1) and *Doraiswami Serumadan* v. *Nandiswami Seluvan* (2). The learned counsel for the respondents has on the other hand contended that these rulings must be considered to be overruled in view of the judgment of their Lordships of the Privy Council in *A. I. R.* 1926 *P. C.* 16. He has further urged that S. 7, Limitation Act, is not applicable and that even if it were applicable it is not proved that Girdhari Lal, plaintiff, was the manager of the family and was competent to give a valid discharge.

There is, I think, no force in the contention that the view taken by the Madras High Court in *Doraiswami Serumadan* v. *Nandiswami Seluvan* (2)

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1. AIR 1921 Bom 289=59 I C 759=45 Bom 446.
2. (1915) 38 Mad 118=21 I C 410.

which was followed in *Bapu Tatya* v. *Bala Ravji* (1) was overruled by the decision of their Lordships of the Privy Council in *A. I. R.* 1926 *P. C.* 16. This point was carefully considered by a learned Judge of this Court in *A. I. R.* 1929 *Lah*. 14, and it was pointed out that the facts in *A. I. R.* 1926 *P. C.* 16 were different and there is no justification for the view that the Full Bench ruling of the Madras High Court in *Doraiswami Serunadan* v. *Nandiswami Seluvan* (2) is no longer good law. I respectfully concur in this view. A Division Bench of the Madras High Court has also considered the effect of the above referred ruling of their Lordships of the Privy Council in *A. I. R.* 1928 *Mad*. 42 and seems to have come to a similar conclusion. I do not think the learned District Judge was right in holding that S. 7 did not apply inasmuch as Girdhari Lal was not competent to give a valid discharge when there was no benefit to the family. The learned District Judge has not quoted any authority in support of this view and it cannot, in my opinion, be sustained. All that S. 7 says is "time will begin to run when a discharge can be given without the concurrence of the person under disability." It does not say that a valid discharge should actually have been given. S. 7 seems merely to refer to the capacity to give such discharge. If he gives a discharge without any benefit to the family his act may perhaps be liable to be challenged by the minors in a properly constituted suit; but that seems to be immaterial so far as the present question of limitation is concerned: cf. the judgment of Fawcett, J., in *Bapu Tatya* v. *Bala Ravji* (1). In support of his contention that S. 7, Limitation Act, applies only to cases where there is any question of discharge of debts and not to cases involving immovable property, the learned counsel for the respondent has referred to *A. I. R.* 1931 *All*. 398. But this view is not supported by any other authority and seems to be opposed to *Doraiswami Serunadan* v. *Nandiswami Seluvan* (2) and *Bapu Tatya* v. *Bala Ravji* (1), wherein S. 7 was applied though immovable property was involved. It has been said in *Keval Bai* v. *Madhu Kala* (3) that the word "discharge" as used in S. 7, Limitation Act, is wide enough to include any form of quittance, whereby the rights and liabilities between two parties are put an end to and a similar view was expressed by the Madras High Court in *Parmeswaran Nambudripad* v. *Sankaran Nambudripad* (4).

The next contention of the learned counsel for the respondent, viz., that there is nothing to show that Girdhari Lal was the manager of the family and that he was actually in a position to give a valid discharge on behalf of the minor plaintiffs within three years after attaining majority however seems to be sound. The learned District Judge seems to have merely assumed that Girdhari Lal was the manager without considering the evidence or recording any finding. He has also given no definite finding as to when he attained majority. The trial Court on the other hand had considered the question and pointed out there was no evidence to show that Girdhari Lal was in fact the manager as alleged by the appellants. It was urged on behalf of the appellants that there was some evidence to show that Girdhari Lal tried to recover the rent of the shops and had applied for being impleaded in some rent suits filed by the defendants. But this would not necessarily be sufficient to show that he was manager. It will also have to be found definitely when he became a manager and thus competent to give a valid discharge without the concurrence of the minor plaintiffs. It might be noted in this connexion that Girdhari Lal is a nephew while some of the other plaintiffs (Gyan Chand and Manohar) are his uncles. As pointed out in *Sham Puri* v. *Ram Chandra* (5):

> "It cannot be predicted of every Hindu family that an adult brother as soon as he becomes major becomes the manager and therefore necessarily competent to give a discharge. Payment to one may not in every case operate as a discharge. This depends upon several questions of fact and a variety of circumstances varying with different families and unless the necessary facts are properly alleged and proved by the party who wants to deprive the person under disability of the benefit of S. 7, Lim. Act, the claim cannot be thrown out as barred by limitation."

As the learned District Judge has not considered this point, I remand the case (O. 42 read with O. 41, R. 25, Civil P. C.), for a finding on the following issue: Was Girdhari Lal manager of the joint family of the plaintiffs and if so since when did he become a manager and was in a position to give a valid discharge on behalf of the plaintiffs ? Finding to be returned by 1st May 1933. Objections if any to be filed on or before 15th May 1933. Hearing to be fixed as early as possible thereafter.

Case remanded.

M.N.

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3. A I R 1922 Bom 319=64 I C 972=46 Bom 535.
4. A I R 1915 Mad 723=25 I C 755.
5. A I R 1925 Nag 385=88 I C 268.

A. I. R. 1933 Lahore 481 (1)

ADDISON, J.

Ghulam Mohammad — Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1558 of 1932, Decided on 17th February 1933, from order of Sess. Judge, Multan, D/- 1st November 1932.

Penal Code (1860), S. 378—Removal of property, with no right to do so, by way of asserting right to such property is theft.

Where in asserting a right to some property which a person believes to be good, he does something which he knows he has no right to do, e. g., he takes the law into his own hands and removes the property in question from the possession of his opponent who claims the property for himself he may be guilty of theft. Complainant, who had purchased a tree, had felled and had cut it up into suitable logs but the petitioners who claimed it as belonging to the proprietors of the village removed the timber:

Held: the act of the petitioners was unlawful and was not covered by a proper bona fide claim. [P 481 C 2]

Mohammad Amin—for Petitioner,

Madan Lal—for the Crown.

Judgment. — Ghulam Mohammad lambardar, was sentenced by a Magistrate, First Class, to two months' simple imprisonment under S. 379, Penal Code, and to Rs. 50 fine under S. 447, Penal Code, while Mahmud Ali and Khairan were sentenced to one month's rigorous imprisonment under S. 379, Penal Code, and to Rs. 10 fine each under S. 447, Penal Code. They appealed and were let out on bail by the Sessions Judge after they had undergone ten days' imprisonment. He accepted their appeal so far as to reduce the periods of imprisonment to what had already been undergone, but maintained the fines. Against this decision Ghulam Mohammad has preferred one revision petition and the other three another. There was a house in the abadi which was admittedly in the occupation of Dhanu Ram alias Ghulam Mohammad. He first mortgaged it in 1922 and then sold it in 1928 to Sewa Ram, who took possession of the house and continued to remain in possession, although part of the house is in a tumble-down condition. A shisham tree stood in the court-yard and this also was sold. Sewa Ram felled it and cut it into fourteen logs of various sizes, which he stacked in the court-yard of the house. There is no dispute as to the facts up to this stage.

Ghulam Mohammad claimed that the proprietors of the village were entitled to all trees grown in the village site. He accordingly, along with the three others, went to the court-yard of the house in question and removed the stacked timber therefrom. It is for doing so that the four petitioners have been convicted and sentenced as stated. The law does not seem to admit of any doubt that where in asserting a right to some property which a person believes to be good, he does something which he knows he has no right to do, e. g., he takes the law into his own hands and removes the property in question frmo the possession of his opponent who claims the property for himself, he may be guilty of theft. In the present case the complainant had felled the tree and had cut it up into suitable logs before the petitioners removed the timber. The act of the petitioners was therefore unlawful and it cannot be said to be covered by a proper bona fide claim. For this reason I am not prepared to interfere with the convictions of the petitioners.. The offences committed however are of a very technical kind and I accept the petition of Ghulam Mohammad to the extent of reducing his fine to Rs. 10. The balance of Rs. 40 which he has paid in excess, will be refunded to him. In the case of the other three petitioners I do not think that it was necessary to impose a fine at all on them. I would accept their petition to the extent of remitting the fine of Rs. 10 each imposed upon them. These sums will be refunded to them.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 481 (2)

ADDISON AND AGHA HAIDAR, JJ.

Het Ram and *another*—Plaintiffs—Appellants.

v.

Dal Chand and *others*—Defendants—Respondents.

Second Appeal No. 243 of 1928, Decided on 20th December 1932, from decree of Dist. Judge, Delhi, D/- 26th October 1927.

Punjab Pre-emption Act (1 of 1913), S. 16—Suit for pre-emption—Plaintiff should continue to have right till date of decree.

The law of pre-emption is a highly technical one and a plaintiff, before he can succeed, must show that his right existed not only in its preliminary stages before he went into the Court but also while the case was in the course of active prosecution before the Judge and in fact up to the time when the Court passed the decree. He should show that he has the right on three important dates, viz.. (1) the date of the sale, (2) the date of the institution of the suit and (3) the date of the first Court's decree: *A I R* 1924 *All* 448; *A I R* 1924 *All* 82; 44 *Cal* 47; 46 *I C* 339 and 46 *I C* 353, *Rel on*; *A I R* 1922 *Lah* 344; *A I R* 1923 *Lah* 339; *A I R* 1925 *Lah* 56 and 21 *All* 374 (*F B*), *Ref.* [P 483 C 1]

Kishen Diyal and *Bhagwat Dayal*—for Appellants.

Shamair Chand and *Qabul Chand*—for Respondents.

Agha Haidar, J.—These three connected appeals (Nos. 243, 244 and 245 of 1928) arise out of three pre-emption suits. Both the Courts below dismissed the plaintiff's suits and the plaintiff has come up to this Court in second appeal. The appeals were first heard by a learned Judge of this Court: but, in view of what the learned Judge described as the serious conflict of opinion on the point at issue, he thought it advisable to refer them to a Division Bench. The facts of the case are fairly simple and the judgment of the learned District Judge and of the learned referring Judge of this Court are full and exhaustive, and it is not necessary to go into them in any detail. At the time when the three suits were instituted the plaintiff was admittedly a cosharer in the property sought to be pre-empted, but a parallel litigation had been going on in the shape of a partition suit and, before a decree could be passed, the final stages of the partition suit had been reached and certain specific plots were marked off for each of the cosharers. The result of this was that the plaintiff ceased to be a cosharer in the land in respect of which he had brought the three pre-emption suits. The Punjab Pre-emption Act, (Local Act No. 1 of 1913), gives the right of pre-emption to various classes of persons and, under S. 16, firstly, the plaintiff must be a cosharer in the property. There is no definition of the word "cosharer" given in the Act and we have to go to first principles in order to find out who is a cosharer under a given set of circumstances.

There are two decisions of this Court which require consideration and which seem to have weighed with the learned referring Judge of this Court. The first is reported as *Mohindar Singh* v. *Arur Singh* (1). In that case two suits for pre-emption were pending in the trial Court and, during their pendency, a notification was issued by the Punjab Government under the provisions of S. 8 (2), Punjab Pre-emption Act, declaring that "no right of pre-emption shall exist" within a certain area. The two Courts below dismissed the plaintiff's suits, holding that the right of pre-emption claimed by the plaintiff had been wiped out as a result of the Punjab Government Notification. The plaintiff filed two second appeals against the dismissal of his suits. These appeals came up for hearing before a Division Bench of this Court which held that, if a right of pre-emption existed at the date of the suits, the mere fact that the Notification had been issued while the suits were pending would not deprive the plaintiff of his right unless the Notification had retrospective effect. Admittedly the Notification had no retrospectivity and the learned Judges held that, under the circumstances, the right of pre-emption, which existed at the date of the institution of the suits, could not be said to have been taken away as a result of the Notification. They further held that, although there might be circumstances which justified a Court in refusing to enforce a right of pre-emption unless it was maintained intact throughout the progress of the suit, the usual method of dealing with the suit was to decide the questions at issue according to the state of affairs existing when the plaintiff's cause of action arose. The learned Judges (Abdul Raoof and Campbell, JJ.), accepted the appeals and remanded the two suits for decision on the other points at issue.

In a subsequent decision reported as *Ladha Ram* v. *Jidhu Ram, A. I. R.* 1923 *Lah.* 339, Campbell, J., had to consider a similar question and he dismissed the plaintiff's suit because, before the decree could be obtained, circumstances had happened which were calculated to deprive him of his right of pre-emption. In this case *Mohindar Singh* v. *Arur Singh* (1) was referred to and the learned Judge held that the circumstances of the case which was before him justified the dismissal of the suit on the ground that before the decree could be passed the plaintiff had lost his right of pre-emption by ceasing to be a cosharer. The other case is *Amar Chand* v. *Satyapal, A. I. R.* 1925 *Lah.* 56, where Rossignol, J., held that the plaintiff's right should be determined by the situation existing at the time of the sale. No authority is quoted in support of this view. This matter has been considered in a number of decisions by the Allahabad High Court. It was held in *Janki Prasad* v. *Ishar Das* (2), that a cause of action

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1. A I R 1922 Lah 344=67 I C 625=3 Lah 267.
2. (1899) 21 All 374=1899 A W N 126 (F B)

must exist at the date of the institution of the suit. It was not necessary for the learned Judges to decide any other matter and this case therefore cannot be said to be an authority in favour of the plaintiff.

There are however more recent decisions of the Allahabad High Court, e. g., *Baldeo Misir* v. *Ram Lagan Shukul* (3) and *Umrao* v. *Lachhman* (4), in which the view has been expressed that the plaintiff, in order to maintain his suit for pre-emption, should have his right to pre-empt on three important dates, namely, (1) the date of the sale; (2) the date of the institution of the suit; and (3) the date of the first Court's decree. This seems to be the correct view and, with due respect, I fully endorse it. The law of pre-emption is a highly technical one and a plaintiff, before he can succeed, must show that his right existed not only in its preliminary stages before he went into the Court, but also while the case was in the course of active prosecution before the Judge and in fact up to the time when the Court passed the decree. I may mention here the case reported as *Muri Mian* v. *Ambica Singh* (5), where the learned Judges have accepted the principle that a person, who enforces a right of pre-emption in a suit, must establish his right not only before he instituted his suit, but at the time when the decree had been given in his favour.

There are two cases reported as *Kehri Singh* v. *Mt. Deo Kunwar* (6) and *Wali Muhammad Khan* v. *Nabi Hasan* (7), which follow the law as laid down in the Allahabad decisions. Thus it appears that there is a large volume of case-law in which the point had been definitely agitated and the view expressed that the plaintiff must have his right not only at the date of the sale or at the date of the institution of the suit, but right up to the moment when the decision of the Court is to be given in the shape of a decree. Under these circumstances, and having regard to the findings of fact arrived at by the learned Judge of the lower appellate Court, the plaintiff's suits must fail. I would therefore affirm the decrees of the lower appellate Court in the three suits and dismiss with costs the three appeals preferred by the plaintiff.

Addison, J.—I agree.

K.S. *Appeals dismissed.*

✻ A. I. R. 1933 Lahore 483

TAPP, J.

Ram Lal Kapur & Sons—Plaintiffs—Appellants.

v.

Asian Commercial Assurance Co. Ltd. Defendants—Respondents.

Second Appeal No. 682 of 1932, Decided on 21st November 1932, from decree of Addl. Dist. Judge, Lahore, D/-19th January 1932.

✻ Principal and Agent—Agent is entitled to call for accounts from principal in special circumstances—Contract Act (1872), S. 213.

While the principal is under no statutory obligation to render accounts to his agent, he does become an accounting party in special circumstances or under trade usage or a definite contract. The right to claim a statement of accounts is an unusual form of relief only granted in certain specific cases and is only to be claimed when the relationship between the parties is such that this is the only relief which will enable the claimant to satisfactorily assert his legal rights: 60 *P R* 1899; *A I R* 1925 *Lah* 100 and *A I R* 1927 *Lah* 701, *Ref.* [P 484 C 1]

Where the plaintiffs who were insurance agents were to be remunerated by a commission calculated on the premia paid on all policies effected or introduced through them:

Held: as the plaintiffs cannot certainly know which of these policies have lapsed, matured or been forfeited, they are entitled to call on the defendants for rendition of accounts as this is the only relief which will enable the plaintiffs to satisfactorily assert their rights. [P 481 C 1]

M. L. Batra—for Appellants.

Ram Lal Anand—for Respondents.

Judgment.—The plaintiffs as agents brought a suit, against the Asian Commercial Assurance Company Limited, of Bombay, for rendition of accounts for the period January 1925 to the end of 1926. They were refused a preliminary decree and their suit dismissed on the ground that an agent could not sue his principal for rendition of accounts. An appeal against this order was dismissed by the Additional District Judge, Lahore, and the plaintiffs have come up in second appeal. Both the Courts below have referred to S. 213, Contract Act, which requires an agent to render proper accounts to his principal on demand, but there is no provision for the converse proposition that a principal is liable to render accounts to his agent.

For the proposition that an agent is not entitled to call for accounts from his principal, the lower appellate Court

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3. A I R 1924 All 82=77 I C 694=45 All 709.
4. A I R 1924 All 448=79 I C 217=46 All 321.
5. (1917) 44 Cal 47=34 I C 869.
6. (1918) 46 I C 339.
7. (1918) 46 I C 353.

has relied on *A. I. R.* 1925 *Lah.* 100 and *A. I. R.* 1927 *Lah.* 701. In both these reported cases the decision contained in *Jowahar Singh* v. *Harya Mal* (1), was followed, but in none of the authorities cited has any hard and fast rule been laid down that under no circumstances can an agent call on his principal to render accounts. On the contrary a perusal of all three authorities will show that, while the principal is under no statutory obligation to render accounts to his agent, he does become an accounting party in special circumstances or under trade usage or a definite contract. It was further observed in the 1899 decision that the right to claim a statement of accounts is an unusual form of relief only granted in certain specific cases and is only to be claimed when the relationship between the parties is such that this is the only relief which will enable the claimant to satisfactorily assert his legal rights. On p. 507 of Katiar's treatise on the Law of Agency in British India, 1928 edition, it is remarked that it has been held in England that where the accounts between a principal and agent are of so complicated a nature that they cannot be satisfactorily disposed of in an action at law, an agent, in such a case, has a right to have an account taken in a Court of Equity. Such a right is of a very limited nature and does not follow from the fact that the principal has also such right, as the right of the latter to an account from his agent is generally found on the fiduciary character of the agency while the right of the agent has no such equitable basis. Where an agent is paid a salary or commission in proportion to the profits made on the business done, the question, whether he is entitled to have an account taken, depends on whether or not the accounts are of too intricate or complicated a nature to be properly and conveniently gone into in the proceedings in an ordinary suit.

Now, I think, it would be obvious from the above authorities that an agent can call on his principal for an account in certain special circumstances. In the present case the plaintiffs were to be remunerated by a commission calculated on the premia paid on all policies effected or introduced through the plaintiffs. While no doubt the plaintiffs are aware of all policies effected or introduced through them they cannot certainly know which of these policies have lapsed, matured or been forfeited. Consequently it would not be possible for them to calculate what commission would be payable to them on policies effected through or introduced by them as agents of the Insurance Company. It was contended on behalf of the defendants-respondents that the plaintiffs could have requested the Insurance Company to furnish them with a statement of the policies in force and claimed the amount of commission due to them as a specific sum, but in view of the litigation that had already ensued between the parties, I do not think that the plaintiffs would have been supplied with the information in question. In my opinion therefore the circumstances in the present case entitle the plaintiffs to call on the defendants for rendition of accounts as this is the only relief which will enable the plaintiffs to satisfactorily assert their rights. (The rest of the judgment is unnecessary for reporting).

K.S. *Case remanded.*

A. I. R. 1933 Lahore 484

TAPP, J.

Chanan Singh—Appellant.

v.

Mt. Har Kaur and *another*—Respondents.

Misc. First Appeal No. 955 of 1932, Decided on 20th December 1932, from order of Senior Sub-Judge, Ludhiana, D/- 9th May 1932.

(a) Guardians and Wards Act (1890), Ss. 47 and 34 (d)—Order of Court calling on guardian to deposit amount as rent—No appeal lies.

An order of Court calling upon a guardian to deposit a certain amount as rent of the property of the minor is not appealable as the right of appeal of the guardian is limited by S. 47 and as the above order does not fall under any of the clauses of that section. [P 485 C 1]

(b) Guardians and Wards Act (1890), S. 34 (d)—Failure of guardian to furnish account—Court can take accounts and call upon him to pay balance due.

When the guardian fails to furnish accounts, the Court can act under Cl. (d), S. 34 and call upon him to pay such balance as the Court may find to be due: *A I R* 1924 *All* 593 and *A I R* 1928 *Pat* 255, *Rel on.* [P 485 C 1]

Jhanda Singh—for Appellant.

Har Charan Das Kumar—for Respondents.

Judgment.—The appellant, Chanan Singh, was appointed guardian of the property and the respondent, Mt. Har Kaur, guardian of the person of a minor Bhagta. Appellant was given possession of the minor's land and was required to pay Rs. 205-9-9, as chakota or rent. For the year 1928-29 he

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1. (1899) 60 P R 1899.

paid Rs. 125 and for 1929-30 Rs. 115. He was allowed a credit of Rs. 75, and has now been called on to pay Rupees 15-9-9 for 1929-30 and Rs. 125 per annum for 1930-31 and 1931-32, or a total of Rs. 275-9-9 (obviously a mistake for Rs. 265-9-9), plus revenue. He appeals against this order, but the objection that no appeal lies is well founded and must be upheld. The right of appeal is limited by S. 47, Guardians and Wards Act, and the order in question does not fall under any of the clauses of that section. The record shows that appellant applied for his discharge on 9th February 1931, but no order has been made on this application. If there had been an order refusing a discharge, a right of appeal would have arisen under Cl. (h) of the section. Counsel has asked that the appeal may be treated as an application for revision on the ground that the lower Court had no jurisdiction to make the order or, if it had, there has been an irregular exercise of that jurisdiction.

It appears that appellant rendered no accounts for the year 1930-31, his excuse being that he gave up possession of the land after October 1929, in consequence of an order of the Court that the land should be leased to one Harnam Singh for Rs. 300, for Kharif 1930 and Rabi 1931. This lease was never taken up and the land apparently remained in the possession of appellant who was afforded an opportunity of proving the contrary, but failed to do so. Under Cl. (c), S. 34 the Court was empowered to call on him to furnish accounts and under Cl. (d) require him to pay such sum as may be due from him on those accounts. It is no argument to urge that because no accounts were furnished the Court could not make the order it did as, in my opinion, if the obligation imposed on the guardian to furnish accounts is not discharged, this does not preclude the Court from taking accounts or going into accounts and acting under Cl. (d). The situation in the present case is that the guardian says he has no accounts to furnish as he was not in possession of the land and there is no balance due from him. The Court on the contrary finds he was in possession and a balance is due from him. In my opinion the view taken in *Sita Ram* v. *Mt. Govindi* (1) and *Mahomed Fariduddin Ahmad* v. *Ahmad Abdul Wahab* (2), that the Court can call on the guardian to pay such balance as the Court may find to be due is more correct than certain authorities which limit the power of the Court to such balance as the guardian may or may not show. In such circumstances, surely the scrutiny of the accounts of a guardian becomes a farce.

The learned counsel for the appellant has relied on *A. I. R.* 1932 *Lah.* 306, but this ruling is clearly distinguishable. The controversy in that case was between the discharge of a guardian from office and his discharge from liability matters which do not arise in the present case. For the reasons aforesaid I hold the Court had jurisdiction to make the order it did and there was no illegal or irregular exercise of this jurisdiction. The application is accordingly dismissed, parties bearing their own costs.

K.S. *Application dismissed.*

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1. AIR 1924 All 593=80 I C 592=46 All 458.
2. AIR 1928 Pat 255=107 I C 152=7 Pat 144.

A. I. R. 1933 Lahore 485

SHADI LAL, C. J. AND BROADWAY, J.

Basheshar Das — Appellant.

v.

Diwan Chand and *others* — Respondents.

Letters Patent Appeal No. 140 of 1929, Decided on 14th February 1933, against judgment of Bhide, J., reported in *A.I.R.* 1930 *Lah.* 72.

(a) Decree—Execution—Order staying execution of decree pending appeal and entitling decree-holder to mesne, profits in case of dismissal of appeal — Decree set aside — Stay order ceases to have effect.

Where execution of a decree is stayed pending an appeal and the decree-holder is given right to mesne profits in case of dismissal of appeal should that payment ultimately become necessary, stay order ceases to have effect when the decree is set aside and no order as to mesne profits can be passed by virtue of that order. [P 487 C 1]

(b) Civil P. C. (1908), S. 151—Order as to mesne profits passed under S. 151 by virtue of order which has ceased to be effective is open to appeal.

Where an order as to mesne profits is passed under S. 151 by virtue of an order which has ceased to be effective, the order is open to appeal. [P 487 C 1]

Kishan Dayal and *Rama Nand*—for Appellant.

Mehr Chand Mahajan and *Hem Raj Mahajan*—for Respondents.

Broadway, J.—One Narpat Rai, a Khatri of Lahore, mortgaged certain property to Mul Chand and Company, on 18th June 1907, securing a loan of Rs. 8,000. Narpat Rai had five sons with four of whom he was having litigation. With the fifth, viz., Daulat Ram, he was on friendly terms. Mul Chand and Company brought a suit on the basis of this mortgage and obtained the usual decree and in due course brought the mortgaged house to sale. It was bought by Nikka Mal, for Rs. 6,500, on 27th May 1917. When Nikka Mal sought to obtain possession he was obstructed by Narpat Rai's four sons who claimed to be the sole owners of the property in question. On 30th August 1918, the executing Court held that the four sons of Narpat Rai were entitled to two-thirds of the house and that therefore Nikka Mal, the purchaser, was only entitled to possession of one-third. This resulted in two suits being brought, one by Narpat Rai's four sons *qua* the one-third and the other by Nikka Mal *qua* the two-thirds share.

The suit brought by Nikka Mal for the two-thirds share was decreed in his favour on 21st July 1919. The objectors preferred an appeal, which was admitted, and they also filed an application asking that execution of the decree should be stayed. This application came up before me on 3rd January 1920, for final disposal and I ordered stay of execution on condition that the then appellants furnished security undertaking to make over the property to the decree-holder in its "present condition" should their appeal be ultimately dismissed, and further that they should also give security for the payment to Nikka Mal of such mesne profits as "may have accrued due at the time when possession is made over to him, should that payment ultimately become necessary." The suit that had been brought by the four sons of Narpat Rai *qua* the one-third was also decreed in their favour and the auction-purchaser preferred an appeal in that case. Both appeals came up before a Division Bench and both decrees were set aside and re-trials ordered. The ultimate result was that the auction-purchaser was held entitled to the whole house and of this house he obtained possession on 8th March 1927.

Subsequent to this Basheshar Das, son of Nikka Mal who had died, put in an application in the Court of the Senior Subordinate Judge purporting to be one under Ss. 144 and 145, Civil P. C., praying that he should be given mesne profits from 27th May 1917 to 8th March 1927 and, basing his claim, apparently, on my order of stay dated 3rd January 1920. By an order dated 13th April 1928, Lala Diwan Chand, Subordinate Judge, First Class, who was dealing with this application, came to the conclusion that mesne profits could be claimed under my order of 3rd January 1920, and that, although the application itself did not fall strictly within the ambit of Ss. 144 and 145, Civil P. C., inasmuch as under S. 36, Civil P. C., an order could be executed in the same manner as a decree was executable therefore under S. 151, Civil P. C., the principles of S. 144 could be applied to cases which did not strictly fall within the latter section. He then proceeded to point out that my order of 3rd January 1920, clearly meant that the auction-purchaser would only be kept out of possession to which he was immediately entitled if security was given for the payment of such mesne profits which might become due at the time when possession was delivered to him. He then proceeded to make an enquiry into the amount of mesne profits and came to the conclusion that only such mesne profits could be allowed as had accrued due between 3rd January 1920 and 8th March 1927 and that the auction-purchaser was not entitled to mesne profits between 27th May 1917 and 3rd January 1920. This order was passed on 5th November 1928.

A careful perusal of these orders clearly shows that Lala Diwan Chand was executing my order of 3rd January 1920, and that he allowed mesne profits to the auction-purchaser because he interpreted my order as giving the auction-purchaser a right to the same. Against this order the objectors, the four sons of Narpat Rai, preferred an appeal to this Court while Basheshar Das, son of Nikka Mal, instituted a suit for recovery of mesne profits for the period between 27th May 1917 and 3rd January 1920. He also filed a cross-appeal in the appeal filed by the four sons of Narpat Rai. These two appeals came up before Bhide, J., who accepted the appeal by the objectors and dismissed the cross-appeal by Basheshar Das. The learned Judge held that my order of 3rd January 1920, was not one which was capable of execution and he also held that the Courts were not in a position to allow mesne profits to the auction-purchaser under their inherent jurisdiction inasmuch as the auction-purchaser had other remedies open to him. On objection being taken by the learned counsel for Basheshar Das that the appeal was incompetent as Lala Diwan Chand had acted in the exercise of his inherent jurisdiction under S. 151, Civil P. C., and it had been repeatedly held by this Court that an order made by a Court under S. 151, Civil P. C., was not appealable, Bhide, J., held that the order passed by Lala Diwan Chand was not made under S. 151, Civil P. C., and that, therefore the appeal was competent.

Basheshar Das has now preferred this appeal under Cl. 10, Letters Patent, and it has been urged by Mr. Kishen Dayal on his behalf that the view taken by the learned Judge in Chambers was erroneous. A reference to the record shows beyond any doubt that the whole of these proceedings were based on my order of 3rd January 1920, and what the auction-purchaser was seeking to do was to execute that order. Mr. Kishen Dayal on behalf of the appellant again brought forward his client's contention that inasmuch as Lala Diwan Chand had acted under S. 151, Civil P. C., the appeal to this Court was incompetent. A perusal of Lala Diwan Chand's orders of 13th April 1928, and 5th November 1928, make it abundantly clear that he was acting under S. 151, Civil P. C., but was giving effect to my order of 3rd January 1920. In these circumstances Mr. Kishen Dayal's contention that the appeal by the respondents to this Court was incompetent has no force. Mr. Kishen Dayal next urged that on equitable grounds mesne profits should have been allowed inasmuch as the suit brought by his client was one under O. 21, R. 103, Civil P. C., and the decree ultimately passed in his favour was to the effect that the auction-purchaser was entitled to immediate possession as from 27th May 1919. He urged therefore that inasmuch as the auction-purchaser had been kept out of possession from 27th May 1917 to 8th March 1927, it was not only competent, but incumbent on the Court to put him in the position he would have been on that date.

It is clear, and indeed as has been admitted by Mr. Kishen Dayal, that my order of 3rd January 1920, created no rights to mesne profits in favour of the auction-purchaser. Indeed when the appeals were accepted and the decree, the execution of which was stayed by me, was set aside, my order of 3rd January 1920 ceased to have any effect. It was therefore not capable of execution and the auction-purchaser was not entitled to any mesne profits by virtue of that order. Possession of the property in question was granted to Basheshar Das on 8th March 1927, not in the execution of the decree in his favour, but in the course of the execution of the mortgage decree in favour of Mul Chand and Company. Nikka Mal, the appellant's father, having bought the property at the auction-sale held in execution of that decree. In these circumstances it is clear that the auction-purchaser never having been in possession of this property his position had not been altered by any order, erroneous or otherwise, of the Court and therefore no question of restitution arose. In these circumstances I agree with the view taken by Bhide, J., and would dismiss this appeal, but leave the parties to bear their own costs in this Court.

Shadi Lal, C. J.—I concur.

K.S. *Appeal dismissed.*

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* A. I. R. 1933 Lahore 487

BHIDE, J.

Tota Ram—Appellant.

v.

Ismail Hassan and *others*—Respondents.

Misc. Second Appeal No. 1238 of 1931, Decided on 1st December 1932, from order of Dist. Judge, Karnal, D/- 22nd May 1931.

*** Civil P. C. (1908), S. 11—Appeal and cross appeal—Mistake of counsel in drafting grounds of appeal discovered—Withdrawal and dismissal of appeal—Cross-objections on different grounds filed by appellant in cross appeal are not barred by res judicata.**

Where in case of an appeal and cross appeal, the counsel for the appellant in the appeal drafts the ground of appeal by oversight as if he has been retained by the opposite party and on discovery of the mistake withdraws the appeal and it is dismissed, he can file cross objections on different grounds in the cross appeal by the opposite party and the dismissal of his appeal does not operate as res judicata: 25 *All* 628 and *AIR* 1924 *All* 867, *Dist*; *AIR* 1924 *All* 860 and *AIR* 1929 *Lah* 161, *Ref*. [P 488 C 1]

Shamair Chand—for Appellant.

Shambhu Lal Puri—for Respondents.

Judgment. — One Ibrahim had obtained a decree against Tota Ram restraining the latter from interfering with a plot P Q R S. Subsequently, he presented an application alleging that encroachment had been made by Tota Ram on the plot. The lower Court found that the application was within time so far as encroachment on a portion A B C D was concerned, but was time-barred with regard to the portion E F G. The application was accordingly dismissed as regards the latter portion and was allowed in respect of the former. Both parties preferred appeals, but by oversight counsel for Ibrahim drafted the grounds of appeal as though he had been retained by the opposite party. The only ground taken up in the memorandum of appeal was that the application was time-barred and should have been dismissed in toto. This mistake was discovered subsequently. The appeal was withdrawn and was dismissed on 8th April 1931. Thereafter Ibrahim filed cross-objections under O. 41, R. 22, Civil P. C., in the cross-appeal filed by Tota Ram. These cross-objections were admittedly within time and were eventually accepted on 22nd May 1931. From this decision the present appeal has been preferred.

The main contention of the learned counsel for the appellant is that the appeal of Ibrahim having been dismissed on 8th April 1931, his cross-objections could not be entertained. He has cited *Ramji Das* v. *Ajudhia Prasad* (1) and *Parbhu Dayal* v. *Murli Dhar* (2) in support of the contention. But these authorities are distinguishable. In the first case the appeal had been dismissed on merits and the same points were raised in cross-objections. In the second case the appeal had been withdrawn, but the cross-objections were based on the same grounds on which the appeal was based. In the present case, as pointed out already, the appeal on behalf of Ibrahim was drafted erroneously on the ground of limitation. Even if it be held that as a result of the dismissal of the appeal the question of limitation was decided against Ibrahim this could not in any way be a bar to the cross-objections subsequently filed on his behalf which were based entirely on different grounds. The authorities relied on by the learned counsel proceeded really on the principle of res judicata as was pointed out in *A. I. R.* 1924 *All.* 860 and *A. I. R.* 1929 *Lah.* 161. In the present instance the dismissal of the appeal filed on behalf of Ibrahim could not operate as res judicata so far as the grounds raised in the cross-objections were concerned. Consequently there was, in my opinion, no legal bar to the entertainment of the cross-objections in the circumstances of this case. I dismiss the appeal with costs.

K.S. *Appeal dismissed.*

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1. (1903) 25 All 628.
2. AIR 1924 All 867=78 I C 677.

A. I. R. 1933 Lahore 488

CURRIE, J.

Bishen Das—Defendant—Appellant.

v.

Thakar Singh and *another*— Plaintiffs —Respondents.

Second Appeal No. 937 of 1932, Decided on 17th January 1933, from decree of Dist. Judge, Jullundur, D/- 23rd April 1932.

Punjab Tenancy Act (16 of 1887), Ss. 39 and 110—Denial of landlord's title by occupancy tenant is no ground for forfeiture.

In the case of an occupancy tenant the repudiation by him of his landlord's title does not involve forfeiture of his tenant's right and reduce him to the position of a trespasser liable to ejectment. A forfeiture of the occupancy rights cannot take place on any grounds other than those specified in S. 39: *A I R* 1919 *Mad* 1106; *A I R* 1919 *Mad* 12; *A I R* 1924 *Lah* 315; 5 *I C* 708 and *AIR* 1915 *Cal* 71, *Dist*; *A I R* 1930 *Lah* 515, *Expl*; 32 *P R* 1917, *Ref*. [P 490 C 1]

Badri Das and *Achhru Ram*—for Appellant.

Nawal Kishore—for Respondents.

Judgment.—The facts leading to this second appeal may be briefly stated. Bishen Das, the appellant, is the holder of an occupancy tenancy under the respondents. In July 1925 the respondents landlords instituted a suit against him for recovery of rent and, in February 1926, they instituted another suit for enhancement of rent. In both these suits Bishen Das put forward a plea that the relation of landlord and tenant no longer existed as he had acquired the proprietary rights by purchase. The Revenue Court stayed proceedings and referred Bishen Das to the Civil Courts to determine his title. On 24th January 1927, Bishen Das instituted a suit asking for a declaration that he was the full owner. The Subordinate Judge decreed the suit on 6th August 1928, but this decision was reversed on appeal on 20th April 1929, by the District Judge, an appeal against whose decision was rejected in limine by the High Court on 24th July 1929. During the pendency of this litigation in January 1928 the landlords had again sued Bishen Das for rent and he had again raised the same pleas. This suit also had been stayed. After the dismissal of Bishen Das's appeal by the High Court the landlords, on 29th January 1930, instituted the present suit for possession of the land on the ground that Bishen Das was no longer an occupancy tenant as he had forfeited his rights by repudiating their title in the previous suits. Bishen Das in his pleas admitted that, in view of the decision in the civil litigation he was the occupancy tenant, but pleaded that the repudiations made by him in the course of the litigation in the Revenue Courts had been made bona fide and in good faith on the strength of the sale-deed. The trial Court decreed the landlord's suit, holding that the repudiation was unjustified and that he had therefore forfeited his rights to the tenancy. This decision was upheld by the learned District Judge. He found that "the defendant is not at all justified to repudiate the tenancy in such clear and unequivocal terms." He held further that it could not be said that

> "an occupancy tenure in the Punjab would fall an exception to the general law of tenancy that a repudiation carries with it the consequences of forfeiture."

He concluded by remarking that "the repudiation involved forfeiture and no waiver on the part of the plaintiffs was established." Against this order the present second appeal has been filed. Mr. Badri Das on behalf of the appellant argued that there had been no real repudiation by the appellant of the respondents' title. He contended that the appellant had all along stated that originally the relationship between the parties was that of landlord and tenant and had merely pleaded that, by virtue of a sale-deed which he considered to be genuine, the proprietary rights had been acquired by the occupancy tenant. It appears to me however that the learned District Judge was perfectly right in holding that the repeated assertions that the appellant had become the owner and was no longer the occupancy tenant amount to repudiation of the plaintiffs' title. Mr. Badri Das next urged, citing *Sohawa Singh* v. *Kesar Singh* (1), that, before the repudiation of the landlords' title by the tenant can be held to involve forfeiture, there must be a clear acceptance of that repudiation by the landlords. He further contended that, in the present case, the landlords, by instituting the suit for rent in 1928, waived their right to claim forfeiture and, so to speak, condoned repudiation by the tenant. In reply Mr. Nawal Kishore argued that the institution of the present suit showed that the landlords had accepted repudiation and that contention seems to be sound. As regards the question of waiver, in my opinion the very form of the plaintiffs' plaint shows that there was no waiver. In the plaint it is distinctly stated that the appellant had repudiated their title in the various suits and had repeated the repudiation in the grounds of appeal filed by him in the High Court on 12th July 1929. It may be noted also that, as a matter of fact, the plaintiffs' suit of 1928 was instituted and stayed on the appellant's plea prior to the decision of the appellant's declaratory suit by the Subordinate Judge. There is thus no question of waiver on the part of the plaintiffs. The real question in this case is, whether in the case of an occupancy tenant the repudiation by him of his landlord's title involves forfeiture of his tenant's right and reduces him to the position of a trespasser liable to ejectment. In this connexion Mr. Badri Das urges that the Transfer of Property Act, does not apply in this province and in any case has no application to leases of agricultural land. He contends that the only grounds on which a tenant holding occupancy rights in the Punjab can be held to forfeit those rights and be liable to ejectment are given in S. 39, Punjab Tenancy Act (16 of 1887). That section provides that:

> "A tenant having a right of occupancy shall be liable to be ejected from his tenancy on any of the following grounds, namely: (a) that he has used the land comprised in the tenancy in a manner which renders it unfit for the purposes for which he held it; (b) where rent is payable in kind, that he has without sufficient cause failed to cultivate that land in the manner or to the extent customary in the locality in which the land is situate; (c) when a decree for an arrear of rent in respect of his tenancy has been passed against him and remains unsatisfied."

None of these three grounds are present in this case and therefore it is contended that the appellant is not liable to ejectment. In this connexion Mr. Badri Das cited *Fakir* v. *Wazir Khan* (2), *Jnanendra Nath* v. *Jogendra Nath* (3), *Debiruddi* v. *Abdul Rahim* (4) and *Dhara Kairi* v. *Ram Jewan* (5) *Jnanendra Nath* v. *Jogendra Nath* (3), a case in which the Bengal Tenancy Act was discussed, is not in point as in that case the landlords had withdrawn from their rent suits. *Debiruddi* v. *Abdul Rahim* (4) held that, in cases prior to the enactment of the Bengal Tenancy Act, a denial by the tenant of his landlord's title, created a forfeiture, but that since the passing of that Act, in any case to which it applied, there cannot be any eviction on the ground of

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1. A I R 1932 Lah 586=140 I C 474=13 Lah 482.
2. (1918) 32 P R 1918=45 I C 105.
3. A I R 1926 Cal 772=91 I C 191.
4. (1890) 17 Cal 196.
5. (1893) 20 Cal 101.

forfeiture incurred by denying the title of the landlord, that being not the ground enumerated in the Act and therefore expressly excluded by S. 178. A similar view was taken in *Dhara Kairi* v. *Ram Jewan* (5), where it was held that a tenant in such circumstances could only be evicted after notice to quit.

On the other hand Mr. Nawal Kishore for the respondents contended that the principle of forfeiture could operate in such cases. His argument was that the principle of forfeiture on repudiation was recognized by the Courts prior to the enactment of the Transfer of Property Act, and that the doctrine could be applied in the case of agricultural land. In support of the latter proposition he cited *Kamalu Putti* v. *Puli Kala Kath Mahomed* (6) and *Krishna Shethi* v. *Gilbert Pinto* (7). These rulings however related to the Madras Presidency and I am not aware whether there is any tenancy legislation in that presidency of the same nature as the Punjab Tenancy Act. I am therefore of opinion that these rulings are of no application in the present case. He further cited *A. I. R.* 1924 *Lah.* 315, in which an occupancy tenancy was held to be liable to forfeiture, where the tenancy was diverted to other purposes, as for instance, to build upon, and the tenant disclaimed the title of the proprietors. That does not help him in the present case as one of the grounds for ejectment specified in S. 39, Punjab Tenancy Act, is the use of the land comprised in the tenancy in a manner which renders it unfit for the purposes for which he held it. He further cited certain rulings to show that, where a tenant had repudiated the landlord's title, he could not subsequently shift his ground and plead that he was still a tenant. He cited *Miadhar* v. *Rajani Kanta Roy* (8) and *Sheshi Bhushan Mandal* v. *Ram Sebak Mondal* (9), but in both those cases the tenant had raised the plea successfully and the landlords' suit for rent had been dismissed. In the present case the landlords' suits have merely been stayed and the tenant cannot be said to have successfully raised the plea of ownership in view of the fact that his declaratory suit has been dismissed and it has been determined that he is an occupancy tenant under the plaintiffs.

Finally, Mr. Nawal Kishore has contended that the provisions of the Punjab Tenancy Act are not exhaustive, citing the Full Bench decision reported in *Moti Lal* v. *Kartar Singh* (10). He argues that as the Punjab Tenancy Act does not specifically mention repudiation by the tenant the ordinary principle of forfeiture on repudiation should be held to apply. In the Full Bench ruling the question in issue was the determination of the succession in the case of an occupancy tenancy jointly held by several tenants in specified shares when the line of one of the tenants had become extinct. That case was clearly not provided for in the portion of the Punjab Tenancy Act, relating to succession and it was held that there was nothing in the Act which impliedly supported either view urged before the Bench. In the present case occupancy rights in their present statutory form are the creation of the Punjab Tenancy Act and S. 110 of that Act provides that, nothing in any agreement made between a landlord and a tenant after the passing of the Act shall override any of the provisions of the Act with respect to the acquisition of a right of occupancy, or the reduction, remission or suspension of rent, or the enhancement of the rent of a tenant having a right of occupancy under S. 5 or S. 6 of the Act; and again in Cl. (c) entitle the landlord to eject a tenant otherwise than in accordance with the provisions of the Act. From this it is clear that the Legislature when passing that Act did not contemplate the forfeiture of occupancy rights on any grounds other than those specified in S. 39, Punjab Tenancy Act. *Fakir* v. *Wazir Khan* (2) to some extent supports this view, though the question was not apparently argued on the same lines as have been adopted in the present appeal. In that case the learned Judge remarked:

> "The occupancy tenant of the Punjab is more than a mere permanent tenant; he is an individual who in many cases should have been the landlord and he enjoys a permanent tenancy subject to certain conditions at a concession rent."

He further remarked:

> "No doubt the English rule of forfeiture is applied in this province in the case of ordinary tenancies and (even in the case of permanent tenancies on a rack rent and when the denial of the landlord's title admits of no other remedy) while in the case of ordinary tenancies, the forfeiture involves no loss to the tenant, but the loss of notice."

Accordingly, in that case holding that the tenants had been the victims of

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6. A I R 1919 Mad 1106=45 I C 743=41 Mad 629.
7. A I R 1919 Mad 12=50 I C 898=42 Mad 654.
8. (1910) 5 I C 708.
9. A I R 1915 Cal 71=24 I C 181.
10. A I R 1930 Lah 515=127 I C 1=11 Lah 427 (F B).

worthless legal advice, the learned Judge held that their denial of the landlords' title which they had withdrawn when the suit for ejectment was brought did not cause forfeiture. In that case, however it was the landlords who had sued for ejectments after the plea had been raised in the Revenue Court. However the argument regarding the special status of occupancy tenants applies. I am therefore of opinion that the appellant being an occupancy tenant could only be ejected from his tenancy on the grounds enumerated in S. 39, Punjab Tenancy Act, and therefore the plaintiffs' suit, for possession of the land on the ground that he had forfeited his right of occupancy by the repudiation of their title, must fail. The appellant's action throughout has considerably harassed the plaintiffs-respondents and put them to expense and loss. He failed throughout to establish his claim to be the owner of the land. I therefore while accepting the appeal and dismissing the plaintiffs' suit, direct that the parties bear their own costs throughout.

M.N. *Appeal allowed.*

A. I. R. 1933 Lahore 491

DALIP SINGH, J.

Mt. Umri—Plaintiff—Appellant.

v.

Kalu—Defendant—Respondent.

Second Appeal No. 1475 of 1932, Decided on 17th February 1933, from decree of Dist. Judge, Jullundur, D/- 24th June 1932.

(a) Civil P. C. (1908), O. 7, R. 6—Exemption from limitation—Grounds must be alleged in plaint.

Where a suit is prima facie time barred the grounds on which exemption is claimed must be alleged in the plaint. [P 492 C 1]

(b) Limitation Act (1908), S. 19—Plea of jus tertii in one suit does not constitute acknowledgment.

In a previous suit by reversioners the defendant pleaded that the reversioners could not sue in the presence of the plaintiff who was the preferential heir. In the suit by the plaintiff, the defendant relied on the pleading of the defendant in the prior suit to save limitation.

Held: that the plea therein raised was merely one of jus tertii to defeat the reversioner's suit and did not constitute an acknowledgment within the meaning of S. 19. [P 492 C 1]

(c) Limitation Act (1908), S. 19—Rent suit by one of co-owners—Another co-owner not objecting to former getting decree for full amount does not amount to acknowledgment.

One of the co-owners filed a suit for recovery of rent. The other co-owner did not object to the former getting a decree for the whole amount of rent and stated that he would settle later.

Held: that there was no acknowledgment by the latter co-owner within the meaning of S. 19. [P 492 C 1]

(d) Limitation—Question depends on form and substance of plaint.

Limitation must be dependent to some extent on the form and substance of the plaint. [P 492 C 1]

(e) Landlord and Tenant—Repudiation of landlords' title by tenants—Unless landlord accepts repudiation, his position as landlord does not terminate.

When a tenant repudiates the title of the landlord to the knowledge of the latter, unless the landlord accepts such repudiation, his position as landlord does not terminate. [P 492 C 1]

Badri Das—for Appellant.

Achhru Ram —for Respondent.

Judgment.—One Gandhila died leaving a widow, Mt. Gujri. He also left a daughter married to Kalu, defendant, and a predeceased son's widow, Mt. Umri who is plaintiff in this case. In 1899, Mt. Gujri, gifted half the land of Gandhila to Kalu. A declaratory suit was brought and decreed in 1904, by certain reversioners. It was held therein that the alienation did not bind the reversioners. Gujri died on 6th December 1926, and on 10th July 1928, the reversioners sued for possession of the house property and for a declaration regarding the land because they alleged they were already in possession. It seems that they had entered into possession as tenants and their claim was that as they were in actual possession and their landlord had ceased to be owner and they themselves had become owners, they were entitled to maintain a suit in a declaratory form. The position was contested by Kalu, but his plea, which succeeded, was that the reversioners could not sue for possession in the presence of Mt. Umri who was a preferential heir. In the meantime on 11th July 1928, Mt. Umri brought a suit for rent against all the reversioners and claimed the rent of the whole land alleging that she was the sole owner. In the written statement to this suit Kalu admitted the correctness of the plaint and stated that he himself would settle with Mt. Umri later.

The suit of the reversioners having been dismissed Mt. Umri brought the present suit on 14th August 1930, for possession of the half-share of Gandhila's estate which was gifted to Kalu by Mt. Gujri. The suit was dismissed as time-barred by the trial Court and also by the learned District Judge and the plaintiff has come in appeal. Her counsel wishes to contend that the pleadings of Kalu in the suit by the reversioners dated 10th July 1928, and in the rent suit by Mt. Umri dated 11th June 1928, constitute acknowledgments which extended the period of limitation. In the first place, no such extension was alleged or cliamed in the plaint and under O. 7, R. 6, Civil P. C., this should have been done. Secondly, so far as the suit of the reversioners is concerned, Kalu merely pleaded jus tertii to defeat the reversioners' suit. I do not think that this constitutes an acknowledgment within the meaning of S. 19 to extend the period of limitation of the suit by the plaintiff against Kalu. So far as the rent suit by Mt. Umri is concerned, she was a co-owner with Kalu and Kalu merely stated that he did not object to her getting a decree for the whole amount of rent and stated he would settle later. This also does not appear to be an acknowledgment within the meaning of S. 19, Limitation Act.

Next, the learned counsel contended that as the reversioners had repudiated the tenancy under Kalu in their suit in 1928 Kalu's possession must be taken to have been determined by the repudiation to his knowledge and if he subsequently obtained possession the limitation of the suit would be governed by Art. 141, Limitation Act, and the Punjab Alienation of Land Limitation Act, did not apply at all. Here again, in the first place, the form of the suit shows that this was not the nature of the plaint at all. Limitation must be dependent to some extent on the form and substance of the suit. Secondly, I do not think it is a correct proposition that Kalu's position as landlord terminated merely by the repudiation of the tenants to his knowledge. There is nothing to show that he accepted the repudiation, and owing to the absence of pleading there is nothing to show the nature of the tenancy. I hold therefore that this contention also fails and I accordingly dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 492

TEK CHAND AND MONROE, JJ.

Mt. Surji and *another*—Decree-holders—Appellants.

v.

Sheo Ram and *another* — Judgment-debtors—Respondents.

Second Appeal No. 515 of 1932, Decided on 2nd February 1933.

(a) Punjab Alienation of Land Act (13 of 1900 as amended by Act 1 of 1931) S. 16 (2) —S. 16 (2) does not take effect retrospectively—Leases or mortgages for over 20 years sanctioned before enactment of 1931 are not invalid.

S. 16 (2) of the amended Act has no retrospective effect so as to invalidate leases or mortgages for over 20 years sanctioned before the enactment of 1931. Only leases or mortgages sanctioned after the passing of the Act, whether the order or decree in execution of which they are made was passed before or after its enactment are invalidated. [P 493 C 1; P 494 C 1]

(b) Interpretation of Statutes— Words of statute admitting one meaning—Court is not to speculate on intention of legislature.

When the words of a statute admit of but one meaning the Court is not at liberty to speculate on the intention of the legislature and to construe them according to its own notions of what ought to have been enacted. Nothing could be more dangerous than to make such considerations the ground for construing an enactment that is unambiguous in itself. To depart from the meaning on account of such views is, in truth not to construe the act but to alter it. But the business of the interpreter is not to improve the Statute, it is to expound it. The question for him is not what the legislature meant, but what its language means, i. e., what the Act has said that it meant. To give a construction contrary to, or different from, that which the words import, is not to interpret law but to make it and Judges are to remember that their office is jus dicere not jus dare. [P 493 C 1]

Shamair Chand and *Qabul Chand*—for Appellants.

Charanjiva Lal Aggarwal— for Respondents.

Bhide, J.—In this case certain land belonging to a member of an agricultural tribe was ordered to be mortgaged in execution of a money decree by order of the Junior Subordinate Judge, Karnal, dated 10th April 1931. The mortgage was not for any specified period. An appeal was preferred from this order to the District Judge, Karnal, and one of the points raised in appeal was that the order contravened the provisions of Punjab Act 1 of 1931, by which S. 16, Punjab Alienation of Land Act, was amended. The learned District Judge upheld the contention and set aside the order under appeal. From this decision a second appeal has now been preferred to this Court and it is contended on behalf of the appellant that the order in question was passed before the Punjab Act 1 of 1931 came into force and is therefore not governed by that Act. The provision of Act 1 of 1931, which is said to be contravened, runs as follows:

"Notwithstanding anything contained in any other enactment for the time being in force no land belonging to a member of an agricultural tribe shall, in execution of any decree or order of any civil or revenue Court, whether made before or after the enactment of this sub-section, be leased or farmed for a period exceeding 20 years or mortgaged except in one of the forms permitted by S. 6."

In view of the words "whether made before or after enactment of this sub-section" occurring in the above provision, the learned District Judge has held that the Legislature intended to render illegal leases and mortgages for an indefinite period even when sanctioned before the passing of the Act. It is contended on behalf of the appellant that the words on which the learned District Judge has relied in support of his interpretation of the section merely refer to the words "decree or order" occurring in the preceding clause and the section merely provides that a mortgage or lease sanctioned after the enactment of the section would be illegal even if the decree or order in execution of which it is made was made before its enactment. This appears to me to be the plain grammatical and natural interpretation of the section. The learned counsel for the respondent has suggested that the words "whether made before or after the enactment of this sub-section" refer to the word "execution" occurring in the preceding clause, but this would be. I think obviously a very forced and unnatural interpretation. It is not usual to use the word "make" in connexion with "execution." A decree-holder is not said to "make execution" and I cannot believe that such clumsy language could have been used by the Legislature. The principal sentence in the new sub-section inserted by Act 1 of 1931 is that "no land belonging to a member of an agricultural tribe shall be leased or framed for a period exceeding 20 years or mortgaged except in one of the forms permitted by S. 6." This provision is obviously intended to operate in future, i. e., during the period subsequent to the enactment and not retrospectively. The remaining portions of the sub-section are merely qualifying clauses. It may be noted here that similar words have been used in sub-S. (1), S. 16, Punjab Alienation of Land Act, which runs as follows:

"No land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any civil or Revenue Court, whether made before or after the commencement of this Act."

If the interpretation placed by the learned District Judge on sub-S. (2) inserted by Act 1 of 1931, is to be followed in interpreting the above sub-section, sub-S. (1) would appear to render illegal all Court sales of land belonging to members of an agricultural tribe effected even before the passing of the Punjab Alienation of Land Act. It seems fairly obvious that such could not possibly have been the intention. The learned District Judge seems to be influenced mainly by what he believed to be the intention of the Legislature. In the first place, I do not see any good ground for believing that the Legislature really intended to give retrospective effect to the section so as to invalidate leases or mortgages for over 20 years sanctioned before the enactment of Act 1 of 1931. I think the Legislature only meant to invalidate all such mortgages or leases sanctioned after the passing of the Act whether the decree or order under execution was passed before or after its enactment. But whatever the intention of the Legislature may have been, it is a well-established principle of interpretation of statutes that when the words of a statute admit of but one meaning (as appears to me the case in the present instance) "the Court is not at liberty to speculate on the intention of the Legislature and to construe them according to its own notions of what ought to have been enacted. Nothing could be more dangerous than to make such considerations the ground for construing an enactment that is unambiguous in itself. To depart from the meaning on account of such views is, in truth, not to construe the Act, but to alter it. But the business of the interpreter is not to improve the Statute, it is to expound it. The question for him is not what the Legislature meant, but what its language means, i. e., what the Act has said that it meant. To give a construction contrary to, or different from, that which the words import or can possibly import, is not to interpret law, but to make it, and Judges are to remember that their office is jus dicere not jus dare:" Maxwell on Interpretation of Statutes, Edn. 6, p. 10.

I am therefore of opinion that the contention of the learned counsel for the appellant is sound. As however the point raised is important and it is desirable to have an authoritative pronouncement for the guidance of Subordinate Courts, I consider it preferable to refer this case to a Division Bench. The appeal should be placed before a Division Bench for disposal as early as practicable. It is unnecessary to print the record.

Monroe, J.—This is a second appeal from the judgment dated 7th January

1932, of the District Judge of Karnal. On 15th December 1928 the appellant obtained a decree for Rs. 1,250 and costs against the respondent, and on 10th April 1931, a mortgage for the sum of Rs. 1,475 was sanctioned by the executing Court of agricultural land belonging to the judgment-debtor in favour of a Jat agriculturist for an unlimited period: this order was set aside by the judgment under appeal. One of the contentions of the respondent before the District Judge, was that this mortgage was bad by reason of the Punjab Alienation of Land Amendment Act 1 of 1931 which provides in S. 2 as follows:

> "Notwithstanding anything contained in any other enactment for the time being in force no land belonging to a member of an agricultural tribe shall, in execution of any decree or order of any civil or Revenue Court, whether made before or after the enactment of the sub-section, be leased or framed for a period exceeding 20 years or mortgaged except in one of the forms permitted by S. 6."

This contention was accepted by the learned District Judge who held that the Legislature intended to apply the new provisions with retrospective effect even to such leases or mortgages as had been effected by the Courts prior to the Act came in force on 3rd July 1931. The case then came before Bhide, J., who by a judgment of 4th November 1932, expressed his opinion that the contention of the appellant, namely, that Act 1 of 1931 did not affect the case, was correct, but considering that the point raised was an important one referred the case to a Division Bench.

We have heard arguments of the learned counsel for both sides and have considered the judgment of Bhide, J. I express my respectful agreement with Bhide, J's., opinion and I consider that it is only necessary to say that the words "whether made before or after the enactment of this sub-section" can possibly be referred only to the words "decree or order" immediately preceding. The whole frame of the new section shows that it is intended to operate in the future, that is to say, after the passing of the Act, and that the words "whether made before or after the enactment of this sub-section" were introduced to avoid the argument that if a decree or order had been obtained before the passing of the Act the right of the decree-holder who had not obtained an order for a mortgage or lease would still subsist as it stood before the passing of the Act. These words clearly deprive the decree-holder who had not taken any steps in execution before the passing of the Act of having a lease or mortgage which would last for more than 20 years, but do nothing more. I accordingly think that the appeal ought to be allowed and the order of the executing Court should be restored and the appellant should have his costs against the respondent throughout.

Tek Chand, J.—I agree with the view taken by Bhide, J., and my learned brother, both on the wording of the section, and in accordance with the well-settled rules for the interpretation of statutes, the Act cannot affect the mortgages or leases which had been effected before it came into force. It may be mentioned that the same learned District Judge, who decided this case, took the contrary view in another case decided by him on 29th February 1932, in which he stated that he had erroneously decided this case.

K.S. *Appeal allowed.*

** A. I. R. 1933 Lahore 494

COLDSTREAM AND JAI LAL, JJ.

B. S. Bhagwan Singh & Co. — Defendants—Appellants.

v.

Bakhshi Ram—Plaintiff—Respondent.

First Appeal No. 2065 of 1927, Decided on 6th February 1933, from decree of First Class Sub-Judge, Lahore, D/- 18th May 1927.

(a) Hindu Law — Applicability — Sikhs — Presumption of joint family applies.

The Sikhs are presumed to follow the Hindu law and the presumption regarding the members of a Sikh family, even though living in a town, being a joint Hindu family applies. [P 495 C 2]

**** (b) Negotiable Instruments Act (1881), S. 27 — Pro-note executed by manager of Hindu family for the benefit of joint family —All family members are liable even if they have not signed—Hindu Law — Promissory note.**

The rule that, in order to make a person liable on a promissory note, the liability must appear on the face of the document does not apply to promissory notes executed by the managing member of a joint Hindu family and if it is established that liability was incurred by the manager of the family for the benefit of the family or for family business, then it is not open to the other members of the family to plead that because to evidence such liability a promissory note was executed on which neither their names appear nor is it specified that the liability is incurred for the purposes of or on behalf of the joint family, they are not liable. Their liability follows from the authority of the managing member to make the other members liable for the contracts made by him for the benefit of the family or for carrying on legitimate business of the family: *AIR* 1918 *PC* 146; *AIR* 1925 *Cal* 1153; *AIR* 1928 *Lah* 722 and *AIR* 1924 *All* 8, *Ref.* [P 496 C 2]

Mehr Chand and *Badri Nath*—for Appellants.

Gobind Ram Khana—for Respondent.

Jai Lal, J.—One Bakhshi Ram instituted a suit against seven persons: (1) Firm B. S. Bhagwan Singh and Company; (2) Bhagwan Singh, son of Bhag Singh; (3) Daya Singh, son of Bhagwan Singh; (4) Ram Singh and (5) Jawahar Singh, sons of Bhag Singh; (6) Kartar Singh, and (7) Jaimal Singh, sons of Jawahar Singh, for the recovery of Rs. 8,500, on the basis of three promissory notes for Rupees 13,965-2-6, Rs. 6,034-13-6 and Rupees 3,000, respectively, bearing interest at Re. 1-3-0 per cent per mensem. It was alleged that Rs. 17,208, had been paid towards principal and interest and that though the amount recoverable from the defendants was Rs. 9,792, the plaintiff claimed a decree only for Rs. 8,500. Out of the three promissory notes the first one was signed by Bhagwan Singh for B. S. Bhagwan Singh and Company, the second was signed by Bhagwan Singh without specifying that he purported to sign for B. S. Bhagwan Singh and Company. The third promissory note was signed by Bhagwan Singh for B. S. Bhagwan Singh. The defendants pleaded inter alia that Bhagwan Singh had no authority to sign on behalf of the defendants other than himself as he was not a member of a joint Hindu family with the other defendants, nor was the firm, B. S. Bhagwan Singh and Company, a family concern. Bhagwan Singh supported the other defendants in this plea and alleged that he was the sole proprietor of the firm B. S. Bhagwan Singh and Company. He denied that interest at Re. 1-3-0 per cent per mensem was agreed upon, and also denied the correctness of the plaintiff's account, though he admitted that Rs. 23,000, was the principal sum due under the three promissory notes. During the trial of the suit a further defence appears to have been raised with regard to a remission of Rupees 2,000, alleged to have been granted by the plaintiff to Bhagwan Singh.

The trial Court found that all the defendants were members of a joint Hindu family and were proprietors of the firm B. S. Bhagwan Singh and Company, and that the money borrowed on the promissory notes was for the purposes of the firm. It therefore granted the plaintiff a decree for Rs. 4,876-14-0, out of which Rupees 2,000, were to be deducted if the defendants paid Rs. 2,876-14-0 and proportionate costs within three months to the plaintiff. The learned Judge found that the plaintiff had remitted Rs. 2,000, to the defendants, but that he did so on condition that he would not have to institute a suit for the recovery of the balance due. From this decree both parties have appealed. The main contention raised on behalf of the plaintiff in his appeal is that interest on the principal amount originally due to him should have been allowed to him for 21 days more than the learned Subordinate Judge has done and further that Rs. 2,000, have been wrongly deducted by the Subordinate Judge out of his claim. (The Judge then considered the facts concerning these contentions and proceeded). With regard to the appeal by the defendants, it is contended that the firm B. S. Bhagwan Singh and Company was not owned by the joint Hindu family. In fact they deny that they were members of a joint Hindu family. It is however in evidence that this firm was started by Bhag Singh, father of the defendants Bhagwan Singh, Ram Singh and Jawahar Singh, and there is a presumption that he was the head of a joint Hindu family of which his sons and grandsons were the members. The business of the firm was continued on his death by the eldest son Bhagwan Singh as the managing member of the family and it appears that on previous occasions Ram Singh paid debts due from the firm by sale of property which stood in his own name. Not only that, but even in connexion with the transactions which are the subject-matter of this suit, a sum of Rs. 15,500 was paid out of the consideration of sale of property by Bhagwan Singh and Ram Singh jointly. There is good deal of oral and documentary evidence on the record, which has been discussed in the judgment of the trial Judge, to show that the defendants were members of a joint Hindu family and the firm was owned by the family. It is not necessary to repeat this evidence here and it is sufficient to say that I agree with the conclusions of the Subordinate Judge in this respect.

It is hardly necessary seriously to notice the contention of the defendants' counsel that in the case of Sikhs, even of those residing in towns, there is no presumption that they follow the Hindu law or that they are members of a joint Hindu family. It is merely necessary to mention it and dismiss it as the learned counsel has not shown what other law is to be applied to the Sikhs of the description of the defendants. It was then urged on behalf of the defendants, that, in any case, so far as the second promissory note is concerned, the firm could not be held to be liable as the promissory note was executed by Bhagwan Singh in his own name and not on behalf of the firm, and reliance was placed on *Sadasukh Janki Das* v. *Kishen Pershad* (1), *A. I. R.* 1925 *Cal.* 1153 and *A. I. R.* 1928 *Lah.* 722. On behalf of the plaintiff, on the other hand, *Krishnanand Nath* v. *Raja Ram* (2) and *E. I. Ry. Co.* v. *Gopi Krishna* (3) were relied upon. In my opinion the rule that, in order to make a person liable on a promissory note, the liability must appear on the face of the document does not apply to promissory notes executed by the managing member of a joint Hindu family and if it is established that liability was incurred by the managing member of the family for the benefit of the family or for family business, then it is not open to the other members of the family to plead that because to evidence such liability a promissory note was executed on which neither their names appear nor is it specified that the liability is incurred for the purposes of or on behalf of the joint family, they are not liable. Their liability, I consider, follows from the authority of the managing member to make other members liable for the contracts made by him for the benefit of the family or for carrying on legitimate business of the family. In this case there can be no question that liability was incurred by Bhagwan Singh for the business of the joint family of which he was the manager and the other defendants were the members.

The next contention on behalf of the defendants is that the learned Subordinate Judge is wrong in granting them a conditional remission of Rs. 2,000. I consider there is force in this ground. I have already stated that the remission was for good consideration and was unconditional and there is nothing to debar the defendants from claiming the deduction of Rs. 2,000, from the plaintiff's claim. It was not, as I have stated, a promise to remit the amount in the future and therefore *Maung Pu* v. *Maung Po Thant* (4) and *A. I. R.* 1929 *Mad.* 794, cited by the plaintiff's counsel, do not apply to the facts of this case. This disposes of all the grounds that were taken before us by the counsel on both sides in both the appeals. I would therefore vary the decree of the trial Court by granting the plaintiff a decree for Rs. 3,068-1-0 and proportionate costs throughout.

Coldstream, J.—I agree.

M.N. *Decree varied.*

A. I. R. 1933 Lahore 496

TEK CHAND AND MONROE, JJ.

Shambu Dayal—Auction purchaser—Appellant.

v.

Mt. Munni and *others*—Respondents.

First Appeal No. 2764 of 1926, Decided on 7th November 1932, from decree of Senior Sub-Judge, Ambala, D/- 18th August 1926.

Hindu Law— Maintenance — Mortgage of joint family property by sons—Mother alive —No evidence as to mortgage-debt being for benefit of family or for necessary purpose—Mortgage must be taken to have been made subject to right of residence and maintenance of mother.

Where there is no evidence on the record to show that a mortgage-debt raised by sons on the family property was raised for the benefit of the family or any other necessary purpose; the mortgage must be taken to have been made subject to the rights of residence and maintenance which the mother has in the family estate. [P 497 C 1]

Shamair Chand, *Nawal Kishore* and *Qabul Chand*—for Appellant.

Manohar Lal and *Charanjiv Lal*—for Respondents.

Tek Chand, J.—One Shankar Das, an Aggarwal Vaish of Ambala Cantonment, died many years ago leaving him surviving a widow, Mt. Munni, plaintiff, and three sons, Joti Parshad, Sunder Lal and Gainda Ram. He owned three houses in Ambala Cantonment numbered 4066, 4079 and 4085. There was also an ancestral house in village Karyana in Muzaffarnagar District, the place to which the family originally belonged. Many years after Shankar Das's death his sons mortgaged the three houses in Ambala Cantonment to Banarsi Das, defendant 1. Banarsi Das instituted a suit on foot of this mortgage and obtained a decree for realization of the mortgage money by sale of the houses. Mt. Munni, the mother of the mortgagors, has brought a suit for a declaration that she has got rights of residence and maintenance in the above property and that no part of it is liable to be sold in execution of the decree ob-

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1. AIR 1918 P C 146=50 I C 216=46 I A 33=46 Cal 663 (PC).
2. AIR 1922 All 116=66 I C 150=44 All 393.
3. AIR 1924 All 8=77 I C 1046=45 All 534.
4. AIR 1928 Rang 144=110 I C 612=6 Rang 191.

tained by defendant 1 against her sons. The learned Senior Subordinate Judge has held that the plaintiff possesses rights of residence and maintenance in the property of her deceased husband, and having regard to the circumstances of the family he has set apart house No. 4079 for her residence and maintenance. He has accordingly granted the plaintiff a declaration that this house (No. 4079) "is not liable to sale in execution of the mortgage-decree as it has been left to Mt. Munni for her residence and maintenance." He has also directed that the other two houses can be sold without any charge. Both parties have preferred appeals to this Court. The mortgagee decree-holder claims that the suit be dismissed in its entirety, while the plaintiff, Mt. Munni prays that the other two houses be sold subject to her rights of residence and maintenance.

It is conceded by Mr. Shamair Chand, counsel for the mortgagee decree-holder, that there is no evidence on the record to show that the mortgage-debt raised by the three sons on this property was raised for the benefit of the family or any other necessary purpose. This being so, there can be no doubt that the mortgage must be taken to have been made subject to the rights of residence and maintenance which the mother had in the family estate. Mr. Shamair Chand contended however that the ancestral house at mauza Karyana in the Muzaffarnagar District should have been set apart for the purpose and that the entire mortgaged property should have been allowed to be sold free of charge. But it is clear from the evidence that the family has not lived at Karyana for a very long time, and it is out of the question to require Mt. Munni to go and live there for the rest of her life. Moreover there is no indication on the record as to the size, value and the situation of that house, and counsel is unable to say if the house has been bringing or is likely to bring, any income. In these circumstances there can be no doubt that the learned Senior Subordinate Judge was right in holding that the plaintiff must be given a house in Ambala Cantonment for her residence and that arrangement out of this property should be made for her maintenance.

The next question argued before us is whether house No. 4079 set apart by the lower Court is sufficient for this purpose. Mr. Manohar Lal on behalf of the plaintiff has contended that the value of this house is less than one-fourth of the total estate and therefore the income of the other two houses should have been set apart for her maintenance. Mr. Shamair Chand, on the other hand, has urged that a portion of the house is sufficient for the purpose. After hearing both counsel at length and examining the record I see no reason to differ from the conclusion of the learned Judge below and hold that house No. 4079 is sufficient for the purpose of residence and providing maintenance to Mt. Munni. The only other point requiring decision is whether the declaration granted by the lower Court is correct. There can be no doubt that according to the decree as worded, house No. 4079 has been exempted absolutely from sale in execution of the mortgage decree. The effect of this declaration is that on the death of Mt. Munni this house would devolve upon her heirs. This is obviously an incorrect view of the law and Mr. Manohar Lal on behalf of the plaintiff has not attempted to support it. All that the plaintiff is entitled to is that the aforesaid house be sold subject to her rights of residence and maintenance, and on her death or remarriage the auction-purchaser shall be entitled to take possession thereof.

I would therefore accept Civil Appeal No. 2764 of 1926 to this extent: that in lieu of the decree of the lower Court the plaintiff shall be granted the declaration that house No. 4079 shall be sold in execution of the mortgage-decree obtained by defendant 1 against defendants 2 to 4, subject to the plaintiff's rights of residence and maintenance in it and that the auction-purchaser shall not obtain possession of this house till the plaintiff's death or re-marriage. The plaintiff's appeal, Civil Appeal No. 2939 of 1926, fails and I would dismiss it. Having regard to all the circumstances I would leave both parties to bear their costs in both appeals in this Court.

Monroe, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 497

BROADWAY, J.

Kishori Lal and *others* — Convicts— Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1539 of 1932, Decided on 3rd March 1933, from order of Sess. Judge, Ludhiana, D/- 8th August 1932.

Penal Code (1860), S. 506—Language falling within ambit of S. 503 used and complainant intimidated and alarmed by threat used towards him—Accused is guilty—Criminal P. C. (1898), S. 439.

Accused was convicted under S. 506, I. P. C. It was found that the complainant was intimidated, that the language used fell within the ambit of S. 503, I. P. C., and that the complainant was alarmed by the threat used towards him:

Held: that the conviction cannot be interfered in revision: *AIR* 1931 *Lah* 288, *Dist.* [P 498 C 1]

J. R. Agnihotri—for Petitioners.

C. H. Carden Noad—for the Crown.

Judgment.—The petitioners in this case having been convicted of an offence under S. 506, Penal Code, and sentenced to pay a fine of Rs. 25 each moved the Sessions Judge on the revision side but failed to make out a case for interference before him. Having had that petition dismissed they have now come up to this Court under S. 439, Criminal P. C. Mr. Agnihotri on behalf of the petitioners has urged that on the facts found no offence under S. 506, Penal Code, has been committed, and secondly that the fines were excessive.

So far as the punishment is concerned, reference to the grounds of revision as set out by the petitioners before the learned Sessions Judge shows that they had invited a heavier sentence and one of their complaints was that heavier fines had not been inflicted. In support of the contention that no offence under S. 506, Penal Code, has been established, my attention has been drawn to a case, not reported in the authorized reports but, to be found printed in *A. I. R.* 1931 *Lah.* 288. The case is *Ghulam Muhammad* v. *Emperor* and Agha Haidar, J., having considered the facts found in that case came to the conclusion that those facts did not constitute an offence under S. 506, Penal Code. I have no doubt as to the correct decision of that particular case, but the facts of the present case are different. It has been definitely found that the complainant was intimidated and that language was used which falls within the ambit of S. 503, Penal Code. That the complainant was alarmed by the threat used towards him has been found established and I am unable to see any reason to interfere in this case. The petition is therefore dismissed.

K.S. *Petition dismissed.*

A. I. R. 1933 Lahore 498

DALIP SINGH AND MONROE, JJ.

Emperor

v.

Dharam Vir and *another*—Accused—Respondents.

Criminal Revn. Petn. No. 126 of 1933, Decided on 20th February 1933, from order of Special Tribunal, Lahore, D/- 19th January 1933.

(a) Evidence Act (1872), Ss. 123, 124 and 125—Subject matter of police diaries is privileged.

The subject-matter of police diaries would ordinarily, be privileged under the provisions of S. 124 Evidence Act. As regards particular matters they may also be privileged under the provisions of S. 125 and in certain circumstances under S. 123. [P 500 C 1]

(b) Criminal P. C. (1898) S. 162 — Case diaries of police are not relevant except in case of statement of witnesses under S. 162.

Ordinarily speaking the work done by a police officer and his report of that work to his superior officer in the investigation of a case would not be relevant for the purposes either of the prosecution or of the defence and exception is made in the case of statement of witnesses, that is persons appearing actually at the trial, by the terms of S. 162. And that is the sole exception. [P 500 C 1]

(c) Criminal P. C. (1898), S. 172—Right to inspect police diaries is given only to Court and Court cannot delegate its duties in this matter to counsel for defence.

Section 172 no doubt confers in absolute right on the Court to inspect all police diaries in connexion with the investigation of an offence which is under inquiry or trial before it, but this use is permitted to the Court and to the Court alone. And the Court cannot delegate its duties in this matter to the counsel for the defence. [P 500 C 1]

If at any time the Court itself on inspection of the diaries considers that certain sources of inquiry are revealed by those diaries or that a certain police officer should disclose further to the Court the steps taken by him or if it becomes necessary to contradict the said police officer the Court may use the diaries for the purposes, but until the Court has done so the defence is not entitled to inspect those diaries: 19 *All* 390, *Foll.* [P 500 C 1, 2]

C. H. Carden Noad and *Jowala Pershad*—for Petitioner.

Sham Lal, A. R. Kapur, Pran Nath Mehta and *Fakir Chand* — for Respondents.

Dalip Singh, J.—The facts of this petition are as follows: In connexion with what is known as the Lahore Conspiracy Case, being tried by the Special Tribunal, certain witnesses, Nazir Hussain, (P. W. 151) and Ahmad, (P. W. 147), appeared and deposed that shortly after some bomb explosion, which took place in Lyallpur, they gave descriptions of two persons to the police as having been seen near about the place where the explosion took place. One Sheikh Ghulam Haidar, (P. W. 150), was the Police Officer in question and he appeared as a witness and the Court asked him certain questions as to the time and date when certain statements were made by the witnesses Nazir Hussain and Ahmad and whether they had given descriptions of two persons and whether this fact was noted in the case diary by the witness Sheikh Ghulam Haidar. The witness corroborated the evidence of the other witnesses Nazir Hussain and Ahmad and stated that they had given these descriptions on or about the 19th June and that he had recorded the evidence in the case-diary. Thereafter the counsel for defence put in an application objecting to the questions asked from Sheikh Ghulam Haidar by the Court on the ground that the answers were inadmissible under the provisions of S. 162, Criminal P. C., and therefore prayed that the evidence of Sheikh Ghulam Haidar on this point should be expunged from the record. In the alternative they prayed that all the diaries prepared by Sheikh Ghulam Haidar, Mian Amin Chand and other Police Officers in connexion with the Lyallpur explosion might be made available to the accused for inspection. The grounds for the necessity of this inspection were given in the application under heads (a) to (f). It may be pointed out here that the Tribunal had allowed inspection of the case diary dated 19th June 1930, which appears to be the diary to which reference was made in the evidence of Sheikh Ghulam Haidar.

The contention of the defence appears to have been that the diaries of 19th June 1930 and 7th July 1930 in particular and possibly also other case diaries were forged in the sense that the information contained in those diaries had been obtained subsequently some time in September, not primarily from the witnesses, but from the accused or certain approvers, and that thereafter in order to corroborate the statements of certain persons the police had ante-dated those diaries in order to show that the corroborative evidence had been obtained independently of and antecedent to the information received in September. The Special Tribunal held that the provisions of S. 162, Criminal P. C., had not been contravened in any way. But as regards the second prayer, they held that under the terms of S. 172, Criminal P. C., while the accused had no right to see any portion of these diaries except under the conditions mentioned in that section, nevertheless the words "not entitled" were not synonymous with "not permitted" and the Court could in the interests of justice permit the counsel for defence to see the diaries, subject to withholding any portions which the Court might consider to be against the public interest to disclose. The Tribunal considered that the question whether the diaries were a subsequent fabrication was a relevant one and that there were good grounds for permitting the defence to see the documents in question. They therefore permitted the defence to inspect: (1) the diaries kept by Mian Amin Chand relating to the Lyallpur bomb explosion of the 19th June; (2) the diaries kept by Sheikh Ghulam Haidar relating to the same occurrence and (3) the diaries of any other Police Officers who also took part in the investigation of this occurrence up to and including 7th July 1930. Before doing so however the Public Prosecutor was to point out to the Court what passages in these documents should not be disclosed as being against the public interest.

The prosecution have put in this petition of revision from the said order contending that the accused are not entitled to inspect these diaries and cannot be permitted to do so. The Court alone has according to the prosecution the right to inspect the diaries and make such use of them as it can. The contention of the learned Government advocate is that reading Ss. 161, 162 and 172 together it should be held that "nor shall be entitled" is equivalent to "shall not be permitted." Secondly, that in the question of how far these documents are privileged as being against the public interest to disclose it is contended that it is for the head of the Police Department, namely, the Inspector-General of Police, and not for the Court, to decide this point. Thirdly, it is contended that the present order is improper, and in the circumstances of this case, is contrary to the public interest. The learned Government advocate has cited *Queen-Empress* v. *Mannu* (1) and other rulings which it is unnecessary to refer to here. He has also relied on S. 123, Evidence Act. He contends that an immense mass of material has been made available to the defence without any discrimination and that the order, even if legally justified, is therefore impro-

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1. (1897) 19 All 390=1897 A W N 174 (FB).

per. In reply the learned counsel for the defence contends that "not entitled" is not synonymous with "not permitted." He concedes that there is no direct authority on the point, but relies on *Kallu* v. *Empress* (2) and on *Queen-Empress* v. *Mannu* (1), at p. 424. He also refers to other rulings, which it is unnecessary to mention. Before proceeding to give my opinion on the point I would like to make it clear that I am expressing no opinion whatsoever on the first point raised in the defence application, namely, that the evidence of Sheikh Ghulam Haidar on this point is inadmissible under the provisions of S. 162. I do so because, firstly, the matter was not contended before us and, secondly, it may arise in appeal and I therefore wish to guard myself from being understood to express any opinion on that point.

On the second point it seems to me that the contention of the learned Government advocate must prevail. The subject-matter of police diaries would ordinarily, it appears to me, be privileged under the provisions of S. 124, Evidence Act. As regards particular matters they may also be privileged under the provisions of S. 125 and also in the circumstances of this particular case under S. 123, Evidence Act. Ordinarily speaking the work done by a Police Officer and his report of that work to his superior officer in the investigation of a case would not be relevant for the purposes either of the prosecution or of the defence and exception is made in the case of statement of witnesses ,that is persons appearing actually at the trial, by the terms of S. 162. But that as far as I can see is the sole exception. S. 172 no doubt confers an absolute right on the Court to inspect all police diaries in connexion with the investigation of an offence which is under inquiry or trial before it, but this use is permitted to the Court and to the Court alone. It is not possible to hold that the Court can delegate its duties in this matter to the counsel for the defence. The reasons given in *Queen-Empress* v. *Mannu* (1) are to my mind conclusive on the point and it would be against public policy to allow a wholesale disclosure to the accused of all that happened in a particular investigation of a particular offence or of connected offences. If at any time the Court itself on inspection of the diaries considers that certain sources of inquiry are revealed by those diaries or that a certain Police Officer should disclose further to the Court the steps taken by him or if it becomes necessary to contradict the said Police Officer, the Court may use the diaries for these purposes, but until the Court has done so the defence are not entitled to inspect those diaries.

This opinion practically is all that is necessary for the decision of the point before me, but as the special Tribunal had remarked that there are good grounds for permitting the defence to see the documents in question I put questions to the learned counsel for the defence with respect to each of the paras. (a) to (f) given in his application. I do not consider it is necessary to enter into a detailed analysis of the replies given by the learned counsel. It is sufficient for me here to say that I do not think that any good grounds were shown by his replies for permitting this wholesale inspection of the documents in question. I would therefore accept this petition and set aside the order of the Tribunal allowing the counsel for the defence to inspect the documents mentioned in the order.

Monroe, J.—I agree.

K.S. *Petition accepted.*

A. I. R. 1933 Lahore 500

HARRISON, J.

Emperor

v.

Ujagar Singh—Respondent.

Criminal Revn. No. 92 of 1933, Decided on 3rd February 1933, to revise order of Sess. Judge, Lahore, D/- 11th January 1933.

Criminal P. C. (1898), S. 438—Four cases in which evidence was same committed to Sessions Court by Magistrate with power under S. 30—Magistrate competent to try two cases—Held committal order was proper.

A Magistrate committed four cases in which the evidence was the same to the Sessions Court. The charges were against one accused under S. 302, against another accused under S. 307, I. P. C., and against both under S. 19 **(f)**, Arms Act. The Sessions Judge disposed of the case under S. 302, I. P. C., but submitted that the other commitments should be quashed and that the Magistrate should be ordered to dispose of them:

Held: that the committal order regarding S. 307 was proper as the case was triable by the Sessions Court and as the Magistrate might have thought the sentence of seven years which he was competent to inflict might not be sufficient, that the committal regarding the charges under Arms Act was also proper as the disposal of the charges of murder and attempted murder was more important and as the trial of the charges under Arms Act by the Magistrate would have delayed

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2. (1894) 17 P R 1894 Cr.

sented a written petition to him stating that the deceased had intended to make a charitable endowment of a portion of his estate, but that he had died before he could give effect to his intention, that they were now desirous of setting apart a portion of his property for the purpose and had accordingly agreed among themselves that eight plots of land in Delhi, with the superstructure existing therein, valued approximately at Rupees 12,000 be made wakf with the direction that these plots be sold, and with the sale proceeds thereof a robat or free boarding house be constructed at Mecca, in the name of Hafiz Muhammad Ishaq, for the benefit of the Hajis. Muhammad Yakub, younger brother of the deceased, was to be appointed muttawali. He was to keep a true and correct account of the income, arrange for the sale of property, and see that the sale proceeds and the income were applied for the construction of the building at Mecca. It was further agreed that Muhammad Yakub would either himself remain the muttawali or appoint some other person as such with the consent of the heirs. The arbitrator delivered his award on 22nd March 1897, and in para. 13 he incorporated the terms of the agreement relating to the creation of the endowment and its administration. Muhammad Yakub accordingly entered into possession of the plots in 1897, but took no steps to sell them or otherwise administer the trust during his lifetime. He died on 25th September 1925, and after his death, his sons Muhammad Yusuf, Muhammad Yamin and Muhammad Yunis, defendants 1 to 3, took possession.

In March 1926, Muhammad Siddiq and Muhammad Abdul Rehman, who are the brother and nephew respectively of Mt. Salamati Jan, widow of Muhammad Ishaq, brought an action under S. 92, Civil P. C., with the sanction of the Collector, alleging that Muhammad Yakub had failed to administer the trust and that his sons, the defendants, were holding possession as trespassers, and praying that a scheme for the administration of the wakf be settled by the appointment of a new trustee or trustees, that the property be vested in the trustees, that the defendants be directed to render accounts from 1896 up to date, and that the trust properties be ordered to be sold with a view to carry out the object of the trust. The defendants pleaded inter alia that S. 92 was inapplicable, that the suit was not maintainable in its present form, that the defendants had been duly appointed muttawalis in succession to their father and that they could not be removed. The learned Senior Subordinate Judge has decreed the suit and has directed that a new trustee be appointed, the selection to be made from amongst the members of the family of the founder, after hearing the parties and Mt. Rehmat Bi and Fatima Bi.

From this decree a first appeal has been preferred in this Court by the defendants, and on their behalf Mr. Kishen Dayal has contended that the suit was not maintainable under S. 92 as no trust, express or constructive, for a public purpose of a charitable or religious nature, had been created. After hearing him at length and examining the terms of the award dated 22nd March 1897, and the other materials on the record, I have no doubt that this contention is without force and must be overruled. It is not denied that in 1897 at the request and with the agreement of the heirs of Muhammad Ishaq, in whom the property had vested on his death, the arbitrator had declared in express terms that the property in question was dedicated for the purpose of constructing a robat in Mecca for the benefit of pilgrims. Admittedly, the construction of such a building is a fit purpose for which a wakf can be validly made under Mahomedan law, and before us Mr. Kishan Dayal specifically stated that from the date of the award the plots in question ceased to to be the personal property of the heirs of Muhammad Ishaq. He urged however that these plots could not be regarded as having been made wakf, as there was an express direction in the award for their sale, and under Mahomedan law property once made wakf could not be validly alienated. He argued therefore that, though the robat, after its construction at Mecca, would be a public trust, the plots at Delhi, which were to be sold in order to raise money for the purpose, did not constitute a trust for a public purpose of a religious nature. This contention is however based on an incorrect view of the Mahomedan law. It is well settled that a direction to the muttawali in the deed of wakf authorizing him to sell the dedicated property and apply the proceeds thereof in carrying out the purpose of a wakf is valid under Mahomedan law: see Mulla's Principles of Mahomedan Law, p. 152, para. 168 and Tyabji's Mahomedan Law, p. 623, para. 501. In such a case the sale of the property is not in contravention of, but is in accordance with, the terms of the endowment, and its object is not to defeat, but to carry out, the purpose which the founder had in view. I hold therefore that the suit was properly brought under S. 92, with the sanction of the Collector.

The second contention raised is that the first muttawali, Muhammad Yakub, appointed the defendants as his successors-in-office a few days before his death, and therefore the Court had no power to appoint a new muttawali. The alleged appointment of the defendants however is not supported by any documentary evidence. The oral evidence consists of the statement of Muhammad Yusuf defendant himself, as D. W. 9, and of three witnesses Aziz-ud-din, (D. W. 2), Sayyad Mahmud (D. W. 7) and Muhammad Ismail, (D. W. 8). These statements are full of contradictions and discrepancies and cannot be relied upon. Moreover, in the award Muhammad Yakub had been authorized to appoint his successor as muttawali with the consent of the other heirs. Two of the heirs, namely, Mt. Rehmat Bi and Mt. Fatima Bi, were admittedly alive at the time of the alleged appointment, and Mt. Fatima Bi appeared as a witness and deposed that no such appointment was ever made and that, at any rate, she was never consulted about it. There is no reason to disbelieve her, and I have no doubt that the alleged appointment, even if made, was invalid. In my opinion the decree passed by the learned Subordinate Judge must be upheld and this appeal dismissed with costs.

Monroe, J.—I agree.

V.S. *Appeal dismissed.*

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* A. I. R. 1933 Lahore 503

TEK CHAND AND MONROE, JJ.

Sundar Das—Defendant—Appellant.

v.

Beli Ram and *others*—Plaintiffs—Respondents.

Misc. Second Appeal No. 923 of 1931, Decided on 31st January 1933.

*** Limitation Act (1908), Arts. 132 and 148 —Mortgagor authorising subsequent mortgagee to redeem prior mortgage — Suit by such mortgagee for redemption is governed by Art. 148 and not Art. 132.**

Where a mortgagor authorizes a subsequent mortgagee to redeem a prior mortgage, the subsequent mortgagee is a person who is entitled to redeem and a suit by him for redemption is governed by Art. 148 and not by Art. 132: *Case law reviewed.* [P 504 C 1]

Hem Raj Mahajan **and *Desh Raj Mahajan*—for Appellant.**

***Tirath Ram*—for Respondents.**

Tek Chand, J.—In 1891, one Khazan Singh mortgaged the land in suit to the ancestors of defendants 1 to 3. In 1893, Khazan Singh created a second mortgage on the same property in favour of Harya Mal, authorizing him to redeem the prior mortgage of 1891. The plaintiffs are the successors-in-interest of Harya Mal, and on 8th May 1930, they brought the present suit against defendants 1 to 3 for redemption of the mortgage which Khazan Singh had created in their favour in 1891. The defendants pleaded inter alia that the suit was barred by time under Art. 132, Limitation Act. The trial Judge upheld this plea and applying Art. 132 dismissed the suit. On appeal by the plaintiffs the learned District Judge has held that Art. 148, and not Art. 132, was applicable and that the suit was within time. He has accordingly accepted the appeal and has remanded the case under O. 41, R. 23, for decision of the other points in issue. The defendants have preferred a miscellaneous appeal under O. 41, R. 1 (u), and the sole point for determination is whether on the facts stated above Art. 132 or Art. 148 is applicable. Before discussing the authorities cited by the learned counsel for the parties it will be convenient to refer to the material portions of the two Articles. Art. 132 reads as follows:

132	To enforce payment of money charged upon immovable property.	(Twelve years).	When the money sued for becomes due.

Article 148 is in the following terms:

148	Against a mortgagee to redeem or to recover possession of immovable property mortgaged.	(Sixty years).	When the right to redeem or to recover possession accrues.

It will be seen that the nature and scope of the two articles is entirely different. Art. 132 prescribes the period of limitation for suits to enforce payment of money charged on immovable property and the terminus a qua is the date when the money sued for became due. Art. 148, on the other hand, fixes the time during which a suit against a mortgagee to redeem or recover possession of immovable property mortgaged may be instituted. Now the present is not a suit to enforce payment of money charged upon immovable property, but is one against a mortgagee to redeem the mortgaged property. According to the plain meaning of the wording of the statute, therefore the suit is not one to which Art. 132 would be applicable. It is however contended that Art. 148 is inapplicable as the plaintiffs are not the original mortgagors but are puisne mortgagees. This contention is clearly devoid of force, as the article is not limited to suits by the mortgagor, but governs all suits for redemption by parties entitled to redeem the mortgage. As stated already, the puisne mortgagee, whose rights have now passed to the plaintiffs, was specifically authorized by the mortgagor to redeem the prior mortgage from the defendants. He had therefore a clear right to redeem. It is not contended that this right has become extinct by any act of the plaintiffs or by any agreement between the original mortgagor and the defendants. It is clear therefore that Art. 148 and not Art. 132, is the appropriate article governing the case.

In support of his contention that Art. 132 is applicable, the learned counsel for the appellants has relied on two Single Bench decisions of the Madras High Court reported as *A. I. R.* 1925 *Mad.* 76 and 150, respectively. These decision are certainly in his favour but in none of them was the question discussed at any length. They merely followed a decision of the Calcutta High Court in *Nidhiram Bandopandhya* v. *Sarbessar Biswas* (1). This case has since been considered at great length by a Full Bench of five Judges of the same Court in *Sayamali Molla* v. *Anisuddin Molla* (2), who have held that the decision in that case proceeded on its peculiar facts, but that if it be supposed that it was decided in that case that a suit by a puisne mortgagee to redeem a prior mortgage is governed by Art. 132, then it was wrongly decided. The learned Judges definitely ruled that a suit of this kind was governed by Art. 148. The Patna and the Allahabad High Courts have also taken the same view in *Ramjhari Kuar* v. *Kashi Nath* (3) and *Priya Lal* v. *Champa Ram* (4). In our own Court Art. 148 has been consistently applied to such suits. *Budha* v. *Mub Rai* (5) and *Basanta* v. *Indar Singh* (6). It would appear from 57 *M. L. J.* (*Notes of Recent Cases*), p. 59, that the Madras High Court, also, has since changed its opinion. It is stated in these Notes that in S. A. No. 304 of 1926, decided on 10th December 1929, a Division Bench of that Court dissented from the two earlier Single Bench decisions referred to above, and held that a suit by the assignee of the second mortgage to redeem the first mortgage was governed by Art. 148 and not Art. 132. I hold that both on the plain wording of the Statute as well as on authority the suit has been rightly held to be within time by the learned District Judge. I would accordingly dismiss this appeal with costs.

Monroe, J.—I agree.

K.S. *Appeal dismissed.*

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1 (1910) 5 I C 877.

2 AIR 1929 Cal 669=119 I C 135=57 Cal 704 (FB).

3 AIR 1926 Pat 337=94 I C 284=5 Pat 513.

4 AIR 1923 All 271=79 I C 498=45 All 268.

5 (1918) 48 I C 916.

6 AIR 1920 Lah 504.

A. I. R. 1933 Lahore 504

BHIDE, J.

Karam Singh and *another*—Plaintiffs—Appellants.

v.

Narain and *another* — Defendants—Respondents.

Second Appeal No. 1050 of 1929, Decided on 25th January 1933, from decree of Dist. Judge, Jullundur, D/- 1st February 1929.

Legal Practitioner—Mukhtar appearing in trial Court cannot file appeal unless so authorized by power—Practice.

A mukhtar though appearing in trial Court cannot file an appeal unless his power of attorney authorises him to do so. Mere general words in power are not sufficient: 132 *I C* 895, *Dist.*

[P 505 C 1]

Nand Lal—for Appellants.

Judgment.—The plaintiffs' suit having been dismissed their mukhtar preferred an appeal, but the appeal was dismissed on the ground that the power of attorney did not authorize the mukhtar to file an appeal. The plaintiffs have now preferred a second appeal. The learned counsel for the appellants concedes that the power of attorney did not expressly authorize the mukhtar to file the appeal, but urged that the terms were wide enough to cover an appeal inasmuch as the plaintiffs said therein they would be bound by all acts performed (sakhta pardakhta) by the mukhtar. The learned counsel refers to *Dyal* v. *Hirde Ram* (1) and *Bishen Singh* v. *Karam Ilahi* (2) in support of this contention. But in those cases the powers of attorney contained expressions to the effect that the agent was authorized to take all proceedings connected with the litigation. In the present case there are no such expressions and those cases are thus clearly distinguishable. The words "sakhta pardakh-

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1. (1915) 29 I C 895.

2. (1930) 132 I C 895.

ta" on which the learned counsel lays stress appear to me from the context to refer to acts done in the course of the suit only. The learned counsel next referred to certain cases dealing with powers of attorney given to pleaders, but they turn largely on the special provisions of O. 3, R. 4, Civil P. C., and are not helpful in this case.

It is true for certain purposes the word "suit" has been held to include an appeal. But in the present instance, we have to ascertain the intention of the parties and for that purpose we must consider the meaning of the word as usully understood by litigants. It would be obviously unsafe to extend the scope of the power in such cases without any clear indication of the intention of the parties in the document itself. In the present instance, there seems to me nothing in the language of the document to justify the conclusion that the plaintiffs intended to authorize the mukhtar to file an appeal. It may be noted in the end that the learned counsel who appeared before the learned District Judge admitted that the power of attorney did not authorize the mukhtar to file an appeal. The learned counsel for the appellants urged that this was only an admission of counsel on a point of law and is not binding. But the admission can be looked upon as an admission on a point of fact also. There is nothing on the record to show that the counsel merely meant to make an admission on a point of law. I dismiss the appeal. No order as to costs as the respondents did not appear.

M.N. *Appeal dismissed.*

A. I. R. 1933 Lahore 505

BHIDE, J.

Daulat Ram—Appellant.

v.

Punjab National Bank, Ltd., Lahore and *another*—Respondents.

Misc. First Appeal No. 908 of 1932, Decided on 2nd February 1933.

(a) Decree — Decree passed on basis of award.

A decree passed on the basis of an award should be construed in the light of the award only. [P 506 C 2]

(b) Contract Act (1872), S. 44—Position of joint judgment debtors is same as that of joint promisors—Release granted to one does not absolve others.

The position as regards joint judgment-debtors is the same in principle as that as regards joint promisors under S. 44, Contract Act. Hence a release granted to one of them without the consent of others does not absolve the latter from liability: 39 *Mad* 548, *Rel on*; In re *E W A a debtor*, (1901) 2 *K B* 642, *Dist.* [P 507 C 1]

H. C. Carden Noad—for Appellant.

Mukund Lal Puri—for Respondents.

Judgment.—The material facts of the case giving rise to this appeal may be briefly stated as follows: On 11th January 1924 Jairam Das and Banshi Ram, defendants 1 and 2, executed a mortgage of certain properties in favour of the Punjab National Bank in consideration of a loan of nine lakhs of rupees. Defendants 3 and 4 guaranteed payment of this loan according to the terms of the mortgage-deed and in the event of default made themselves liable for payment of the whole amount. The loan was not paid up by the mortgagors or the sureties in accordance with the terms of their contracts with the result that the Punjab National Bank instituted a suit against them for recovery of a sum of over eleven lakhs of rupees. The subject-matter of the suit was referred to arbitration and an award was given by the arbitrator on 6th August 1928. A decree followed in accordance with the award. Later on the plaintiff Bank purchased the Sugar Mill at Unso, which was one of the properties mortgaged in their favour for ten lakhs of rupees, from defendants 1 and 2 and took out execution against defendants 3 and 4 for the balance. Defendant 3 (Lala Daulat Ram) raised a number of pleas but the only points which were pressed on his behalf and which are material for the purposes of this appeal were (1) that defendants 3 and 4 being sureties were absolved from their liability inasmuch as the plaintiff had purchased one of the mortgaged properties from defendants 1 and 2 without their consent and had absolved defendants 1 and 2 from their personal liability and (2) that even if the position of defendants 3 and 4 was that of joint debtors they are absolved from their liability on account of the purchase of the Mill by the plaintiff from defendants 1 and 2 in the circumstances stated above. In support of the latter proposition reliance was placed on *In re E. W. A., A Debtor* (1). The learned Subordinate Judge, First Class, has rejected these objections and it is from this decision that the present appeal has been preferred by Daulat Ram. It may be noted here that Rai Bahadur Narsingh Das (defendant 4), who was a co-surety with Daulat Ram entered into a compromise with the plaintiff Bank and paid up 2 lakhs of rupees

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1. (1901) 2 K B 642.

and consequently the Bank is not seeking any relief against him in these proceedings

The arbitrator in this case was the late Sir Moti Sagar who wrote a detailed award giving a full statement of facts and his reasons. The learned counsel for the appellant has drawn my attention to certain portions of the award in which the arbitrator has referred to the position of defendants 3 and 4 as guarantors. But this is only by way of recital of the facts. The learned counsel has also referred to Cl. 4 in the guarantee bond dated 2nd December 1923, executed by defendants 3 and 4 in favour of the Punjab National Bank, according to which the Bank could only grant an extension of time or other indulgence to the principal debtor on obtaining the guarantor's written consent and giving notice to them. But this clause also obviously referred to the conditions in the preceding clause according to which the principal debtor was bound to repay the loan in certain instalments. I am unable to find anything in the award to support the learned counsel's contention that the position of defendants 3 and 4 continued to be that of guarantors even after the award. By virtue of the gurantee-bond defendants 3 and 4 had agreed to undertake full liability in the event of a default on the part of the principal debtors. Defendants 3 and 4 apparently realized fully the heavy responsibility they were undertaking and had taken the precaution to safeguard their position by requiring certain annual payments in cash from the principal debtors in addition to a lien on certain properties. The default had admittedly occurred and the award gives effect to the liability of defendants 3 and 4 under the guarantee-bond in holding them liable for the full amount of the decree, with costs and interest up to date of realization. The award further stated in clear terms that the decree was executable against these defendants immediately.

In view of the above clear findings in the award, it is impossible to maintain that the liability of defendants 3 and 4 was any longer dependent upon that of defendants 1 and 2. It is true that the award first deals with the liability of defendants 1 and 2 and states that the whole amount due shall be paid by them on or before 31st December 1928 and in the event of default the mortgaged properties entered in Schs. A and B of the mortgage-deed be sold. If the proceeds were found insufficient, these defendants were also to be personally liable for the balance. But this part of the award, which deals with the liability of defendants 1 and 2, does not in any way restrict the liability of defendants 3 and 4, for immediate satisfaction of the decree, as set forth in the latter portion of the award. As pointed out above, the liability of defendants 3 and 4 as found by the arbitrator on the basis of the guarantee-bond was absolute and not in any way dependent upon that of defendants 1 and 2. In view of the above findings it is hardly necessary for me to discuss the matter further, but I may briefly refer to two other arguments on which some stress was laid. It was urged that the terms of the award have been infringed inasmuch as the mortgaged properties have been sold to the Bank by private treaty instead of being sold by auction through the Court and secondly that the discharge from personal liability given by the Bank to the principal debtors would be unreal, if it were held that defendants 3 and 4 are still liable, for defendants 3 and 4 would in that case be entitled to recoup themselves by proceeding against the principal debtors.

These contentions seem to me to be devoid of any force. There is nothing in the award to support the contention that the mortgaged properties could not be sold except through Court. This is not a case of an ordinary mortgage-decree passed under O. 34, Civil P. C., but a decree passed on the basis of an award and must be construed in the light of the award only. All that the award requires is that if the mortgaged properties are sold, the proceeds should be credited towards the decree and this has admittedly been done. It was urged that if this procedure were upheld, defendants 3 and 4 would suffer, as the Bank might have undervalued the properties in collusion with the principal debtors. But this is a question of facts to be decided on its merits. The appellant has apparently raised this point in the Court below. The matter has been put in issue and is yet to be decided. It is therefore unnecessary for me to say anything further about it at this stage. But it may be pointed out that the chances of such undervaluation are remote, as according to the argument of the learned counsel himself if the balance is realized from the sureties, the sureties would in their turn be able to recoup themselves by realizing it from the princhased the Sugar Mill at Unso which

[illegible]

[illegible] On 19th May [illegible]

[illegible] dismissed [illegible]

[illegible] Disney [illegible]

is a loose woman and must have contracted the disease, if, in fact, she ever had it, from one of her paramours. Of this evidence I may dispose at once: I find it altogether unsatisfactory as a ground for the suggested inferences: it may be that, as in the words of the learned District Judge, "the petitioner likes gadding about and is fond of masculine society," but there is no ground whatever for believing that she has at any time committed adultery. It is significant that in the one case, that of Mr. Hirons, which the respondent chose to put to the test, and it was presumably the strongest. The Magistrate, who decided the case, had no difficulty in coming to the conclusion that the charge was completely without foundation. The first and principal question then is whether the respondent had gonorrohea and communicated it to the petitioner. (After considering the evidence, of the doctor, the judgment proceeded). I feel myself compelled to act on this evidence and hold that the petitioner contracted gonorrohea from the respondent, but not that he knew at the time that he infected her, that he had the disease. The result is that on this evidence the respondent is guilty of adultery.

It remains only to ascertain whether the charges of cruelty are established. (After considering the evidence, the judgment proceeded). On the question of cruelty I accept the evidence of the petitioner that the respondent beat her on many occasions: I find the allegation of cruelty proved. Accordingly, finding both adultery and curelty proved against the respondent, I would allow this appeal and grant the petitioner a decree nisi with costs for the dissolution of her marriage with the respondent and I would give the petitioner custody of the children of the marriage.

Tek Chand, J.—I agree.

K.S. *Appeal allowed.*

A. I. R. 1933 Lahore 508

HARRISON AND DALIP SINGH, JJ.

Tara Singh and *others* — Objectors—Appellants.

v.

Secretary of State—Defendant—Respondent.

First Appeal No. 124 of 1926, Decided on 17th January 1933, from decree of Dist. Judge, Jhelum, D/- 10th October 1925.

Land Acquisition Act (1894), S. 23—Demands for buildings limited—Land should be valued on basis of agricultural land.

Where except for a small portion of land, the land in dispute, had no value as a building site because the demand for buildings was limited, the value of the land should be assessed on the basis of what was its worth as an agricultural land.

[P 508 C 2; P 509 C 1]

J. N. Aggarwal, Kishan Dayal, Ram Chand Manchanda, J. L. Kapur and *Asa Ram Aggarwal*—for Appellants.

C. H. Carden Noad and *Anant Ram Khosla*—for Respondent.

Dalip Singh, J.—These four appeals (Civil Appeals Nos. 124 to 127 of 1926), may be disposed of in one judgment. They are appeals from the decision of the learned District Judge modifying the award of the Collector to a certain extent with respect to certain land acquired by the Government under the Land Acquisition Act. The only question which arises before us in appeal, and which arose before the learned District Judge, was whether the value of the land was to be assessed purely on the basis of what was its worth as agricultural land or whether this value should be enhanced by consideration of the potential value of the land as a building site. The learned District Judge came to the conclusion, that, except for a small portion of land, the land in dispute had no value as a building site because the demand for buildings was limited. He pointed out that as soon as the Government released certain land situate in what has been called on the record the kacha or temporary bazar and granted leases on various terms to persons dealing in the Mandi, the result was that persons, who had previously been occupying shops and houses adjacent to the land in dispute, left those shops and houses and took up their residences in the kacha bazar. The shops so left have not again been tenanted. In fact the evidence is that in 1925 the whole of the shops and houses, which had previously been fetching a high rental, were completely deserted.

I cannot imagine better proof of the fact that the demand was a strictly limited one and that in 1919 there was no immediate future probability of this land being used for a building site. Had this land had any such probable immediate use, at the very least, the shops and houses round about it would have continued to be tenanted, even if they did not fetch the rents they were fetching before the release of the sites in the kacha bazar. In the circumstances therefore I am clearly of opinion that the learned District Judge was right in holding that the land in dispute had no building value. I would therefore dismiss all the appeals with costs.

Harrison, J.—I agree.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 509

ADDISON AND BHIDE, JJ.

H. Ubedul-Rahman and *others*—Defendants—Appellants.

v.

Darbari Lal and *others*—Plaintiffs—Respondents.

First Appeal No. 525 of 1927, Decided on 16th February 1933, from decree of First Class Sub-Judge, Delhi.

(a) Transfer of Property Act (1882), Section 111 (a)—Lease determined—Person holding over is trespasser—For calculating compensation for use and occupation he cannot rely on terms of tenancy.

Where a lease terminates the position of the persons erelong occupying the lease hold-land cannot be considered to be that of a tenant thereafter according to the principle of S. 111 (a). And hence in determining the compensation for use and occupation such persons being in unlawful possession cannot rely on the terms of the tenancy. The compensation for "use and occupation" in such a case must naturally be assessed on the basis of the normal rent realizable during the periods in question: *AIR* 1933 *Lah* 61, *Rel on.* [P 510 C 1, 2]

(b) Provincial Small Cause Courts Act (1887), Art. 31—Suit for recovery of profits of immovable property is not cognizable by Small Cause Courts—Hence second appeal lies and not revision—Civil P. C. (1908), Ss. 9 and 96.

A suit for Rs. 187 being one for recovery of profits of immovable property wrongfully received by the defendants, is excluded from the cognizance of a Court of Small Causes by Art. 31 and consequently an appeal lies to the District Court. And a revision therefore is incompetent. The mere fact that the suit is originally instituted in the Court of Small Causes and is transferred therefrom under S. 24, Civil P. C., cannot alter its nature, when it is in fact not cognizable by that Court. [P 510 C 2]

Mohammad Amin and *Prakash Chandra*—for Appellants.

Kishen Dayal and *Bhagwat Dayal*—for Respondents.

Bhide, J.—Civil Appeals Nos. 525, 526 and 1729 and Civil Revision No. 196 of 1927, are connected and will be disposed of together. These arise out of four suits of a similar character which were tried and disposed of together by the Sub-Judge, First Class, Delhi. The learned Sub-Judge has decreed the suits and the defendants have appealed. One of the suits, which was for recovery of Rs. 187 only, was at first instituted in the Court of Small Causes, but was later transferred to the Court of the Sub-Judge under S. 24, Civil P. C. A petition for revision (Civil Revision No. 196 of 1927) has been filed in connection with the decree passed in this suit, on the ground that the suit continued to be of a small cause nature in spite of the transfer by virtue of the provisions of sub-S. 4, S. 24, Civil P. C. The history of the protracted litigation, which has given rise to these appeals and the petition for revision, which dates as far back as the year 1909, has been given in detail in the order of the learned Subordinate Judge. It will be sufficient to give the following facts for the purpose of this judgment.

One Karim Ullah died about the year 1909, leaving some shops in Chandni Chauk as his property. He left about a dozen heirs. Three persons, named Altaf-ul-rahman Ubaid-ul-rahman, and Ahmad Said, obtained a lease of these shops (including the shops now in dispute which have been described as shops Nos. 8 and 9, in the judgment of the learned Sub-Judge), for a period of five years at a rental of Rs. 180 per month. According to the terms of the lease the period of five years was to begin to run when the lessees obtained possession of all the nine shops. The shops in dispute were already in the occupation of certain tenants and the lessees had to sue for their ejectment in August 1909. The suit was contested and objections were raised also in the execution proceedings. It was not till August 1912 that the lessees obtained possession of the shops. In the meantime, the heirs of Karim Ullah had sold the shops in Delhi to different persons and these latter had sued for partition. Eventually the shops in dispute fell to the share of three persons named Parmeshari Das, Sultan Singh and Kudrat Ullah. These persons now sued to eject the lessees from the shops, but the lessees resisted on the ground that they had not yet obtained possession of all the shops and the period of five years of their tenancy had not yet expired. This litigation had a chequered career and went on for a considerable time. Eventually it was held by a Division Bench of this Court: vide judgment reported as *Obedur Rahman* v. *Darbari Lal* (1), (at pp. 432 to 435 of 7 *Lah.*) that the lease in question had expired on 9th July 1915. This finding which

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1. AIR 1927 Lah 1=98 I C 584=7 Lah 423.

is binding on the parties to these suits must be accepted as final for the purpose of these appeals and the petition for revision.

The suits out of which the present appeals and the petition for revision arise were instituted in the years 1923 and 1926 and were for recovery of mesne profits for the shops realized by the defendants, who were alleged to be in wrongful possession. The mesne profits were claimed for periods from 15th November 1918 onwards, as the claim for the prior period had already become time-barred. The learned Subordinate Judge has decreed the claim for the actual amounts realized by the defendants from their sub-tenants and the fact that these amounts were so realized is not now disputed. The sole point which the learned counsel for the defendants has pressed before us is that the defendants were in possession bona fide as tenants and that they should have been held liable to pay only Rs. 20 per month according to the terms of their lease irrespectively of the amount actually realized by them from their sub-lessees.

For the determination of the above question it must first be seen whether the possession of the defendants during the periods in question was that of trespassers as held by the learned Sub-Judge or that of tenants as contended by the learned counsel for the defendants before us. As stated already, the lease was for a period of five years. This Court having, already decided that this lease terminated on 9th July 1915, the position of the defendants cannot be considered to be that of tenants thereafter according to the principle of S. 111 (a), T. P. Act. This was the view taken by the learned Sub-Judge and it is fully supported by a recent Division Bench judgment of this Court reported as *Sundar Singh* v. *Ram Saran Das* (2). The learned counsel for the defendants contended that the question, whether the lease had or had not terminated, was in dispute and was not finally decided by the High Court till the year 1926 (the judgment reported as *Obedur Rahman* v. *Darbari Lal* (1) was delivered on 4th March 1926), and consequently the defendants should be held to be in occupation as tenants during the periods for which mesne profits were claimed in the present suits. But the mere fact that the matter was in dispute cannot help the defendants and the question must be decided in the light of the final decision of the point. The plaintiffs were trying hard to eject the defendants ever since the year 1914 and it is not suggested that they ever accepted or acquiesced in their position as tenants. It appears that the rents have risen very high since the original rent was fixed and it was apparently owing to this reason that the defendants persisted in resisting the plaintiffs' claim. If in these circumstances the defendants continued in occupation after the expiry of the lease it was at their own risk. It was next contended that, even if it be held that the defendants were unlawfully "holding over," they should not have been held liable to pay more than double the rent fixed for each shop by the terms of the lease, i. e., Rs. 20 per mensem. But as the tenancy had terminated and the defendants were in unlawful possession, they cannot rely on the terms of the tenancy. The compensation for "use and occupation" in such a case must naturally be assessed on the basis of the normal rent realizable during the periods in question.

It is unnecessary to discuss for the purposes of this appeal cases in which double the normal rent has been allowed when the tenant was found to have held over wilfully and contumaciously. For, in the present instance the plaintiffs have been given decrees only for the amounts actually realized by them from the sub-tenants. They have thus not been really penalized in any way. In the circumstances I see no ground to interfere. As regards the petition for revision, a preliminary objection was raised that no revision is competent, as the suit was for Rs. 187 being one for recovery of profits of immovable property wrongfully received by the defendants, was excluded from the cognizance of a Court of Small Causes by Art. 31, Sch. 2, Provincial Small Cause Courts Act, and consequently an appeal lay to the District Court. This contention seems to be correct. The mere fact that the suit was originally instituted in the Court of Small Causes and was transferred therefrom under S. 24. Civil P. C., cannot alter its nature, when it was in fact not cognizable by that Court. On the above findings I would dismiss the appeals as well as the petition for revision with costs.

Addison, J.—I agree.

V.S. *Appeals dismissed.*

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2. AIR 1933 Lah 61=14 Lah 137.

A. I. R. 1933 Lahore 511

ABDUL QADIR AND MONROE, JJ.

Jahana—Convict—Appellant.

v.

Emperor—Opposite Party

Criminal Appeal No. 1558 of 1932, Decided on 4th March 1933, from order of Sess. Judge, Jhelum, D/- 2nd December 1932

Penal Code (1860), Ss. 302 and 304—Death by strangulation—Absence of direct evidence—Doubt whether death was not accidental—Benefit of doubt should be given.

Knowledge that pressure applied to the neck is likely to cause death must be attributed, at least to every adult and an accused who is a man of thirty cannot plead ignorance on the ground of youth or inexperience; but it remains with the Court to determine whether the circumstances show that the accused intended to cause death. Where therefore it is evident that the accused was violent and intended to be so, but if a doubt still remains whether so far as his intention went the deceased's death was not accidental; of this doubt the accused is entitled to the benefit. In this case such a benefit was given and the conviction under S. 302 was altered to one under S. 304. [P 512 C 1]

Mohammad Amin—for Appellant.

D. R. Sawhney—for the Crown.

Judgment.—Jahana accused has been convicted for the murder of Mt. Fatima Bibi his wife and sentenced to death under S. 302, Penal Code. The facts as alleged by the prosecution witnesses are as follows: Mt. Fatima Bibi, the deceased, was married as a child, about two years before her death: during the period between her marriage and death she was sent by her father Palhu from time to time to stay at the accused's house against her will. A few days before her death she was sent to the accused's house, where he and his mother Mt. Bhage were living together. On the next day (15th April 1932) the accused and his mother went to Palhu and informed him that, during the night, the deceased had been enticed away by Mohammad Hayat son of Pir Bakhsh. Palhu made inquires from Pir Bakhsh and became suspicious; and on the 18th April, he went to the accused's house and questioned him: the manner of the accused and his mother became embarrassed when Palhu told them that Pir Bakhsh had denied on oath the charge against his son and that he (Palhu) would hold the accused responsible. Palhu then searched the house and finding nothing there went to their cattle shed which is in the same compound a short distance away. He then found a newly dug grave covered with dried fodder. He ran and collected Shahna, (P. W. 3), Umri, (P. W. 6), Raja, (P. W. 4) and Bahawal, (P. W. 5), and brought them back to the house; they asked the accused what he had done and he replied that he had killed the deceased. They all went to examine the grave and while they were doing so, the accused slipped away. The accused's mother also disappeared; she returned on the 19th April and he on the 20th. The grave was opened by the police: it measured 5 ft. 3 in. by 2 ft. 3 in., and had been levelled with the floor, and the corpse was found and sent for examination.

The post mortem examination of the body of the deceased was made on the 19th April and the body was then decomposed: two abresion marks were found on the front of the neck and the opinion of the Assistant Surgeon was that there was some evidence to show that the deceased was suffocated by some kind of ligature, that is that the deceased was strangled; the fact that the lungs were found to be congested confirmed this view. Palhu, Shahna, Raja and Bahawal have given evidence about their parts in the events set out above; they all testify to the admission by the accused that he had killed the deceased there is no ground for thinking that any of them, even Palhu, bear ill-will to the accused. Mt. Bhage was called as a witness by the Court: she states that, on the day when the death of deceased must have taken place, her son was absent from the village and again on the day on which the body was found; and that on that day she herself was ill in bed; these statements are in conflict with the evidence of the witnesses for the prosecution and are obviously false. She admitted the reluctance of the girl to stay at the accused's house. She made another important statement, namely, that the girl had attained puberty about six months before her death.

The view of the assessors differed: two were of opinion that the case was not proved, one that circumstantial evidence proved the accused to be the murderer and the fourth that the accused wanted to satisfy his sexual desire, the deceased resisted and in the struggle the accused caused her death by pressing her throat, but that the murder was not premeditated or deliberate. The learned Sessions Judge held that the accused was guilty of murder without extenuating circumstances. In my opinion, there is no doubt that the accused was responsible for the death of the deceased. I can find no reason for doubting the evidence of the witnesses who state that he admitted that he caused her death and even without that evidence, the rest of his conduct after the discovery demonstrates his sense of guilt. In my opinion the accused caused the death of the deceased.

The question remains what is the nature of the crime if any, which the circumstances of the case establish. Notwithstanding the guarded opinion of the medical witness I think that death by strangulation is established; the deceased died an unnatural death and the only signs of violence are those on the neck. Knowledge that pressure applied to the neck is likely to cause death must be attributed, at least to every adult—the accused a man of thirty could not plead ignorance on the ground of youth or in experience and it remains then to determine whether the circumstances show that the accused intended to cause death. He had so far as the record shows no motive for murdering his wife: I cannot see why he should have tried to kill her even if full weight is given to the evidence that she was unhappy with him and the theory of the assessor that she refused him his marital rights be adopted. A dispute, about this or of some other nature, must have taken place before the accused became violent and though it is evident that the accused was violent and intended to be so, a doubt must remain whether so far as his intention went the deceased's death was not accidental: of this doubt, he is entitled to the benefit. I would hold therefore that the accused caused the death of the deceased with the knowledge that his act, applying pressure to her neck, was likely to cause death, but without any intention to cause death or such bodily injury as was likely to cause death. So far I think that it is just to take the view most favourable to accused; but no forther: the whole circumstances of the case and particularly the extreme youth of the girl, and the very deliberate concealment of the dead body require that this crime be regarded as very serious, and severely punished.

Accordingly, I would allow this appeal and alter the conviction from one of murder under S. 302, Penal Code, to one of culpable homicide under S. 304, Part 2, Penal Code, and sentence the accused to ten years' rigorous imprisonment.

V.S. *Conviction altered.*

A. I. R. 1933 Lahore 512

MONROE AND CURRIE, JJ.

Ajaib Singh—Convict—Appellant.

v.

Emperor—Opposite Party

Criminal Appeal No, 699 of 1932, Decided on 24th February 1933, from order of First Class Magistrate, Ambala, D/- 29th April 1932.

Criminal P. C. (1898), Ss. 234 and 235—Charges under Ss. 393, 394 and 397, I. P. C. cannot be joined unless they form part of same transaction—Penal Code (1860), Ss. 393 394 and 397.

Charges can be joined only in circumstances set out in Ss. 234 and 235, Criminal P. C. An offence punishable under S. 393, I. P. C. is not an attempt to commit an offence under S. 394, I. P. C. and hence charges under these sections cannot be joined. And charges under Ss. 393, 394 and 397 cannot be joined unless they form part of the same transaction within the meaning of S. 235.

[P 512 C 2; P 513 C 2]

Jhanda Singh—for Appellant.

S. C. Chatterji for *Government Advocate*—for the Crown.

Monroe, J.—These appeals (No. 699 and 809 of 1932), came in the first instance before Coldstream, J., who thought that they should be placed before a Division Bench for decision on the ground that the objections raised by the accused appeared to be of importance.

The petitioners were charged together in one case with having committed, in company with two absconders, offences under Ss. 393, 394 and 397, Penal Code, were convicted by a Magistrate of the First Class, and sentenced to various terms of imprisonment. They have appealed on the ground (amongst others) that these charges were illegally joined. It is admitted by counsel for the Crown that charges can be joined only in the circumstances set out in Ss. 234 and 235, Criminal P. C., and he claims that an offence punishable under S. 393, Penal Code, is an attempt to commit an offence under S. 394 and that therefore the charges under Ss. 393 and 394, Penal Code, were properly joined by virtue of the provisions of S. 234, Criminal P. C. It is only necessary to read the sections to see that this claim is not sustainable. He further argues that the three offences in the present case formed part of the same transaction and that the charges were therefore properly joined under S. 235, Criminal P. C., but the first charge relates to an attempt to rob Gamoon and Ali Nawaz near the village Bulana, on 25th May 1931; the second to the robbery of Naurata at a place near Dhurkara, on the same night, and the third to the robbery of Punnu and others near the village Patwi while armed with deadly weapons and causing grievous hurt: it is clear that the third act was unconnected with the first two, even if it be granted that the first two acts form part of the same transaction by reasons of the fact that they took place during the same night.

In my opinion, the learned counsel for the prosecution has failed to show that any provision of the Code which permits the joinder of charges applies to the circumstances of the present case and accordingly I would allow this appeal and send these cases for re-trial.

Currie, J.—I agree.

K.S. *Appeal allowed.*

A. I. R. 1933 Lahore 513 (1)

TEK CHAND, J.

Shadi Ram v. *Emperor.*

Cr. Revn. No. 1425 of 1932, D/- 4th January 1933, reported by Addl. Dist. Judge Delhi.

Bombay Prevention of Gambling Act (1887), S 12—Abettors are not guilty.

Under the Act only those persons who are gaming are punishable and those who aid and abet are not punishable. [P 513 C 2]

Facts.—In this case Shadi Ram has been convicted by the lower Court for gambling under S. 12, Bombay Prevention of Gambling Act, (4 of 1887), and sentenced to pay a fine of Rs. 25 or in default to undergo rigorous imprisonment for 15 days. He has paid the fine but appeals against the order. According to the facts of the case as appear from the judgment of the lower Court it would appear that the appellant and two others, namely, Jai Ram and Ratan Lal had been indulging in Satta gambling when one Habiburrahman, an Assistant Sub-Inspector of Police, organized a raid. One Bakhsh Ilahi was appointed as a bogus gambler and he was given a four anna bit and a one anna bit to stake on different figures. He went to the gambling place and found all the three accused present. He made over five annas and staked on different figures. It is said that he first met Ratan Lal accused, who took him to a gali close by where the two other accused were standing. The marked coins were given to Ratan Lal. All the three accused are stated to have entered into the transaction and accepted the money. Now no money was recovered from the possession of the appellant. It is urged that he was in possession of the satta gambling parchies and a pocket-book. The marked coins were only recovered from the possession of Ratan Lal. Nothing was recovered from Jai Ram but he has been convicted on the mere statement that he was taking part in the transaction.

Grounds.—No case whatever has been made out against the appellant. Taking the facts at their value no case appears to have been made out against the appellant for the simple reason that he was not actually found gaming. The most that can be said about him is that he was aiding and abetting. This is not punishable under the Act. Only those persons who are gaming are punishable and those who aid and abet are not punishable: vide S. 12. Similarly there is no evidence of gaming against Jai Ram.

Order.—For the reasons recorded by the Additional District Magistrate, I accept the petition of Shadi Ram and acquit him. The fine,, if paid, will be refunded.

M N. *Petition accepted.*

A. I. R. 1933 Lahore 513 (2)

ABDUL QADIR AND MONROE, JJ.

Ran Singh v. *Emperor.*

Criminal Appeal No. 1429 of 1932, Decided on 16th February 1933.

Evidence Act (1872), S. 26—Confessional statement made to Magistrate while in custody of police is admissible under S. 26.

The only condition on which S. 26 insists is that a confessional statement made by an accused person while in police custody should be made in the presence of a Magistrate. [P 515 C 1]

Where a Magistrate, to whom certain oral confessions were made by the accused, did prepare a memorandum of what was stated to him by the accused in order to help him to remember the things said to him if he has to prove confession orally made to him, even though the confession was not recorded as such.

Held: that the oral confession was admissible under S. 26. [P 515 C 1]

B. I. Ali Khan—for Appellant.

D. R. Sawhney—forthe Crown.

Abdul Qadir, J. — Ran Singh, a Gorkha, who was working as a band master in the B. D. High School, murder of a boy, named Jai Kishen. Ambala Cantonment, was accused of the Persons co-accused with him were Raj Kumar, an absconder, and Toni, a school boy reading in the same school with Jai Kishen deceased. Toni was discharged by the Committing Magistrate, Raj Kumar has not so far surrendered himself and Ram Singh has taken his trial before the Sessions Judge of Ambala, who has convicted him of an offence under S. 302, Penal Code, and condemned him to death. A charge was also framed against him under S. 364, Penal Code, but the Court below felt that there was not sufficient material on the record for a conviction under that section. Ran Singh has appealed through jail and his case has been argued before us by Mr. B. I. Ali Khan. We have also heard the learned Public Prosecutor for the Crown.

The case for the prosecution is that the boy Jai Kishen was on friendly terms with Raj Kumar, Toni and Ran Singh and often used to go about with them, though his doing so was disliked by his father and other members of his family, who suspected his companions to be men of bad character. The boy however was so much under their influence that he told his relations that if they persisted in objecting to his association with them he would leave Ambala and go somewhere else. Nahar Singh, (P. W. 20), father of the deceased, tells us that on the Saturday in the month of June, after which the boy was seen no more Jai Kishen left with his permission to see the cinema and told him that he was going there with Raj Kumar and Ran Singh. He did not come home that night and the father began to search for him, but could not find him. On Monday the 20th June there was a proclamation by beat of drum that a dead body was found with its head cut. He went to Mauza Barhman Mazra, the place near which the dead body was found, and saw the dead body of his son there, the head of whch was severed from the neck and which was discovered at some distance from the place where the body was found. He identified the dead body as that of his son Jai Kishen. Suspicion naturally fell on the persons with whom the body used to associate. It was discovered during the investigation that the three suspects and the deceased had gone to the shop of Om Parkash, son of Raghunath Das, who sells betel leaves in Ambala Cantonment, on the evening on which he disappeared. Om Parkash has given evidence as P. W. 21, and states that all the four persons above mentioned had visited his shop on an evening three days before the proclamation by beat of drum. Kallu Khan, (P. W. 22), says that he saw Raj Kumar and Ran Singh following Jai Kishen and one other, by about 10 paces, near the pond known as Jone Sahib ki diggi and going towards the Benarsi Dass Mill and that he exchanged greetings with Raj Kumar and Ran Singh and was told by them that they were going out for a walk Kanta Parshad, (P. W. 23), found three or four persons going towards the railway line, of whom he identified the son of Nahar Singh as well as Raj Kumar and the band master of the B. D. High School.

The prosecution has thus tried to establish, through the evidence of these three witnesses, P. Ws. 21, 22 and 23, that the deceased was last seen alive in the company of the appellant and the absconder. (After referring to the evidence of these witnesses, the judgment proceeded). Besides the evidence as to Ran Singh and the deceased having been seen together on the evening on which the latter was killed, there are two important pieces of evidence against Ran Singh, appellant; (1) that he pointed out certain places to Sayed Ahmad Hussain, Tahsildar and Magistrate, Second Class, and in pointing out those places to him made statements admitting that he had committed the murder and had killed Jai Kishen by a Khokhri; and (2) that he produced a Khokhri from his house and made it over to the police. It is significant that the Khokhri had been produced by the accused on the 20th June, i. e., on the day on which the body of the deceased was identified and on which he was arrested and questioned. The Khokhri is a rather formidable weapon. The accused admits that he has had it in his possession and that it was recovered from his house, though he denies having made it over to the police himself. It did not appear to be stained with blood, as it may have been washed, but there was some blood observed inside the scabbard in which it was found. Both the things were submitted to the Chemical Examiner, who did not find any blood on the Khokhri, but declared that there was blood on the scabbard and submitted the same to the Imperial Seroligist. The latter has reported that the blood was disintegrated and not sufficient for the purposes of determination whether it was human blood. (After referring to the medical evidence regarding the wound, the judgment proceeded). The counsel for the appellant has laid much strees on the nature of the confession relied on by the prosecution in this case and he urges that it is inadmissible in evidence and that, even if it is held to be admissible it is not of much value. In support of the argument that it is inadmissible, counsel relies on the fact that some of the spots pointed out by the accused to the Magistrate were those already known to the police, e. g., the place where the body was found or the place where the head severed from the body was lying. It is urged therefore that if the accused goes and points out those spots and nothing is discovered in consequence of the information given by him, the statement accompanying that pointing out cannot be held to be admissible under S. 27, Evidence Act.

It appears to me, however that the prosecution does not rely on the pointing out of spots in the present case as relevant or admissible under S. 27, Evidence Act, but want to use the confession under consideration as one made admissible by S. 26 of the said Act. The only condition on which S. 26 insists is that a confessional statement made by an accused person while in police custody should be made in the presence of a Magistrate. Here the evidence of Sayed Ahmad Hussain, (P. W. 13), shows that oral confessions were made by the accused to him when pointing out certain spots, e. g., the accused took the Magistrate to a well and said that he and the absconder had quenched their thirst at that well after committing the murder. When pointing out the *Ak* plant where the head of the deceased was found, the accused said to the Magistrate that he and the absconder had kept it there after the murder. It has been urged that in the absence of a duly recorded confession by a Magistrate, in which the accused could have had the opportunity of being warned that he was not bound to make a confessional statement and that any statement made by him would be taken into consideration against him, these oral confessions, said to have been made by the accused to Sayed Ahmad Hussain, should not be taken into account. It is true that there is on this record no confession purporting to have been recorded as such by a Magistrate. Sayed Ahmad Hussain did prepare a memorandum of what was stated to him by the accused, while pointing out the spots and that has been placed on the record as Ex. P. G., and is proved by Sayed Ahmad Hussain to be in his handwriting and correctly made at the time when the statements were being made to him. The memorandum was made to help the witness to remember the things said to him, if he has to prove the confession orally made to him, which is proved by the oral testimony of this respectable witness. I do not see how this evidence can be excluded from consideration and if it is taken into consideration along with the other evidence against Ran Singh, appellant, which has been summarised above, I think, the cumulative effect of the whole is that the appellant is undoubtedly guilty of this murder.

Agreeing therefore with the finding of the learned Sessions Judge on this point, I would dismiss this appeal and uphold the conviction of the appellant and confirm the sentence of death passed against him.

Monroe, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 515

TEK CHAND, J.

Lt. Dhara Singh and *others*—Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1544 of 1932, Decided on 2nd March 1933, from order of Addl. Sess. Judge, Montgomery.

Penal Code (1860), S. 176 — Intentional omission alone is offence.

Section 176 is intended to apply to parties who commit an intentional breach of obligation to report and not where the public servant has already obtained the information from other sources: 4 *Cal* 623, *Foll.* [P 516 C 1]

M. L. Batra—for Petitioners.

Facts.—The three petitioners, Lieutenant Dhara Singh, Ranbir Singh and Kavi Datt Lambardars of Chak No. 66/12-L, have been convicted under S. 176, Penal Code, and sentenced to pay a fine of Rs. 15 each or in default to undergo one month's rigorous imprisonment on an allegation that they failed to furnish information to the police about an offence under S. 457, Penal Code, said to have been committed in the house of Sundar Singh, (P. W. 1), on the night between 12th and 13th September 1931. The prosecution examined three witnesses including Sundar Singh, (P. W. 1), in whose house the offence is said to have been committed, Ghulam Mohammad Constable, (P. W. 2), who recorded the First Information Report under S. 457, Penal Code, on 15th September 1931 and Mohammad Shariff, Sub-Inspector, (P. W. 3). The case for the prosecution is that although Sundar Singh (P. W. 1), the complainant himself did make a report at the Thana on 15th September 1931, the petitioners who are the lambardars of the village furnished no information to the police about the offence though they were bound to do so under S. 45, Criminal P. C.

The case for the defence is that on the very next day after the occurrence the complainant Sundar Singh, (P. W. 1), did go to the Thana accompanied by Ranbir Singh accused and Nathu Chaukidar. It is stated however that the police did not record the report on that day, but sent them back saying that they should follow the tracks. An attempt was made again on the next day to make a report, but with no better results and Sundar Singh accompanied by Nathu chaukidar—then admittedly made the First Information Report on the third day of the incident, that is, on 15th September 1931. The defence version has been supported by Sundar Singh, (P. W. 1), who was produced by the prosecution in this case. The defence also examined in addition to three other witnesses Subedar Major Bishan Singh, (D. W. 1), Jamadar Gian Chand, (D. W. 2), and Beant Singh, (D. W. 3), who saw Sundar Singh complainant with Ranbir Singh either returning from the Thana or going to it. The learned Magistrate however has disbelieved all these witnesses and even Sundar Singh, (P. W. 1), who was produced by the prosecution itself. The three accused have accordingly been convicted and sentenced as stated above.

Grounds.—(1) It is obvious from the evidence produced that the police did come to know about the offence from Sundar Singh, (P. W. 1), on the very next day and even if he is disbelieved then at least on 15th September 1931, though the present complaint against the accused was not lodged till 29th March 1932. It is a well established principle that S. 176 is intended to apply to parties who commit an intentional breach of obligation to report and not where the public servant have already obtained the information from other sources. I may refer in this connexion to *Empress* v. *Sashi Bhusan Chukrabutty* (1) in which it was held that this section should not be put into force against one who has omitted to give information to the police of an offence having been committed in cases where the police have actually obtained such information from other sources as they undoubtedly did in the present case. It is remarked in that ruling that when once the information has reached the authorities concerned

> "it is not reasonable that every other person who may possibly be bound to give information should be prosecuted for not having done so. A police officer is no better off when he has half a dozen copies of the same report than when he has the first."

It appears to me, therefore that the prosecution in the present case was ill advised and probably vindictive because it was alleged by the complainant that the police failed to record his report when he first went to the Thana.

(2) As stated already it is necessary in a case under S. 176, Penal Code, to prove that the accused committed an intentional breach of the obligation to report the matter. We have seen however that according to Sundar Singh, (P. W. 1), a witness produced by the prosecution itself, one of the lambardars Ranbir Singh did actually go with him to the Thana, but the police did not record the report. It is very doubtful if under the circumstances it can be said that the accused intentionally omitted to give the requisite information to the police. It is therefore submitted that the conviction and sentence recorded by the learned Magistrate against the accused should be set aside.

Order.—I agree with the reasons recorded by the learned Sessions Judge accept his recommendation that the conviction in this case is not justified and be set aside. I accept the petition for revision and quash the convictions and the sentences and acquit the petitioners. The fine, if paid, shall be refunded.

M.N. *Petition accepted.*

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1. (1879) 4 Cal 623.

A. I. R. 1933 Lahore 516

COLDSTREAM, J.

Nawab Din—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1220 of 1932, Decided on 17th March 1933, from order of Sess. Judge, Amritsar, D/- 13th September 1932.

(a) Penal Code (1860), S. 201—Person secretly burying murdered person is guilty —Knowledge or conviction of murderer is unnecessary.

A person who secretly buries the headless body of man just murdered is prima facie guilty under S. 201 unless he can establish that his act was innocent. It is not necessary for a conviction that the accused should be aware of the identity of the offender whom he intends to screen nor need the offender himself have been convicted: 16 *I C* 755 and 9 *Lah* 671, *Rel on.* [P 517 C 1]

(b) Evidence Act (1872), S. 27—Accused under detention as suspect making statement leading to discovery of murdered body — Statement is admissible.

Where the accused was under detention as a suspect Shamil Taftish when he made a statement about the burial of the body of a murdered person and pointed out the manure heap wherefrom the

body was discovered directly in consequence of that statement such statement is admissible: 9 *Lah* 671, *Ref*. [P 517 C 1, 2]

Nand Lal—for Appellant.

Ram Lal—for the Crown.

Judgment. — The appellant, Nawab Din was tried along with two others Jhandu and Khair Din by the Sessions Judge of Amritsar on a charge of murdering a money lender Uttam Chand on the night of 2nd July 1932 at Mehmadpura. The principal witness was a professed accomplice Ismail who turned approver. The learned Sessions Judge held that the evidence of Ismail was not corroborated by independent evidence showing that the accused were the murderers. He acquitted Jhandu and Khair Din. Against Nawab Din there was evidence that he had informed the police during the investigation that he had joined in the burial of Uttam Chand's headless body as stated by the approver and had pointed out to the police a manure heap in Ismail's land from which Uttam Chand's body was exhumed. Finding this evidence satisfactory corroboration of Ismail's statement regarding the disposal of the body the Sessions Judge convicted Nawab Din under S. 201, Penal Code, and sentenced him to seven years' rigorous imprisonment.

It is argued by Dr. Nand Lal counsel in appeal that the conviction is bad inasmuch as it is not proved that his client buried the body with the intention of screening that actual murderer, that the evidence of his having told the police that he buried the body and pointed out the place where it was is inadmissible under S. 27, Evidence Act, because he was not then in police custody, and that in any case the sentence is excessive. There is nothing in S. 201, Penal Code, to support the first contention. A person who secretly buries the headless body of man just murdered is prima facie guilty under this section unless he can establish that this act was innocent. It has indeed been held that it is not necessary for a conviction that the accused should be aware of the identity of the offender whom he intends to screen (16 *I. C.* 753). Nor need the offender himself have been convicted, (*I. L. R.* 9 *Lah.* 671).

It is clear from the evidence of Malik Haq Nawaz Khan, P. W. 31, the investigating officer, as well as from that of Anup Singh, P. W. 22, on which counsel himself relies that the appellant was under detention as a suspect Shamil Taftish (he was formally arrested after the body was exhumed) when he made the statement about the burial of the body and pointed out the manure heap: see *I. L. R.* 9 *Lah*. 671, at p. 674. It is also clear that the body was discovered directly in consequence of this statement and not of any statement made by Ismail. The evidence establishes the appellant's guilt beyond doubt. I see no good reason for interfering with the sentence and I dismiss the appeal.

M.N. *Appeal dismissed.*

A. I. R. 1933 Lahore 517

JAI LAL, J.

Banarsi Das—Plaintiff—Appellant.

v.

Cantonment Authority, Ambala Cantonment— Defendants—Respondents.

Second Appeal No. 469 of 1932, Decided on 20th July 1932, against decree of Dist. Judge, Ambala, D/- 13th January 1932.

(a) Deed—Construction.

The description of a document is not the sole guide for determining its real nature. [P 518 C 2]

(b) Cantonments Act (1924), Ss. 200 and 210—Relationship between parties held to be that of landlord and tenant—S. 200 held applicable and not S. 210—Transfer of Property Act (1882), S. 108.

The Cantonment Authorities gave a shed to *B* on payment of Rs 300. The agreement was for three years and the amount to be paid was described to be the payment for the occupation of the shed known as the vegetable market. *B* was not to charge commission fees other than those specified in the agreement and was prohibited from selling vegetables in any other place but the shed. A clause in the agreement provided that money, any due from *B*, was to be recovered from his moveable and immovable property. Some instalments were paid by *B* but the shed subsequently was blown off; *B* refused to pay the next instalments on demand by Cantonment Authorities. Some overdue instalments not having been paid by *B*, Cantonment Authorities recovered the same by issue of warrant of attachment of *B*'s moveable property. *B* thereupon instituted suits for recovery of amount realized and also for damages for illegal restraint:

Held: that S. 200 applied to the case and not S. 210. The relationship between the parties was that of landlord and tenant and it was governed by the ordinary rules relating to tenancies in absence of special provisions governing such tenancies in the Act. On the destruction of the shed it was optional for *B* to avoid the lease under S. 108, T. P. Act. If the authorities provided its own premises to *B* on destruction of the shed, the inference would be that the agreement that *B* remained liable under the original lease still existed. But if *B* carried on his business in other premises an express agreement was necessary to enable Cantonment Authorities to realize rent of the premise which had been destroyed. [P 519 C 1, 2]

(c) Cantonments Act (1924), S. 259—Cantonment Authority recovering arrears of rent from tenant by distress and sale of moveable property—Its action is illegal and it is liable to pay damages.

The expression "recoverable by the Cantonment Authority under the Act" does not include the case of money due under ordinary contract between that authority and others. It merely applies to such dues as are recoverable by the Cantonment Authority under the express provisions of certain sections of the Cantonment Act which entitle it to levy fees for permitting acts to be done which cannot otherwise be done without the sanction or permission of such authority the interest of sanitation and general welfare of the Cantonment. It does not include moneys which are payable to the Cantonment Authority under express agreements or contracts which the Cantonment Authority is authorized to enter into or to make like an ordinary individual. Where therefore the Cantonment Authority proceeds to recover arrears of rent due from a tenant by distress and sale of his immovable property its action is illegal and makes the Authority liable to pay damages to the tenant for its illegal action.
[P 520 C 1]

Tek Chand—for Appellant.

Ghulam Mohyuddin—for Respondent.

Order.—By means of an agreement dated 7th May 1928, the Cantonment Authority of Ambala Cantonment gave a shed known as vegetable market, Ambala Cantonment, for three years from 1st April 1928, to 31st March 1931, on payment of Rs. 300 to Banarsi Das, appellant. Apparently this Rs. 300 was to be the annual payment by the appellant and was to be paid by quarterly instalments of Rs. 75. The appellant is called the contractor in the agreement and authority was given to him to charge commission for the sale of vegetables and fruits at specified rates. He was not to auction the vegetables and fruits at any other place, but in the shed mentioned above, nor was any, but the contractor authorized to do so. Cl. 5 of the agreement provides:

> "The money, if any, due from the contracts can be recovered from the moveable and immovable property of the contractor."

Other conditions of the agreement need not be mentioned for the purposes of this appeal. Some instalments, it appears, were paid by the contractor, but the shed was blown off on 5th June 1929. A demand having been made by the Cantonment Authority for the instalment which had become due the appellant declined to pay the same on 19th July 1929. A reply to this letter was sent by the Cantonment Authority on the 26th July which is as follows:

> "You have submitted an objection through a pleader to the demand for your instalment of contract money due on account of rent from the vegetable market, R. A. Bazar. You seem oblivious of the fact that you have been carrying on your business at another place provided for you and getting your regular income from it. At any rate you have apparently not told your pleader this."

The rest of the letter need not be referred to. Some overdue instalments not having been paid by the appellant the Cantonment Authority recovered the same by issue of a warrant of attachment of his moveable property, as in the case of recovery of taxes and other dues recoverable by the Cantonment Authority under the Act. The appellant thereupon instituted two suits for recovery of the amounts realized by the Cantonment Authority and also for damages for illegal restraint, it being alleged that the Cantonment Authority was not authorized under the law to recover the amount by warrant. These suits were dismissed by the trial Court and on appeals being preferred to the District Judge one of them was dismissed as it was held that the same was barred by time; the other was dismissed on the merits. Counsel has not argued the appeal which was dismissed on the ground that the same was barred by time. Both have argued the other appeal on the merits, and after giving due consideration to the facts of the case I have reached the conclusion that there are some matters in this case which require further elucidation.

The first question that arises for determination is whether the agreement between the parties amounted to a lease of premises belonging to the Cantonment Authority to the appellant or whether it was merely a licence granted by the Cantonment Authority entitling the appellant to sell vegetables and fruits and whether therefore the sum of Rs. 300, which was to be paid annually by the appellant to the Cantonment Authority, was rent of premises belonging to the Cantonment Authority or whether it represented the licence fees. If what the parties understood the contract to be were the sole guide for determination of this question, then there can be no manner of doubt that the letter of 26th July 1929, written by the Cantonment Authority to the appellant, clearly describes the document as a lease. They described the amount due to them to be money due to them on account of rent for the vegetable market. The description of a document however is not the sole guide for determining its real nature. The document itself, as I have already stated, is for three years, and Rs. 300

to be paid by the appellant is described to be the payment for the occupation of the shed known as vegetable market. It is a part of the condition of the agreement that the appellant is not to charge fees other than those specified in the agreement. Further he is prohibited from selling vegetables and fruits at any other place, but in the shed. A reference may in this connexion be made to S. 200, Cantonments Act, which provides that the Cantonment Authority may charge for the occupation or use of any stall, shop, standing, shed or pen in a public market, etc., rent and fees as it thinks fit. S. 210 provides that no person of any of the following classes, namely, ... (g) vendors of fruits or vegetables...shall carry on his trade, or calling or occupation in any part of a Cantonment unless he has applied for and obtained a licence from the Cantonment Authority. Sub-S. 4 of the section provides:

> "The Cantonment Authority may charge for the grant of licences under this section such fees as it may fix with the previous sanction of the Local Government."

On behalf of the respondent it is contended that the sum of Rs. 300 mentioned in the agreement was really fees fixed by the Cantonment Authority for the grant of licence and that the document of 7th May 1928, was really a licence. The appellant, on the other hand, contends that the agreement was nothing more or less than a lease of premises belonging to the Cantonment Authority on payment of an annual rent of Rs. 300. In my opinion it is S. 200 that applies and not S. 210. S. 210 is intended to apply to places which do not belong to the Cantonment Authority. S. 200 contemplates the case of places built by the Cantonment Authority for particular purposes and for the occupation of which the Cantonment Authority is entitled to charge rent and fees. That, in my opinion, is a matter quite distinct from licence fees. The relationship between the parties, therefore was of landlord and tenant and it was governed by the ordinary rules relating to tenancies in the absence of any special provisions governing such tenancies contained in the Cantonments Act and no such provision has been pointed out by the learned counsel for the respondent except S. 210 which, as I have already stated, has no application to this case.

From what I have stated above it is obvious that the shed on the premises rented to the appellant was destroyed in June 1929. Now S. 108, T. P. Act, sub-S. (e) provides for the case of the destruction wholly or partially, or any material part of the demolished property and it is laid down there that the lease shall ,at the option of the lessee, be void. The question is whether the lease was avoided by the appellant after the shed was blown off. The appellant's counsel relies upon his letter dated 19th July in support of his contention that he avoided the lease by giving a notice to the Cantonment Authority. I have examined the letter and am of opinion that the letter does not by itself amount to a notice to the Cantonment Authority that the appellant had exercised his option to avoid the lease.

The next question is whether after the shed had been blown off the appellant was given other premises by the Cantonment Authority for the sale of vegetables and fruits or whether the appellant continued to sell vegetables and fruits in other premises rented by him or with the permission of the owner or occupier thereof. In other words, if the conduct of the parties was such from which it can be inferred that there was a substitution of a new agreement between the parties whereby it was expressly or impliedly agreed that in consideration of the Cantonment Authority having permitted the appellant either to occupy its own premises or to continue sale of fruits and vegetables in other premises the appellant still remained liable under the original lease then it is obvious that the Cantonment Authority was entitled to enforce the terms of the agreement of 7th May 1928. If the Cantonment Authority provided its own premises for the purpose to the appellant then the inference must be almost irresistible that such an agreement existed between the parties. If, on the other hand, the business was carried on by the appellant in other premises, that is to say, other than those of the Cantonment Authority, then there must be an express agreement between the parties in order to enable the Cantonment Authority to realise the rent of premises which had been destroyed. It also may be that if after the shed had been blown off the appellant ceased to do any business at the place where the shed existed and shifted to another place, that might amount to his abandonment of the premises and his conduct might be tantamount to an avoidance of the lease and, under S. 65, Contract Act, he would then be entitled not only to refuse to pay future rent, but also to recover whatever rent he had paid for the period after the shed had been destroyed. There is no clear finding on this matter by the Courts below. There is some indication in the judgments and also in the letter of the Cantonment Authority dated 26th July 1929, that the appellant was "allowed" to carry on his business in another place, but it is not clear whether that place belonged to the Cantonment Authority or to some private individual and under what circumstances the appellant was allowed to carry on his business there.

Another important question arises in this case. On my finding that the relationship between the parties created by the agreement of 7th May 1928, was one of landlord and tenant, it follows that S. 259 did not authorize the Cantonment Authority to recover the amount, if any, due to it by distress and sale of the moveable property of the appellant. That section provides that all money recoverable by the Cantonment Authority under the Cantonment Act shall be recoverable either by suit or on application to a Magistrate by the distress and sale of the moveable property of the person from which it is recoverable. In my opinion the expression "recoverable by the Cantonment Authority under the Act" does not include the case of money due under ordinary contract between that Authority and others. It merely applies to such dues as are recoverable by the Cantonment Authority under the express provisions of certain sections of the Cantonment Act, which entitled it to levy fees for permitting acts to be done which cannot otherwise be done without the sanction or permission of such authority in the interest of sanitation and general welfare of the Cantonment. It does not include moneys which are payable to the Cantonment Authority under express agreements or contracts which the Cantonment Authority is authorized to enter into or to make like an ordinary individual.

Therefore my opinion is that the action of the Cantonment Authority in recovering the dues payable to them under the agreement of 7th May 1928, under S. 259 was illegal and made that authority liable to pay damages to this Court within two months. The Courts below have not assessed such damages. This case therefore will have to go back to the learned District Judge with direction to determine the two issues on the evidence which is already on the record and to submit a finding to this Court within two months. The points on which the learned Judge will submit a report are: (1) Whether the appellant carried on his business of sale of fruits and vegetables on premises belonging to the Cantonment Authority or on premises otherwise secured by him after the shed had been blown off, and whether there was any express agreement between the parties, if the business was carried on on premises not belonging to the Cantonment Authority, for the continuation of the payment of the rent by the appellant as provided in the agreement of 7th May 1928 ? (2) What compensation the appellant is entitled to for the illegal recovery of the rent from him by the Cantonment Authority by warrant ? So far as the appeal which was dismissed by the District Judge as barred by time is concerned, the hearing of it shall be held over till the return is made by the District Judge.

R.M./R.K..   *Case remanded.*

A. I. R. 1933 Lahore 520

ABDUL QADIR, J.

Kishen Singh— Plaintiff—Appellant.

v.

Sadhu and *others*—Defendants—Respondents.

Second Appeal No. 325 of 1932, Decided on 19th January 1933, from decree of Dist. Judge, Ambala, D/- 24th November 1931.

Evidence Act (1872), S. 112—Filiation proved—Legitimacy should be presumed.

Where a child establishes the possession of filiation, which is the aknowledgment of the parents and habit and repute, everything such as legitimacy must be presumed in his favour: *AIR* 1927 *Mad* 733 and *AIR* 1929 *P C* 135, *Rel on.*

[P 521 C 2]

N. C. Pandit—for Appellant.

Tek Chand—for Respondents.

Judgment. — Sarup Singh, of the village Khizarbad, in Ambala District, had two sons Natha Singh and Partap Singh. Natha Singh had left his village about 40 years before the suit which has led to this appeal, in search of employment and had not been heard of for a large number of years. Some years before suit however he came back to the village, accompanied by a little boy named Sadhu, who, he declared, was his son and whom he treated as such during the time that he was alive. Partap Singh, brother of Natha Singh, had also not resided in Khizarabad for a considerable period, but had gone to another village and married a Chamar woman there. Kishan Singh was the son of Partab Singh from that woman. After Sarup Singh's death, it seems, his land had been mutated in favour of his two sons and Kishen Singh had got the share of his father after some dispute. When Natha Singh died, the revenue authorities mutated the share of Natha Singh in the land of Sarup Singh in favour of Sadhu. A suit to challenge this mutation and to challenge the statute of Sadhu, who was a minor at the time, was brought by Kishen Singh, who alleged that Sadhu was not the son of Natha Singh and that he was entitled to Natha Singh's land as his nearest heir. The trial Court decreed the plaintiffs claim and Sadhu appealed. The learned District Judge accepted the appeal and dismissed the plaintiff's suit with costs throughout. The plaintiff, Kishen Singh preferred a second appeal to this Court, which has been argued before me by Mr. N. C. Pandit. I have also heard Mr. Tek Chand for the respondent. The sole question in this case is whether Sadhu has been proved to be the son of Natha Singh or not. The finding of the learned District Judge on this point is as follows:

> "The principal fact which emerges from the evidence is that Natha Singh treated Sadhu Singh as his legitimate son and that he was accepted by the village as such. The general presumption of law is in favour of the legitimacy and it is for the person denying this to produce at least some prima facie indication to the contrary before the person whose legitimacy is questioned be put to strict proof of his legitimacy. The treatment accorded to Sadhu Singh by his father is in itself valuable evidence of his paternity and legitimacy and as there is no evidence at all in rebuttal, I consider that his claim to be the legitimate son of Natha Singh should be accepted."

Mr. Tek Chand raises a preliminary objection that the finding is one of fact and cannot be challenged in second appeal. Mr. N. C. Pandit replies by urging that the finding is vitiated by the circumstances given below: (1) that the lower appellate Court wrongly allocated the onus of proving that Sadhu was not a legitimate son of Natha Singh on the plaintiff; (2) that the learned District Judge relied on a general presumption which does not exist independently of S. 112, Evidence Act; (3) that he erred in stating that there was no evidence at all in rebuttal. I will dispose of the last point first. My attention has been drawn to the evidence produced on behalf of the plaintiff, but that is absolutely unconvincing and worthless, and I think the learned District Judge was justified in saying that there was no evidence in rebuttal, as there was no evidence worth the name.

As to point No. 2, it is urged that there is hardly any presumption of law in favour of legitimacy, except in cases covered by S. 112, Evidence Act, where it is shown that the alleged father and the mother of a person claiming to be their legitimate child were living as husband and wife. I think that Mr. Pandit's contention is correct to this extent that in the present case there is no reliable proof as to who the mother of Sadhu was and whether she and Natha Singh lived as husband and wife. The presumption in favour of the legitimacy of Sadhu therefore is not based on the presumption mentioned in S. 112, Evidence Act, but it is based on the evidence of the acknowledgment by Natha Singh that Sadhu was his son and his treatment of him as such. Mr. Tek Chand relies on *Mohabbat Ali Khan* v. *Mohammad Ibrahim Khan* (1), where it has been held by their Lordships of the Privy Council that when acknowledgment by the father is proved, the onus is on those who deny a marriage to prove that no marriage had taken place. He also refers to a decision of the Madras High Court in *Krishna Rao* v. *Rajah of Pittapur* (2), which says that where a child establishes the possession of filiation, which is the acknowledgment of the parents and habit and repute, everything must be presumed in his favour. In the present case there is reliable evidence on the record, particularly the testimony of Indar Singh, Zaildar, that Natha Singh brought Sadhu with him and told the village people that he was his son. It is also shown that he treated him as his son and that is the main evidence in his favour which has been believed by the lower appellate Court. In my opinion the finding of the lower appellate Court based on this evidence, which it had a perfect right to believe and which I think has been rightly believed, is a finding which must be taken as conclusive in this case.

On the above view of the facts, it is hardly necessary to discuss the question of onus. I may say, however that I am inclined to agree with the learned District Judge in thinking that in order to succeed in his suit it was for the plaintiff to establish that he was the nearest heir of Natha Singh. He had therefore to show how Sadhu, who was by acknowledgment habit and repute the

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1. AIR 1929 P C 135=117 I C 17=56 I A 201=10 Lah 725 (PC).
2. AIR 1927 Mad 733=102 I C 713.

son of Natha Singh, was to be excluded by him. As a matter of fact Kishen Singh did not assert in his plaint that Sadhu Singh was an illegitimate son of Natha Singh. The evidence produced by him is to the effect that Natha Singh never brought Sadhu with him. This evidence has been disbelieved. Even if it be assumed that when Kishen Singh denied that Sadhu was the son of Natha Singh, he denied by implication his legitimacy as well, the burden of proving illegitimacy was on him, which he has not been able to discharge at all. Reference has been made in this connexion by Mr. Tek Chand to *Jang Bahadur Singh* v. *Ram Sundar Singh* (3), which holds that where evidence has been given on both sides and the evidence on one side has been affirmatively believed, no question of the burden of proof arises. I think this decision would have helped the respondent, even if I had held that the question of onus had not been correctly decided by the learned District Judge. This appeal is therefore dismissed with costs and the decree of the lower appellate Court is maintained.

M N. *Order accordingly.*

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3. (1917) 38 I C 817.

A. I. R. 1933 Lahore 522

BHIDE, J.

Mt. Ishro—Plaintiff—Appellant.

v.

Naubat Rai and *others*—Defendants—Respondents.

Second Appeal No. 729 of 1932, Decided on 19th December 1932, from decree of Dist. Judge, Rawalpindi, D/- 29th January 1932.

Transfer of Property Act (1882), S. 55 (4) — Vendee dispossessed by decree in subsequent pre-emption suit—Suit by vendor for unpaid purchase money—Vendee is not entitled to set off expenses incurred in contesting pre-emption suit.

Soon after a sale, vendees were dispossessed in pursuance of a decree in a pre-emption suit in respect of their sale. In a suit by the vendor against vendees for the balance of purchase money for which the vendees had executed promissory notes, the vendees sought to set off the expenses incurred by them in contesting the pre-emption suit on the strength of a covenant contained in the sale-deed:

Held: that the covenant should be reasonably interpreted in view of all the circumstances of the case, that it was merely intended to cover defect of title and that it did not cover any loss resulting from a pre-emption suit: **111 *P R* 1908 and *AIR* 1926 *Lah* 182, *Dist*. [P 522 C 2; P 523 C 1]**

Nawal Kishore—for Appellant.

Gobind Das—for Respondents.

Judgment. — On 29th September 1927, Mt. Ishro sold certain land to Naubat Rai and Hakumat Rai for Rs. 3,000. Rs. 660 were paid to her in cash, while for the rest the vendees executed a promissory note in her favour. A pre-emption suit was instituted by one Nanak Chand with respect to the sale. The trial Court granted a decree on payment of Rs. 600, but on appeal the amount payable by the pre-emptor was raised to Rs. 2,502. Naubat Rai and Hakumat Rai were thus deprived of the land as a result of the pre-emption decree. Mt. Ishro thereafter filed a suit against Naubat Rai and Hakumat Rai for recovery of Rs. 2,340, with interest on the basis of the promissory note executed by them in her favour. Naubat Rai and Hakumat Rai claimed in this suit inter alia, a sum of Rs. 750 by way of set off on account of the expense incurred by them in the pre-emption suit. They based their claim on a covenant in the sale-deed. This claim has been allowed by the learned District Judge and Mt. Ishro's claim has been decreed in part only. From this decision, Mt. Ishro has filed a second appeal. The sole contention put forward in this appeal on behalf of the appellant is that the covenant in the sale-deed on which the respondent's claim to expenses in the pre-emption suit was allowed has been misconstrued and the aforesaid sum of Rs. 750 should not have been allowed. This recital in the sale-deed bearing on this point runs as follows:

> "*Agar kisi nukas-i-kanuni ya kisi wajah se jaidad mobia bala mushtarian ke kabza se nikal jawe to kul zare beh tarikh nikal jane kabza mushtarian ko wapas undal talab ada karungi, jis ka mokhaza muziharra baya ki har kisam jaidad wa zat-i-khas par hoga.*"

The learned District Judge was apparently inclined to think that the covenant was merely intended to cover defects of title, but considering the view taken in *Khonmon Bibi* v. *Shahmali* (1), and *A. I. R.* 1926 *Lah*. 182, he felt himself bound to uphold the respondents' claim. The learned counsel for the appellant urges that these rulings have been misunderstood and that the covenant referred to above did not cover expenses in the pre-emption suit. There is no doubt that the words "Ya kisi wajah se" occurring in the sale-deed are very wide, but they must be reasonably interpreted in view of all the circumstances of the case. They cannot, for instance, be taken to include unlawful dispossession though literally

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1. (1908) 111 P R 1908.

the words might possibly cover such a case. The learned counsel for the appellant has distinguished in *Khonmon Bibi* v. *Shahmali* (1) and *A. I. R.* 1926 *Lah*. 182, on the ground that in these cases there was a clear reference to loss resulting from suits by other persons (though there was no specific reference to pre-emption suit). It is also pointed out that in the former ruling the vendor had only recently purchased the property and her own title was yet liable to be defeated by a pre-emption suit. In the present case it is important to note further that all that the covenant relied on says is that if the vendees were dispossessed, the vendor would be liable to refund the whole of the purchase money. Now, if the parties had in their mind the possibility of dispossession as a result of a pre-emption suit the plaintiff could not be expected to agree to any such condition. For, if the vendees were dispossessed of the land by a pre-emptor, the latter would have to pay purchase money or market price as found by the Court. There could therefore be no necessity for refund of the whole of the purchase money in that case. This is, in my opinion, an important distinguishing feature of this case and in view of it, I hold that the covenant in question did not cover any loss resulting from a pre-emption suit. This feature is also sufficient to distinguish the other case cited on behalf of the respondents. I accept the appeal and adding the sum of Rs. 500 (the amount claimed in this appeal) to the amount decreed by the learned District Judge, grant plaintiff a decree for Rs. 1,386 only with proportionate costs throughout.

K.S. *Appeal accepted.*

✲ A. I. R. 1933 Lahore 523

TEK CHAND, J.

Bishambhar Das — Plaintiff — Petitioner.

v.

Katha Singh — Defendant—Opposite Party.

Civil Revn. Petn. 522 of 1932, Decided on 19th January 1933, from decree of Sub-Judge, Third Class, Kasur.

(a) Contract Act (1872), S. 74—Bond stipulating no charge of interest if principal paid on certain date and in default interest at certain rate is not penal.

Where a creditor plaintiff shows a concession to the defendant that if he paid the amount on a certain specified date no interest would be charged but that if he failed to avail himself of the concession he would be liable to pay interest at stipulated rate from the date of the bond, such condition cannot be said to be in the nature of the penalty and cannot be relieved against under S. 74, Contract Act, or on equitable grounds. [P 524 C 1]

✲ **(b) Debtor and Creditor—Debtor making extra payments voluntarily under mistake of law cannot claim refund — Contract Act (1872), S. 72.**

Where a debtor alleges that he overpaid his creditor under a mistake of law but makes the payment voluntarily he is not entitled to claim a refund of it: *AIR* 1920 *Bom* 192 and *AIR* 1930 *Bom* 430, *Ref.* [P 524 C 1]

Amar Nath Monga—for Petitioner.

Ram Saran—for Opposite Party.

Judgment.—This petition arises out of a suit for the recovery of Rs. 33 instituted in the following circumstances. The defendant owed Rs. 1,180 to the plaintiff on account of various debts due by him, which carried interest. On 21st January 1928 the defendant executed a bond in favour of the plaintiff for Rs. 1,180 agreeing to pay it in two instalments. It was stipulated that if the instalments were paid on the due dates no interest would be charged, but in case of default, interest would be payable at a certain specified rate. The defendant failed to pay the instalments on the dates fixed. About a year after the execution of the bond, he mortgaged certain lands belonging to him to one Narain Singh and authorized the mortgagee to pay to the plaintiff Rs. 2,000, out of the mortgage money. The mortgagee accordingly paid Rs. 2,000 to the plaintiff on 16th December 1929. In April 1932 the plaintiff brought a suit for recovery of Rs. 33 alleging that after giving credit for Rs. 2,000 which he had received on behalf of the defendant from the mortgagee, the sum sued for was still due to him. The defendant admitted the execution of the bond and the payment of Rupees 2,000, but pleaded that really Rs. 1,802 only was due on the bond and the plaintiff had been paid Rs. 198 in excess. He accordingly claimed a refund of this sum, and paid court-fee on this claim. The learned Judge, Small Cause Court, held that the condition, that on default of the payment of the instalments interest would be charged, was penal, that Rs. 198 had been paid in excess, and that the defendant could claim a refund of that sum. As the learned Judge was deciding the case as a Court of Small Causes, and as such he could not entertain a claim for more than Rs. 100, he dismissed the plaintiff's claim, but passed a decree in favour of the defendant against the plaintiff for Rs. 100, leaving the parties to bear their own costs.

The plaintiff has filed a revision in this Court and on his behalf it has been contended that: (1) the condition as to payment of interest was not penal, and (2) in any case, the defendant having voluntarily paid Rs. 2,000 and that no misrepresentation, coercion or mistake of fact having been alleged or proved, he was not entitled to claim a refund. As has been pointed out already, the debts originally due by the defendant to the plaintiff carried interest, but the plaintiff showed a concession to the defendant that if he paid the amount on certain specified dates no interest would be charged, but that if he failed to avail himself of the concession he would be liable to pay interest at the stipulated rate from the date of the bond. Such a condition cannot be said to be in the nature of a penalty and cannot be relieved against under S. 74, Contract Act, or on equitable grounds. The first contention is therefore sound and must be upheld.

In this view of the case it is not necessary to enter into a detailed examination of the second point raised by the petitioner. It may however be pointed out that the payment of Rupees 2,000, is not alleged to have been made under misrepresentation, fraud or coercion on the part of the plaintiff, nor is any mistake of fact alleged. All that is contended is that the amount was paid under a mistaken notion of law, that the condition as to the payment of interest on the date of the bond was penal. Even if this were so, the payment was made voluntarily and as such the defendant is not entitled to claim a refund of it. As observed by Pollock in his Law of Fraud in British India (p. 128)

> "the man who has chosen to Judge his own cause upon all the facts, and has decided against himself, cannot appeal to the Court against his own judgment, whether it was well-informed or not."

See also to the same effect *Wolf & Sons* v. *Dadiba Khemji* (1) and *Mani Lal Lallubhai* v. *Chandu Lal* (2) I therefore accept the petition, set aside the judgment and decree of the Court below and in lieu thereof pass a decree in favour of the plantiiff for Rs. 33 with proportionate costs.

M.N. *Petition accepted.*

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1. AIR 1920 Bom 192=58 I C 465=44 Bom 631.
2. AIR 1930 Bom 430=125 I C 907.

A. I. R. 1933 Lahore 524

ADDISON AND BHIDE, JJ.

Gajindar Singh and *another*—Plaintiffs—Appellants.

v.

Balwant Kaur and *others*—Defendants—Respondents.

First Appeal No. 700 of 1926, Decided on 21st February 1933.

(a) Hindu Law — Alienation—Necessity—Proof must be strict in case of transfers by females

In the case of a sale by a widow stricter proof of necessity is required than in the case of a male proprietor. [P 525 C 2]

(b) Hindu Law—Widow—Legal necessity—Sikh Jats — Pilgrimage is not necessarily necessity.

According to the religious notions of Sikh Jats pilgrimage by a widow is not necessarily considered beneficial to the soul of a deceased husband. [P 526 C 1]

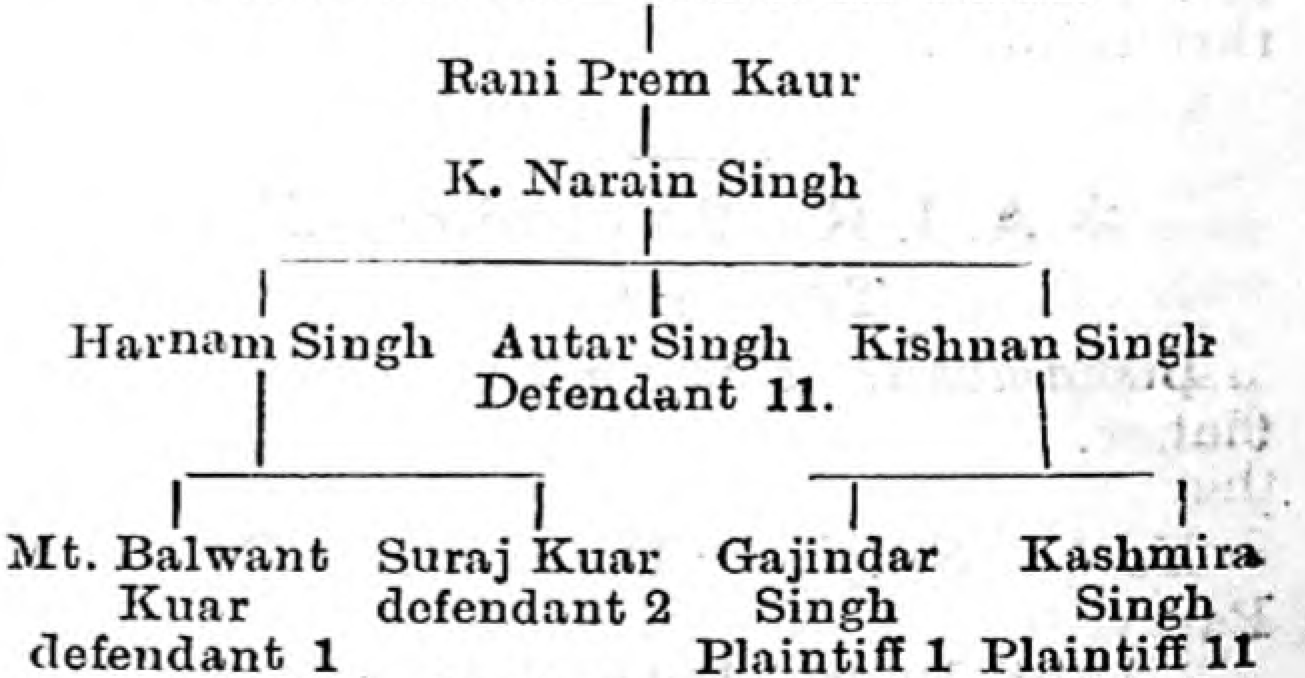
(c) Limitation Act (1908), S. 7—Suit by reversioners to challenge alienations is representative—Time begins to run from date of alienation if there is one reversioner competent to sue—Hindu Law.

A suit by a reversioner to challenge an alienation by the female limited owner is a representative one and it follows that if there is at the date of the alienation a reversioner who is competent to challenge it, but fails to do so within the period of limitation, the result is binding on the whole body of reversioners, whether minors or otherwise: *AIR* 1927 *Mad* 216; *AIR* 1919 *Mad* 911 (*FB*) and *AIR* 1925 *Lah* 654, *Rel on; AIR* 1927 *Lah* 348, *Dist.* [P 527 C 1]

Badri Das and *Amarnath Chopra*—for Appellants.

J. N. Aggarwal and *J. L. Kapur*—for Respondents.

Bhide, J. — The following short pedigree table will be useful for the purposes of this appeal.


HARI SINGH=MAI DAN KAUR
Rani Prem Kaur
K. Narain Singh
Harnam Singh
Autar Singh Defendant 11.
Kishnan Singh
Mt. Balwant Kuar defendant 1
Suraj Kuar defendant 2
Gajindar Singh Plaintiff 1
Kashmira Singh Plaintiff 11

Plaintiffs, Gajindar Singh and Kashmira Singh sued for a declaration that the sale of 866 kanals 8½ marlas of land made by defendants 1 and 2 in favour of defendant 3 by a registered deed on 11th December 1920, shall not affect their reversionary rights. After the sale, Autar Singh, defendant 11 sued for pre-emption of the land and obtained a decree, but sold it again in favour of defendants 4 to 10, who were thus the real contesting defendants in the case. The plaintiffs' suit was based on the usual allegations that the land in dispute was ancestral and that the sale in question being without valid necessity and consideration was invalid according to custom. These allegations were denied by the contesting defendants. The learned Senior Subordinate Judge who tried the case found the material issues against the plaintiffs and dismissed the suit with costs from this decision the plaintiffs have appealed. The learned counsel for the appellants has challenged the correctness of the learned Senior Subordinate Judge's findings both as regards the ancestral character of the property and the necessity and consideration for the sale. As to the first point, the sale being by widows the question whether the property was or was not ancestral would ordinarily have been immaterial; but it is alleged on behalf of the defendants that a part of the property was gifted by Harnam Singh in favour of defendant 1 and hence the alienation was valid at least as regards her share. It is therefore necessary to examine this question.

The plaintiffs' position was that the land in dispute was gifted by Mai Dan Kaur in favour of K. Narain Singh her grandson and fell to the share of his son Harnam Singh on partition. (His Lordship after considering the evidence held reversing lower Courts finding). I accordingly hold that the land in dispute was ancestral and the alleged gift in favour of Mt. Balwant Kaur being invalid against the plaintiffs (as held in the previous case) they have a locus standi to challenge the alienation of the whole of the land included in the sale-deed of 11th December 1920. I now pass on to the next question as regards the necessity and consideration for the sale. I may say at the outset that the passing of the consideration was not disputed before us and the only point that needs discussion is therefore whether there was any legal necessity to justify the sale. It would appear from the terms of the sale-deed that the consideration was as follows:

(a) Rs. 30,000 left with the vendee for payment to prior mortgagees;
(b) Rs. 1,000 for payment to one Bur Singh on account of a debt owed by Mt. Suraj Kaur;
(c) Rs. 1,500 to be spent on a pilgrimage according to an oral will of Harnam Singh for the benefit of his soul;
(d) Rs. 500 for expenses of registration, etc

Total Rs. 33,000.

The existence of the prior mortgages referred to in (a) is not disputed; but at the date of the sale, the mortgagees were apparently in possession: vide recital in the sale-deed dated 28th April 1922, at p. 84 of the Printed Record, and it is not shown that the widows were benefited in any way by the sale so far as the previous mortgages were concerned. It was alleged by the contesting defendants in their written statement that the whole of their land was under mortgage, that about Rs. 4,000 per annum had to be paid by way of interest, that the widows had nothing to live on and hence the sale was beneficial. But the learned counsel for the respondent was unable to point out any evidence to support these allegations. The sale-deed itself shows that a good deal of land was still free from mortgage at the date of the sale and the area of this unencumbered land was reduced to only 149 kanals by virtue of the sale. The allegation that Rupees 4,000 per annum had to be paid by way of interest is not substantiated. As shown above the mortgagees had already taken possession of the land. According to the terms of the principal mortgage-deeds, profits of the land were to be taken to cover interest on the mortgagees' taking possession: vide, Exs. D-1 and D-14. The remaining mortgages were in the nature of additional charges. Possibly there was some interest running on them, but the amount could not have been very large. The land was now irrigated by canal and the income therefrom must have substantially increased. It is significant that even the sale-deed does not say that the sale was necessitated owing to heavy interest charges or the paucity of income. It is well established that in the case of a sale by a widow stricter proof of necessity is required than in the case of a male proprietor; but no attempt has been made to adduce evidence to show that there was any real necessity for the sale. Even if the widows were unable to redeem the previous mortgages, they could easily have left them alone. It does not therefore appear that so far as this item is concerned, there was really any necessity to justify the sale.

In support of the next item, the only evidence relied on is an oral statement of Aziz Singh, D. W. 17. There is no reliable evidence to show that any such debt was actually owed by Mt. Suraj Kaur. As to the third item, also, there is no evidence as regards the alleged oral will of Harnam Singh. Nor is there any evidence to show that any pilgrimage was in contemplation or that such a pilgrimage was actually made. Mt. Balwant Kaur was in the witness box; but even she did not say that any such pilgrimage was contemplated. All that she says is that she received the money "for expenses." The parties are Sikh Jats and it is not shown that according to their religious notions a pilgrimage by a widow is considered beneficial to the soul of a deceased husband and that a sum of about Rs. 1,500 would have been needed for the purpose. The necessity mentioned for this item appears to me to be fictitious. The last item as regards the expenses of the deed must stand or fall with the others and needs no discussion. No necessity for the sale having been established so far as the first three items are concerned the sale must be held to be invalid so far as the reversionary rights of the plaintiffs are concerned.

The learned counsel for the respondents urged that the sale was accepted as valid by Autar Singh, one of the reversioners (who sued for pre-emption as stated already) and from this fact necessity should be presumed. But Autar Singh's evidence shows that he really brought the suit at the instance of the contesting defendants, to whom he transferred the land at a considerable profit, immediately on obtaining a decree. Autar Singh has not deposed that there was any necessity for the sale and has on the contrary said that he himself advised the plaintiffs to bring the present suit. Autar Singh's acceptance of the sale is therefore of no value in the circumstances. The learned counsel for the respondents next referred to *Sri Krishan Das* v. *Nathu Ram* (1) in which it was held by their Lordships of the Privy Council that the real question for consideration in such cases is whether the sale itself was justified by necessity and that the mere fact that a portion of the consideration was not applied to necessary purposes is no ground for setting aside the sale. But this ruling cannot help the respondents in the present case in any way as it has been found that there was no necessity at all to sell the land. The sale having been found to be invalid, it is necessary to consider whether the vendees can take their stand on the previous mortgages referred to in the sale-deed. It appears that there were altogether five mortgage transactions three by Harnam Singh and two by his widow, Mt. Balwant Kaur, the details of which were as follows:

(a) Mortgage-deed dated 30th August 1910, by Harnam Singh in favour of Kirpal Singh (Ex. D-1)	Rs. 10,000
(b) Mortgage-deed dated 22nd April 1912, by Harnam Singh in favour of Kirpal Singh (Ex. D 3)	Rs. 6,222
(c) Mortgage-deed dated 3rd August 1912, by Mt. Balwant Kuar in favour of Kirpal Singh (Ex. D-14).	Rs. 3,500
(d) Mortgage-deed dated 5th February 1914, by Harnam Singh in favour of Kirpal Singh (Ex. D-9)	Rs. 3,715
(e) Mortgage-deed dated 24th September 1919, by Mt. Balwant Kaur in favour of the sons of Kirpal Singh (Ex. D-15).	Rs. 2,150
	Total Rs. 25,587.

The contention of the plaintiffs-appellants was that these mortgages were also invalid as neither Harnam Singh nor Mt. Balwant Kaur had any legal necessity to enter into these transactions. It was urged that Harnam Singh and Mt. Balwant Kaur had ample income and had no necessity to incur debts and that Harnam Singh was in fact a debauchee and had incurred the debts for immoral purposes. These allegations were denied by the respondents and it was further alleged on their behalf that the first four mortgages were at any rate barred by time under the Punjab Act 1 of 1920 at the date of the present suit and the plaintiffs could not therefore challenge them. The learned counsel for the plaintiffs on the other hand contended that the plaintiffs were minors at the date of these alienations and had a right to challenge them. It is common ground that limitation as regards these alienations is governed by Punjab Act 1 of 1920 and the decision of the question turns on the interpretation of S. 6 of that Act, which runs as follows:

> "Notwithstanding anything herein contained, any suit for which the period of limitation prescribed by this Act, is shorter than the period of limitation prescribed by the Limitation Act 1908, or by the Punjab Limitation (Ancestral Land Alienation) Act 1900, may be instituted within the period of one year next after the commencement of this Act, or within the period prescribed for such suit by the Limitation Act 1908, or by the Punjab Limitation Act (Ancestral Land Alienation) Act 1900, whichever period expires first."

Punjab Act 1 of 1920 came into force on 28th May 1920. The period of grace of one year granted by S. 6 therefore expired on 28th May 1921. The present suit was instituted on 9th January 1922, i. e., after the lapse of this period of grace. But the learned counsel for plaintiffs-appellants contended

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1. AIR 1927 P C 37=100 I C 130=54 I A 79=49 All 149 (P C).

that as the plaintiffs were minors at the date of the alienations and also at the date when the period of limitation prescribed by Punjab Act 1 of 1920 came into operation they are entitled to sue within three years after attaining majority according to the provisions of Ss. 6 and 8, Limitation Act. The reply of the learned counsel for the respondents was that the cause of action in respect of the right to challenge the alienations in question was a joint one as regards all the reversioners, that several of the reversioners were majors and were competent to sue at the date of these alienations and hence time began to run against them all and that consequently the minority of the plaintiffs could not help them. In support of this contention the learned counsel referred to the principle laid down by their Lordships of the Privy Council in *Venkata Narayana Pillai* v. *Subhammal* (2) and also to *Varamma* v. *Gopala Dasayya* (3) and *A. I. R.* 1927 *Mad.* 216. The proposition of law that a suit by a reversioner to challenge an alienation in cases of this type is a representative one is now well established and it follows almost as a corollary from this that if there is at the date of the alienation a reversioner who is competent to challenge it, but fails to do so within the period of limitation, the result is binding on the whole body of reversioners. The learned counsel for the appellants did not attempt to challenge these propositions, but merely sought to distinguish the present case on the ground of the minority of the plaintiffs. But the minority of the plaintiffs cannot help them as the period of limitation began to run against the whole body of reversioners, some of them at any rate being majors when the alienations were effected. This was the view taken in *A. I. R.* 1927 *Mad.* 216 and seems to be in accord with the propositions laid down by the Full Bench of the Madras High Court in *Varamma* v. *Gopala Dasayya* (3). The view taken by the Full Bench of the Madras High Court was followed by this Court in *Chiragh Din* v. *Abdulla* (4). The mere fact that the plaintiffs were minors when the Punjab Act 1 of 1920 came into force does not appear to be material. That Act merely cuts down the period of limitation and no new cause of action arose at the time. The learned counsel for the appellants referred to *Masulla Khan* v. *Ghazi Khan* (5); but that case is distinguishable as it does not appear that any major reversioners competent to sue were in existence when the cause of action arose in that case and consequently the point now under decision was neither raised nor decided therein. But there are certain observations at the end of the judgment which seem rather to support the contention of the learned counsel for the respondents. After referring to the provisions of S. 6, Punjab Act 1 of 1920, the learned Judges remark:

> "The words quoted above (i.e. the words 'notwithstanding anything therein contained" occurring at the beginning of S. 6) were in our opinion intended to govern the period of limitation prescribed by the Act, and the object of the section was to prescribe a maximum period of one year after the commencement of the Act, for a suit for which the period of limitation had commenced to run before the enforcement of the Act."

In the present instance, there being major reversioners in existence at the date of the first four alienations the period of limitation had commenced to run. Consequently as the present suit was instituted after the expiry of the period of one year allowed by S. 6, Punjab Act 1 of 1920, it must be held that the plaintiffs have no right to challenge the first four mortgages, which were effected more than six years before the date of the suit. In view of the above findings it is not necessary, strictly speaking, to discuss the question of necessity and consideration for the first four mortgages, but I propose to discuss it very briefly. (His Lordship after discussing the evidence proceeded). It will appear from the above that there is adequate evidence to establish necessity in respect of four out of the five mortgages. There is no evidence to establish necessity for the fourth mortgage dated 5th March 1914; but as I have found above, this alienation was already barred by limitation at the time when the present suit was instituted. The plaintiffs cannot therefore get any relief in respect of this mortgage also.

In the end it may be noted that the learned counsel for the appellant conceded that Autar Singh having pre-empted the sale in dispute he was estopped for challenging the sale and that the plaintiffs' claim must be confined to the half share in the land which they will be entitled to inherit on the death of the widows. On the above findings I would accept the appeal and grant a declara-

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2. AIR 1915 P C 124=29 I C 298=42 I A 125=38 Mad 406 (P C).
3. AIR 1919 Mad 911=46 I C 202=41 Mad 659 (FB).
4. AIR 1925 Lah 654=90 I C 1022=6 Lah 405.
5. AIR 1927 Lah 848=109 I C 817=8 Lah 711

tion to the plaintiffs that the sale in dispute shall not affect their reversionary rights on the death of the alienors; but inasmuch as the five mortgages discussed above have been found to be valid as against them, they will not be entitled to recover their half share in the land in dispute when succession opens out, without payments of the proportionate sum due on these mortgages to defendants 4 to 10 (vendees) or their legal representatives then living and redeeming the mortgages according to law. The plaintiffs will get half their costs throughout.

Addison, J.—I agree.

M.N. *Appeal allowed.*

A. I. R. 1933 Lahore 528

TEK CHAND, J.

C. P. Baston—Plaintiff—Petitioner.

v.

Nawab of Bahawalpur State—Defendant—Opposite Party.

Civil Revn Petn. 621 of 1932, Decided on 18th November 1932, from order of Sub-Judge, First Class, Lahore, D/- 10th November 1931.

Civil P. C. (1908), O. 33, R. 1—Equity of redemption is not asset when money cannot be raised on it.

Property in dispute over which the petitioner had an equity of redemption was not in his possession and the defendant set up an adverse title having taken up wrongful possession of the same: *Held*: that there was no question of raising money on the equity of redemption and that petitioner cannot be deemed to be a man of asset: *AIR* 1928 *Lah* 271, *Dist.* [P 528 C 2]

Shamair Chand—for Petitioner.

Akbar Ali—for Opposite Party.

Judgment.—This is a petition for revision of the orders passed by S. Harnam Singh, Subordinate Judge, First Class, Lahore, on 10th November 1931 and 9th June 1932. By the former order the learned Judge dismissed the petitioner's application for permission to sue in forma pauperis, and by the latter he rejected his application for review of the order of 10th November 1931. The review petition was filed on the ground that the Court had omitted to consider the order of the High Court dated 8th June 1928. The learned Judge overruled this contention, holding that the copy of the aforesaid order of the High Court had been produced in his Court after the order under review had been passed. It appears however that the learned Judge was wrong in this assumption. A reference to the record shows that the petitioner had filed with the amended plaint, on 31st July 1931, a copy of the order of the High Court dated 8th June 1928, and that it was on the record when the Subordinate Judge passed his order on 10th November 1931. The petitioner had presented a second copy of this order in the proceedings before the tahsildar who was conducting an inquiry into the question as to whether the petitioner was possessed of sufficient means to pay the court-fee, and it appears that it was this copy to which the learned Judge was referring when he dismissed the application for review. I hold therefore that the order dismissing the application for review was based on an erroneous assumption and cannot be sustained.

Equally unsustainable is the original order dated 10th November 1931, dismissing the application for permission to sue in forma pauperis. The learned Judge has observed that on the evidence led before him, which remained entirely unrebutted, he would have held the petitioner to be a pauper for the purposes of this suit; but he felt that he was helpless in face of a ruling of this Court reported as *A. I. R.* 1928 *Lah.* 271, in which it was held that the equity of redemption of the property for the redemption of which the suit was laid was an asset of the plaintiff and that unless the plaintiff showed that he could not realize any money on the basis of this asset, he could not be considered to be a pauper. That ruling however has no application to the facts of the present case. There the title of the plaintiff was not in dispute and the suit was for redemption of a mortgage. In this suit the plaintiff claims to be the owner of the properties in dispute and alleges that the defendant has set up an adverse title and has taken wrongful possession. Admittedly, the properties are not in the possession of the plaintiff and no question of his being able to raise money on the "equity of redemption" of these properties arose.

It was however urged by Mr. Akbar Ail on behalf of the respondent that there were certain other properties which the plaintiff had mortgaged to one Islam Din and of which the equity of redemption "vests" in him, and that it was open to the plaintiff to raise money on the security of the "equity of redemption" of those properties. But it is admitted that litigation is going on between the plaintiff and Islam Din in respect of those properties and that in that suit the plaintiff's allegation is that he had originally mortgaged the properties to Islam Din and subsequently he contracted to sell the equity of redemption to Islam Din, but that the latter had backed out of the contract because the property had fallen in value. Islam Din has denied the alleged contract to buy the equity of redemption, but has contended that his mortgage charge exceeded the existing value of the properties. In these circumstances it cannot be said with certainty that the equity of redemption of those houses still vests in the plaintiff, or, even, if it does, it is an asset of a kind on which the plaintiff can raise sufficient money to pay the court-fee on this suit. I hold therefore that the learned Subordinate Judge was in error in not deciding the case on his view of the evidence led before him and in relying on a ruling which had no bearing on the facts of the case. I therefore accept this petition, set aside the orders of the Court below dated 10th November 1931 and 9th June 1932, and grant the application of the petitioner for permission to sue in forma pauperis. Having regard to all the circumstances I leave the parties to bear their own costs of these proceedings.

K.S. *Petition accepted.*

A. I. R. 1933 Lahore 529

CURRIE, J.

Muhammad Khan—Plaintiff—Appellant.

v.

Ata Muhammad and *others*— Defendants—Respondents.

Second Appeal No. 1152 of 1932, Decided on 18th January 1933, from decree of Dist. Judge, Attock, D/- 13th April 1932.

Civil P. C. (1908), S. 11—Vendee's suit against vendor successful—Part of property pre-empted—Vendor suing vendee and pre-emptor—Suit is barred.

The vendees successfully brought a suit for possession of the vendor's properties sold. Part of these properties was pre-empted. The vendor brought a suit for setting aside the original sale and urged that he was not barred by res judicata as the pre-emptor was not a party to the previous litigation:

Held: that the addition of the pre emptor who merely stood in the shoes of the vendees did not affect the operation of the rule of res judicata and the suit was barred: 54 *P R* 1918 and *AIR* 1932 *Lah* 282, *Dist*; *AIR* 1922 *Pat* 63, *Ref*. [P 530 C 2]

H. C. Kumar—for Petitioner.

Nand Lal and *Krishan Sarup*—for Respondents.

Judgment.— Fateh Khan, father of the plaintiff, Muhammad Khan, executed three sale-deeds for Rs. 99 each in favour of Mehr Khan and his sons, Nur Muhammad and Gul Muhammad, the present defendants, on 22nd September 1927. Mehr Khan and his sons brought separate suits for possession on the basis of the sale-deeds against the present plaintiff who raised the plea that the sales were without consideration and necessity and were therefore void against him as the land was ancestral property. Mehr Khan's suit was decreed on 4th March 1929, but dismissed on appeal on 22nd July 1929. In the other suits, however, a preliminary issue had been raised with regard to the ages of Nur Muhammmad and Gul Muhammad. Evidence thereon was produced and a date fixed for orders. On that date the defendant Muhammad Khan absented himself and ex parte proceedings were ordered against him and the suits were decreed against him on 28th March 1929. Muhammad Khan's application to have the decrees set aside was rejected and this order was upheld on appeal. On 1st March 1930, Ata Muhammad, the present appellant, instituted a suit for pre-emption against Nur Muhammad and Gul Muhammad and obtained a decree on 8th October 1930. On 14th July 1930, Muhammad Khan instituted the present suit for possession of two-thirds of the land against Nur Muhammad and Gul Muhammad, on the ground that the property was ancestral and that the sale by his father was void for want of consideration and necessity. Ata Muhammad was subsequently impleaded as a defendant at his own request. The trial Court decreed Muhammad Khan's suit holding that the property was ancestral and the sale was without consideration or necessity and the suit was not barred by the rule of res judicata. On appeal, however, the learned District Judge held that the suit was barred as res judicata and dismissed the suit without discussing the remaining issues. Muhammad Khan has preferred this second appeal.

For the appellant Mr. Kumar has contended that the rule of res judicata does not apply. His first contention is that the subject-matter of the present suit is not the same as that of the suits by Nur Muhammad and Gul Muhammad and the cause of action is different. He argues that the only question in the previous suits was whether the sale was to be upheld as it had not been set aside, whereas in the present case the question at issue is the cancellation of the sale. He has referred to *A. I. R.* 1932 *Lah.* 179 and *A. I. R.* 1931 *Bom.* 187. The facts of these cases are not on all fours with the present case and these rulings have no application. His argument has no force as in the previous cases the question of the validity of the sales was clearly raised by Muhammad Khan. His next contention is that the previous decision cannot operate as res judicata as the parties in the present suit are not the same. Ata Muhammad not having been a party to those suits. He urges that Ata Muhammad cannot be held to be claiming under the original vendee, and refers to *Lal* v. *Milkhi* (1) in which it was held that a pre-emptor does not claim under the original vendees but stands in their shoes in respect of all rights and obligations arising from the sale under which he derived his title. In that case however apparently there had been no litigation between the reversioners and the original vendees as there has been in this case. Reference has also been made to *A. I. R.* 1929 *Lah.* 589 in which it was held that the right of pre-emption was one of substitution and it could not, therefore, be said that the successful pre-emptors are representatives of or claim under the orginal vendees and thus they could not be bound by the decree against those vendees. In that case the original vendees had not established their title by litigation and the pre-emptors had not been made parties in the declaratory suit. In *A. I. R.* 1927 *Lah.* 259 it was remarked that the previous judgment could not be considered res judicata because the parties were not the same. The point, however, was not discussed at length. In *A. I. R.* 1927 *Lah.* 900, decided by a Division Bench, it was held that, where the prior suit was between A and B and the subsequent suit was between A on the one hand and B and other persons interested in the result of the suit, the parties in the two suits not being the same the subsequent suit was not barred. In *A. I. R.* 1932 *Lah.* 232 it was held that a previous suit did not operate as res judicata in view of the addition of certain defendants in the case.

For the respondent it was contended that the pre-emptor stands in the shoes of the original vendee and therefore a decision between the original vendor's representatives and the original vendee cannot be attacked afresh merely because the original vendee's title had now been acquired by the pre-emptor. In this connection *Kali Dayal* v. *Umesh Parshad* (2) was cited; in that case in litigation between a tenant and landlord the area of the tenant's holding had been fixed. The tenant's right was purchased by a third party at a Court-sale. Subsequently, the auction-purchaser sued both the landlord and tenant as regards the area on which rent was to be payable. It was held that the rule of res judicata operated and the auction-purchaser could have no better title than the person through or under whom he claimed. In none of the cases cited on behalf of the appellant were the circumstances the same as those of the present case. In those cases the new parties were persons who were interested in the re-agitation of the question decided on the previous litigation to which they had not been parties. Here it is only the plaintiff, a party to the previous litigation, who is interested in having the matter re-opened. The pre-emptor Ata Muhammad has acquired the rights and obligations of the original vendees. These vendees had established by litigation, in which the question of the validity of the sale has been raised, their right to this land and the mere fact that the decree was an ex-parte one is immaterial. The plaintiff would clearly be barred by that decree if he were merely suing the original vendees. The pre-emptor cannot be placed in a worse position than the original vendees in whose shoes he stands. I am, therefore, of opinion that the learned District Judge was right in holding that the plaintiff cannot now re-agitate the question. I, therefore, dismiss the appeal with costs.

M N. *Appeal dismissed.*

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1. (1918) 54 P R 1918=56 I C 454.

2. AIR 1922 Pat 63=65 I C 266=1 Pat 174.

A. I. R. 1933 Lahore 530

BHIDE, J.

Santa Singh Govind Ram—**Plaintiffs—Appellants.**

v.

Kahan Singh-Buta Singh — **Defendants—Respondents.**

Second Appeal No. 1791 of 1932, Decided on 15th March 1933, from decree of Dist. Judge, Montgomery, D/- 25th July 1932.

(a) Civil P. C. (1908), S. 105—Order remitting award for reconsideration is not open to appeal.

An order remitting an award for reconsideration of the arbitrators is not open to challenge in appeal: *AIR* 1925 *Lah* 466 and *AIR* 1921 *Lah* 145, *Rel on*; *AIR* 1929 *Lah* 174, *Ref.* [P 531 C 2]

(b) Civil P. C. (1908), Sch. 2, Para. 14—Question referred to arbitration—Arbitrators giving only provisional order leaving certain question to be decided by Court — Award should be remitted for reconsideration.

A suit for rendition of accounts was referred to arbitration and the award of the arbitration ran as follows: "The plaintiffs in the case were actuated by enmity and the arbitrators were satisfied that the hundi in question had been paid. If, however, the defendant could put in a copy of the hundi, a decree should be passed against them in plaintiff's favour for Rs. 60 with proportionate costs. If they could not put in a copy, a decree for Rs. 760 with costs should be passed against them in favour of the plaintiffs."

Held: that the question as to payment was left to be decided by the Court and no decree could be passed by the Court on the award as the question was not finally decided, and as such it was incomplete and should be remitted for reconsideration: 13 *I C* 161, *Dist.* [P 531 C 2]

Amar Nath Monga—for Appellants.

Mohsin Shah—for Respondents.

Judgment.—The material faces relating to this second appeal may be briefly stated as follows: The plaintiffs originally filed a suit for rendition of accounts against the defendants on 19th October 1928. A little later the suit was referred to the arbitration of two persons named Jhanda Singh and Jowala Ram. They filed an award on 21st April which was to the following effect:

> "The plaintiffs in the case were actuated by enmity and the arbitrators were satisfied that the hundi in question had been paid. If, however, the defendants could put in a copy of the hundi, a decree should be passed against them in plaintiff's favour for Rs. 60 with proportionate costs. If they could not put in a copy, a decree for Rs. 760 with costs should be passed against them in favour of the plaintiffs."

The learned Subordinate Judge held that this award was almost incomplete and unsatisfactory and remitted it to the arbitrators for reconsideration. In the meantime one of the arbitrators refused to act and the arbitration was superseded. The Court then proceeded to decide the case on the merits and holding the alleged payment of Rs. 700 on a hundi to be not proved, granted the plaintiffs a decree for Rs. 760. From this decision an appeal was preferred to the District Judge who agreed with the findings of the learned Subordinate Judge on merits but was of opinion that he was wrong in remitting the award to the arbitrators for reconsideration. In the opinion of the learned District Judge, the award purported to settle the whole suit and could not be considered to be incomplete and consequently there was no legal justification for remitting it to the arbitrators for reconsideration. He, therefore, held that the plaintiffs were entitled to a decree for Rs. 60 only and accepting the appeal passed a decree to that effect in the plaintiffs' favour. From this decision the plaintiffs have preferred a second appeal. The learned counsel for the appellants has raised two main points: (1) that the order of the learned Subordinate Judge remitting the award for reconsideration was not open to challenge in appeal in view of the provisions of S. 105, Civil Procedure Code; (2) that the award was rightly held to be incomplete by the learned Subordinate Judge inasmuch as it was only provisional and did not finally decide all the points referred to the arbitrators.

Both the contentions appear to me to be sound. In support of the first contention reliance is placed on *Sundar Singh* v. *Nighaiya* (1) and *A. I. R.* 1921 *Lah.* 145. In *Lachman Singh* v. *Naman* (2), a different view appears to have been taken, but it was recognised therein that the case was not really distinguishable in principle from *Sundar Singh* v. *Nighaiya* (1). In the latter ruling it was held that an order setting aside an ex parte decree was not open to challenge in appeal from the final decree as such an order does not affect the merits of the decision. I am inclined to think, the same principle would apply to the orders remitting the award to the arbitrators for reconsideration, and the subsequent order superseding arbitration, inasmuch as these orders have not affected the final decision on merits. I am further of opinion that the learned Subordinate Judge was right in holding that the award was incomplete and unsatisfactory. The arbitrators did not finally decide the question as to whether the sum of Rs. 700 had or had not been paid. In one part of the award they expressed their opinion that the payment had been made, but then they proceeded to say that if the defendants failed to produce a copy of the hundi in Court on a particular date, the payment should be held to be not proved and that the plaintiffs should in that case be given a decree for Rs. 760. This meant that that the question as to payment of Rs. 700 was left to the decision of the Court. The Court could not obviously pass a decree in the terms of

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1. AIR 1925 Lah 466=88 I C 920=6 Lah 94.
2. AIR 1929 Lah 174=118 I C 434.

the award as given by the arbitrators. The learned counsel for the respondents referred to *Manindra Nath* v. *Mohananda Roy* (3); but in that case all that was left was simple arithmetical calculation, and the case is, therefore, clearly distinguishable from the present one in which the important question of payment of Rs. 700 had yet to be decided. Even if the copy of the hundi were produced, its genuineness might have been disputed and further inquiry might have been necessary. It is thus clear that the arbitrators cannot be said to have decided the matters referred to them finally. I, therefore, hold that the learned Subordinate Judge was fully justified in remitting the award for reconsideration.

In view of the above findings it seems clear that the plaintiffs are entitled to a decree for Rs. 760, as found on the merits by both the Courts below. I accept the appeal and grant the plaintiffs a decree for Rs. 760 with proportionate costs throughout.

K.S. *Appeal accepted.*

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3. (1912) 13 I C 161.

A. I. R. 1933 Lahore 532 (1)

BROADWAY, J.

Nathu and *another* — Defendants—Petitioners.

v.

Sarnun—Plaintiff—Opposite Party.

Civil Revn. Petn. No. 616 of 1932, Decided on 27th February 1933, from decree of Second Class Sub-Judge, Kangra, D/- 11th May 1932.

Husband and Wife—Claim for restitution of wife cannot be referred to arbitration—Arbitration.

It is not competent to the Court to delegate to arbitrators a suit for the restitution of conjugal rights such question being entirely one for the discretion of the Court: 37 *P R* 1895 and *'IR* 1929 *Lah* 394, *Foll.* [P 532 C 2]

M. L. Puri —for Petitioners.

Mehr Chand Sud—for Opposite Party.

Judgment.—The point for determination in this petition for revision is whether the Court below acted legally in allowing the suit to be referred to arbitration. The suit had been brought by one Sarnun against Mt. Muni and her father and a man named Nathu who claimed to be her husband. The plaintiff sued for restitution of conjugal rights on the allegation that Mt. Muni was his duly wedded wife who had actually lived with him and who had been paying a visit to her father with his consent but that during the course of this visit the father had arranged another marriage for her with Nathu. After the suit had been instituted the parties agreed to refer the matter to arbitration. An award was duly made and as no objections had been raised to it within the ten days prescribed it was made a rule of Court and a decree passed accordingly. It is against this decree that this petition has been presented.

Mr. Puri has relied on *Hira* v. *Dina* (1), in which it was held by a Division Bench of this Court that it was not competent to the Court

> "to delegate to arbitrators the question whether or not a claim for the custody of a wife should be decreed, such question, especially when either party is a minor, being entirely one for the discretion of the Court."

This decision was followed by Addison, J., in *Malkhu* v. *Sardar* (2). No authority has been cited by Mr. Mehr Chand Sud on the other side and the principle enunciated in those two rulling appears to me to be a sound one. Following these authorities I accept this petition, and set aside the decree passed on the award. The result will be that the suit will be returned to the trial Court for disposal in the ordinary course. Costs will follow the event.

K S. *Petition allowed.*

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1. (1895) 37 P R 1895.
2. AIR 1929 Lah 394=116 I C 215.

A. I. R. 1933 Lahore 532 (2)

ADDISON AND BHIDE, JJ.

Pala Singh and *others*— Plaintiffs—Appellants.

v.

Mt. Bal Kaur— Defendant—Respondent.

First Appeal No. 311 of 1927, Decided on 13th February 1933. from decree of Senior Sub-Judge, Lyallpur, D/- 12th November 1926.

Custom (Punjab)—Plaintiffs claiming succession along with their deceased mother's sister must prove custom to that effect.

Where in a suit for a declaration the plaintiffs claimed that they were entitled to two-thirds of an occupancy tenancy along with their deceased mother's sister:

Held : that the parties in this case being governed by custom it was the plaintiffs' duty to establish that they were entitled to succeed along with their deceased mother's sister. No evidence of any kind having been produced the plaintiffs must fail. [P 533 C 1]

Nawal Kishore and *Manohar Lal*—for Appellants.

Mehr Chand Mahajan, M. A. Majid and *Nain Sukh*—for Respondent.

Addison, J.—On 13th April 1899, Natha Singh obtained a peasant grant of one and a half squares of land from Government in Chak No. 235 G. B. Tahsil Jaranwala, District Lyalpur. He died on 2nd April 1906, when the tenancy was still a tenancy at will. The tenancy was mutated in the name of his widow Mt. Rup Kaur. She on 12th Jaunary 1914, acquired occupancy rights in the land granted on making the usual payments. She died early in 1925 and on 15th July 1925, mutation was effected in the name of her married daughter Mt. Bal Kaur. She had two other daughters Mt. Askor and Mt. Indar Kaur, but they pre-deceased her leaving three sons who are the plaintiffs. These sons appealed to the Collector against the mutation in favour of their aunt but their appeal was dismissed. Thereupon they sued for a declaration of their title as regards two-thirds of the occupancy tanancy in question. They admitted that their aunt Mt. Bal Kaur was entitled to one-third. They claimed as representing their mothers.

Two issues were framed:—(1) Whether S. 36 of Act 5 of 1912 is a bar to the present suit. (2) Whether the plaintiffs can succeed to the property in dispute along with the defendant. It was held that the suit could proceed but that the plaintiffs had not established that they were entitled to succeed along with the defendant. The plaintiffs have appealed.

The parties in this case are governed by custom and it was therefore the plaintiffs' duty to establish that they were entitled to succeed along with Mt. Bal Kaur, their deceased mother's sister. They have produced no evidence of any kind on this question of custom and if the personal law of the parties is looked at they are not entitled to succeed. In these circumstances the suit was properly dismissed and I would dismiss the appeal with costs.

Bhide, J.—I agree.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 533

ADDISON AND BHIDE, JJ.

Haidar Shah—Plaintiff—Appellant.

v.

Sultan and *others*—Defendants—Respondents.

First Appeal No. 344 of 1927, Decided on 14th February 1933, from decree of Senior Sub-Judge, Jhang, D/- 26th November 1926.

Custom (Punjab)—Village Maghi Sultan in Jhang District—Sayyeds are not restricted in matter of alienation of ancestral property.

The powers of Sayyeds of Maghi Sultan in the Jhang District are not restricted in the matter of alienation of ancestral property. It is true that there is some indication of their following custom in matters of succession; but the mere fact that custom is followed as regards succession does not necessarily justify a presumption that it is followed in matters of alienation. Hence a suit by a Sayyed of the village for a declaration that an alienation of ancestral land made by his father should not affect his reversionary rights is not maintainable. [P 533 C 2]

Kishan Dayal and *S R. Sawhney*—for Appellant.

Abdul Karim and *Amar Nath Chona*—for Respondents.

Bhide, J.—Haidar Shah, minor son of Najaf Shah, a Sayyed of Maghi Sultan in the Jhang District, sued in this case for a declaration that an alienation of ancestral land made by his father should not affect his reversionary rights. The suit has been dismissed by the learned Subordinate Judge on the finding that it was not proved that alienor's powers were restricted in matters of alienation of ancestral immovable property. From this decision plaintiff has appealed. The learned counsel for the appellant has taken us through the evidence on the record, but I am unable to find any adequate ground for dissenting from the view taken by the learned Subordinate Judge. The burden of proof was admittedly on the plaintiff to establish the custom relied on. Najaf Shah belongs to a Sayyed family which originally came from Shiraz in Persia and presumably followed Muhammadan Law at the time. The evidence does not show when the family settled down in the Jhang District, but considering that the members of the family still own large shares, it does not appear likely that they did so, long before the advent of the British rule.

The whole village belongs to the Sayyeds and consequently there was less chance of their being influenced by the customs of other tribes in a short period. There is no entry in the Riwaj-i-am of the District to show that the powers of Sayyeds are restricted in the matter of alienation of ancestral property. It is true that there is some indication of their following custom in matters of succession; but the mere fact that custom is followed as regards succession would not necessarily justify a presumption that it is followed in matters of alienation. It is significant that not a single instance has been proved in support of the alleged custom and in the circumstances the oral statements of 2 or 3 witnesses, on whom reliance is placed, cannot be held to be adequate to establish the custom. It may be noted in the end that plaintiff's brothers at first sued for pre-emption, and it was only, when that suit was dismissed, on a technical ground, that the present suit was instituted. The fact that plaintiff's brothers accepted the validity of the sale and only sued for pre-emption at first suggests that they were conscious that no such custom, as is alleged in the present case, existed. In my judgment the suit was rightly dismissed and I would dismiss the appeal with costs.

Addison, J.—I agree

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 534 (1)

COLDSTREAM, J.

Dasaundha Singh and *another*—Defendants—Petitioners.

v.

Ganda Singh and *others*—Plaintiffs—Opposite Parties.

Civil Misc Petn. 517 of 1931, Decided on 24th February 1933, for grant of leave to file a Letters Patent appeal from decree of Tapp, J., reported in *A I R.* 1931 *Lah* 637.

Letters Patent (Lahore), S. 10—Declaration can be given only by Judge who passed judgment—S. 26 cannot be invoked in aid — Letters Patent (Lahore), S. 26.

Section 10 requires the declaration to be made by the Judge who passed the judgment and no other Judge has power to make it. And as S. 10 does not require the declaration to be made by the High Court of Judicature, S. 26 cannot help in this matter. [P 534 C 1, 2]

Fakir Chand—for Petitioners.

Badri Das—for Opposite Parties.

Order.—This is an application by Dasaundha Singh etc., (against whom an appeal was decided in favour of Ganda Singh etc., by Tapp, J., on 23rd May 1931), asking for a declaration that the case is a fit one for a further appeal in accordance with the provision of S. 10 of the Letters Patent of this Court. Tapp, J., is not now a Judge of this Court, though he has been a Judge in the meantime.

But that section requires the declaration to be made by the Judge who passed the judgment and it appears therefore that I have no power to make it. Mr. Faqir Chand for the applicant contends that S. 26 empowers any Judge of the High Court to make the declaration in the absence of Tapp, J. This contention would have force had S. 10 required the declaration to be made by the High Court of Judicature. But the words of S. 10 clearly preclude me from making it and I am, therefore, unable to entertain the application.

V.S. *Order accordingly.*

A. I. R 1933 Lahore 534 (2)

TEK CHAND, J.

Asghar—Appellant.

v.

Jibu and *another*—Respondents.

Second Appeal No. 752 of 1928, Decided on 28th June 1932.

Civil P. C. (1908), S. 11—*J* died—Suit by heirs of *S* and *B* alleging *J*, *S* and *B* as real brothers propounding certain pedigree which was held not proved and suit was dismissed as *J*, *S* and *B* not proved to be brothers—Subsequent suit by heirs of *B* claiming to be heirs to descendant of *S* basing claim on same pedigree—*B* s heirs cannot propound pedigree being barred by rule of res judicata.

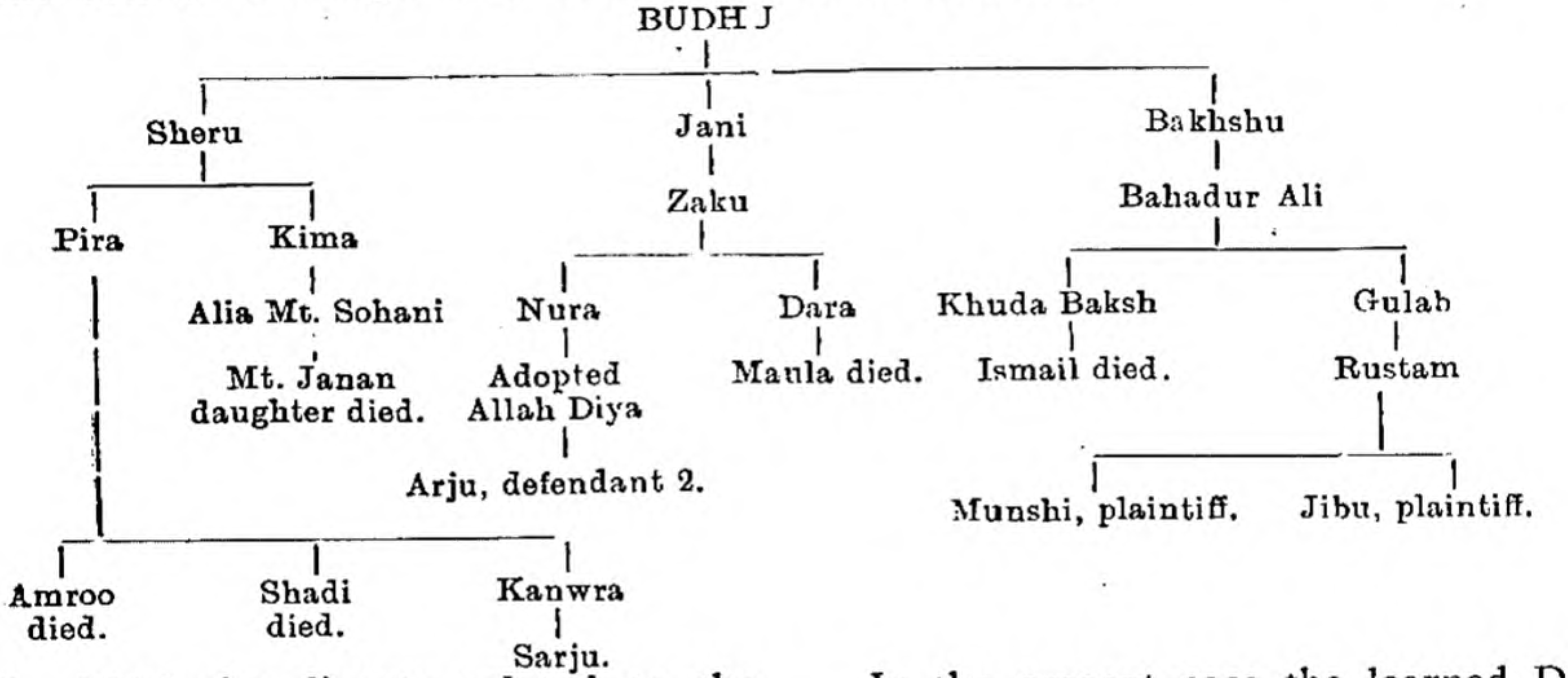
On the death of *J*, in a suit brought by the heirs of *S* and *B*, the plaintiffs contended that *B*, *J* and *S* were real brothers and propounded a certain pedigree. After examining the evidence produced by the parties a definite finding was recorded that the pedigree table propounded by the plaintiffs had not been proved and that *B*, *J* and *S* were not proved to be brothers and on that finding the suit was dismissed. In a subsequent suit by the heirs of *B* alleging to be the heirs of the deceased heirs of *S* propounded the same pedigree.

Held: that the whole of this question was directly and substantially in issue in the former suit, the persons under whom the parties to the subsequent suit claim were all parties to the former litigation and the question was "heard and finally decided" by a Court, which had jurisdiction to try the subsequent suit and the plaintiff in the subsequent suit was barred by the rule of res judicata form propounding the same pedigree. [P 535 C 2; P 536 C 1]

Duni Chand—for Appellant.

Fairlie—for Respondents.

Judgment.—The land in dispute was the property of one Alia Arain of Mauza Kharu Khera in the Ambala District. On Alia's death it devolved on his widow Mt. Sohani, who was succeeded by their daughter Mt. Janan. Mt. Janan has now died and the revenue authorities have mutated the land in the name of Asghar appellant who is the son of Mt. Sahib Jan, whom they described as the sister of Mt. Janan and a daughter of Alia and Mt. Sohani. The plaintiffs have brought the present suit for possession of the land alleging that they are collaterals of Alia in the fourth degree. They have further alleged that Asghar's mother Mt. Sahib Jan, was not the daughter of Alia. The defendant Asghar has denied that the plaintiffs were related to Alia and has further pleaded that the question of their relationship was res judicata by reason of the decision of Khwaja Mahmud Hassan, Munsif first class, in civil suit No. 3 of 1914 decided on 24th February 1914. The learned District Judge has held that the aforesaid decision of Khwaja Mahmud Hassan is not res judicata against the plaintiffs, that on the evidence on the present record the plaintiffs have been proved to be the collaterals of Alia of the fourth degree, and that Asghar has failed to prove that he is the son of a daughter of Alia. On these findings the plaintiffs' suit has been decreed. Asghar has preferred a second appeal to this Court and the first contention raised on his behalf is that the learned District Judge is in error in holding that the decision of Khwaja Mahmud Hassan is not res judicata against the plaintiffs on the question of their alleged relationship with Alia. After hearing both counsel and examining the record I am of opinion that this contention is well founded and must succeed. The pedigree table propounded by the plaintiffs in the 1914 case as well as in the present litigation is as follows:



In 1914 the dispute related to the property of Maula the great-grandson of Jani who had died without wife or child and the suit was brought by Gulab, grandson of Bakhshu, and Shadi and Siraj Din alias Sarju descendants of Sheru against Arju, the alleged adopted son of Allah Diya, grandson of Jani. It was alleged by the plaintiffs in that case that their ancestors Bakhshu and Sheru were the brothers of Jani, all three of them being the sons of Budhu, and as such were entitled to succeed to Maula's estate. Arju contested the suit pleading that the pedigree table propounded by the then plaintiff was incorrect and that Sheru, Jani and Bakhshu were strangers to each other and were not the sons of Badhu. In that litigation Mt. Sohani widow of alia had also been impleaded as a defendant though she did not appear to contest the then plaintiffs' suit. The learned Munsif after examining the evidence produced by the parties recorded a definite finding that the pedigree-table propounded by the plaintiffs had not been proved and that Bakhshu, Jani and Sheru were not proved to be brothers. On that finding the suit was dismissed.

In the present case the learned District Judge has held that, though the question of Sheru and Bakhshu being the brothers of Jani was directly and substantially in dispute in the former litigation, the further question as to whether Bakhshu and Sheru were brothers was only collaterally and incidentally in issue, and any finding on that point, recorded in that litigation, cannot operate as res judicata. In my opinion this nice distinction which the learned District Judge has drawn does not exist, and his conclusion cannot be supported. A reference to the pleadings and the judgment of the previous case makes it clear that, then, as now, the plaintiffs contended that Bakhshu, Jani and Sheru were real brothers and their success in that litigation depended on a finding on this point in their favour. I have no doubt that the whole of this question was directly and substantially in issue in the former suit, as it is in this suit. It is not denied that the persons under whom the present parties claim were all parties to the former litigation. It is also admitted that in 1914 the question was "heard and finally decided" by a Court, which had jurisdiction to try the present suit. All the conditions necessary to make the provisions of S. 11 of the Civil Procedure Code applicable to the case have thus been found to exist and it must be held that the plaintiffs are barred by the rule of res judicata from propounding the present pedigree-table as against the defendant-appellant.

I hold, therefore, that the plaintiffs are not collaterals of Alia and have no right to succeed to his property. On this finding it is not necessary to go into the further question as to whether the defendant-appellant Asghar is the son of a daughter of Alia. The plaintiffs could have succeeded on the strength of their own case, and the weaknesses of the defendant's position does not help them. I, therefore, accept the appeal, set aside the judgment and decree of the learned District Judge and dismiss the plaintiffs' suit with costs throughout.

R.K. *Appeal accepted.*

A. I. R. 1933 Lahore 536

BHIDE, J.

Makhan Lal—Plaintiff—Appellant.

v.

Ghulam Hussain — Defendant — Respondent.

Second Appeal No. 1297 of 1932, Decided on 5th January 1933, from decree of Dist. Judge, Jhelum, D/- 13th June 1932.

Contract Act (1872), S. 176—Notice under S. 176 is not necessary for debt to be due and recoverable.

A notice under S. 176 is not necessary for a debt to be due and recoverable. The section only requires notice to be given before the pledged goods are sold: *Piggot* v. *Cubley*, 137 *R R* 725, *Expl.* [P 536 C 2]

Harcharan Das Kumar — for Appellant.

Judgment.—This appeal was heard ex-parte as the respondent failed to appear in spite of service. The plaintiff sued for recovery of Rs. 1,200 on the basis of a mortgage-deed dated 25th July 1925. The defendant pleaded discharge of the debt by two remittances of Rs. 500 and Rs. 195 on 5th July 1926, and 14th September 1926, by money order, from Persia, where he had gone for business. The plaintiff admitted the receipt of these, but pleaded that those amounts were appropriated to another debt due from the defendant. It appears that the parties had dealings from 1922. On 25th July 1925, account was taken and Rs. 1,050 were found to be due. A mortgage-deed (which forms the basis of the present suit) was executed for Rs. 650 and a sum of Rs. 400 was due in addition for which some ornaments were pledged. A sum of Rs. 105 was borrowed on 3rd August 1925, and this was added to the latter debt. Both the debts carried interest. Plaintiff's version is that the two remittances referred to above were appropriated towards this latter debt and the ornaments together with a small balance of Rs. 30 (the remittances being found to be in excess of the amount actually due) was returned. The defendant admitted the second account, but pleaded that it had been settled by the plaintiff accepting the ornaments in full satisfaction of the debts. There was no documentary evidence forthcoming in the shape of receipts, etc., showing full satisfaction of this debt. The learned Judge of the trial Court found that the debt for which the ornaments had been pledged had not been discharged, but that the plaintiff had not actually appropriated the remittances towards that debt as alleged by him. He held further that the mortgage debt had been discharged by the remittances and dismissed the suit. On appeal, this decision was upheld by the District Judge, though on different grounds. The learned District Judge found that the debt for which the ornaments had been pledged had been discharged before the remittances in question were received by the plaintiff and therefore there was only the mortgage debt in existence towards which they could be appropriated. He held further that, even if the other debt were held to have been undischarged, it could not be said to be due and recoverable as no notice had been given under S. 176, Contract Act, and consequently the remittances could not be legally appropriated towards that debt under S. 60, Contract Act.

The plaintiff has preferred a second appeal and the learned counsel for the plaintiff has sought to challenge the learned District Judge's decision both on facts as well as on law. As regards the question of a notice under S. 176, Contract Act, I do not think the learned District Judge's view is sound. That section only requires notice to be given before the pledged goods are sold. The learned District Judge has referred to an English ruling, *Piggot* v. *Cubley* (1) in support of his view that the debt for which the ornaments were pledged was not yet "due" because no notice of demand had yet been given. I have referred to that ruling and do not find

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1. 137 R R 725.

that it lays down any such proposition. All that was held in that case was that when there is no day stipulated for payment or when the stipulated time has been subsequently rendered indefinite it is not competent for a pawnee to sell the pawned goods without a proper demand and notice. On facts also the learned District Judge has given no clear reasons in support of his view that the defendant's version as regards the settlement of the debt for which the ornaments were pledged was correct. He has merely remarked that the odds were in favour of that version; but he seems to have overlooked material evidence in this connexion, which is to be found in the mortgage-deed itself and his finding is vitiated by omission to consider it. According to that deed the mortgage was not to be redeemed for two years. It was executed on 25th July 1925, while the remittances were made in July and September 1926. It seems therefore clear that these remittances could not have been intended to be appropriated towards the mortgage debt. It is true that some interest was due on the mortgage, but that was a much smaller amount. I hold in view of this evidence that the other debt must have been unsatisfied at the time when these remittances were made. Consequently it would appear that the plaintiff was within his rights in appropriating those remittance towards that debt. The question whether the ornaments were returned as alleged by the plaintiff is not free from doubt, but it is unnecessary to decide it in this case. As pointed out by the learned District Judge himself, it would be open to the defendant to sue for them if so advised.

The plaintiff seems to be therefore entitled to a decree on the basis of the mortgage. I accordingly accept the appeal and pass a preliminary decree in plaintiff's favour (in terms of O. 34. R. 4, Civil P. C.). The amount due on the mortgage, viz., Rs. 1,200, together with interest on the principal amount at the contract rate, and the costs incurred in all the Courts, should be deposited by the defendant in the Court below on or before 5th July 1933. In default of such payment the mortgaged property will be sold for satisfaction of the decree.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 537

BHIDE, J.

Mt. Bhagwanti—Plaintiff—Appellant.

v.

Lachhman Singh and *others*—Defendants—Respondents.

Second Appeal No. 876 of 1932, Decided on 21st December 1932, from decree of Dist. Judge, Rawalpindi, D/- 19th February 1932.

(a) Civil P. C. (1908), S. 100—Finding of fact.

A finding of fact cannot be questioned in second appeal: 102 *P R* 1916, *Ref.* [P 538 C 1]

(b) Civil P. C. (1908), O. 21, R. 63—objection to execution on strength of gift dismissed—Suit under O. 21, R. 63—Onus of proving genuineness of gift is on such person—Evidence Act (1872), S. 101.

When an objection to an execution raised on the strength of a gift in favour of the objector is dismissed after a summary inquiry on the ground that the gift is made to defraud creditors and the objector files a suit under O. 21, R. 63, the burden of proof is on him to prove not only that there is an ostensible deed of title in his favour but also that the transaction is genuine: *AIR* 1930 *P C* 255; *AIR* 1929 *Pat* 579 and *AIR* 1932 *Lah* 174, *Rel on*; 25 *Bom* 202; 60 *I C* 825 and *AIR* 1928 *All* 476, *Dist.* [P 538 C 1]

Amar Nath Chona—for Appellant.

Krishan Swarup—for Respondents.

Judgment.—The plaintiff, Mt. Bhagwanti, sued in this case for a declaration to the effect that the house which had been attached in execution of the decree of one Lachhman Singh against her husband Sundar Singh was her exclusive property by virtue of a gift and was not liable to be attached and sold in execution of the decree. Sundar Singh had become insolvent and his property was in charge of a receiver who was made a party to the suit. The receiver as well as Lachhman Singh resisted the suit on the ground that the gift in question, was fraudulent and had been made in order to defeat and delay the creditors of Sundar Singh. This contention was upheld by the trial Court and the suit was dismissed. The plaintiff appealed to the learned District Judge, but he agreed with the conclusion of the trial Court and dismissed the appeal. From this decision a second appeal has been preferred to this Court by the plaintiff. The learned counsel for the plaintiff has urged that the gift of the house was in lieu of maintenance and was valid according to the provisions of S. 25, Contract Act, and secondly, that the burden of proof as regards the fraudulent character of the gift lay upon the defendants and that they had failed to discharge the onus.

As regards the first point, there is no doubt that there is a deed of gift in plaintiff's favour, supporting prima facie her ostensible title to the property. But the main question is whether this gift was genuine or was merely a colourable transaction intended to defeat the creditors of Sundar Singh as alleged by the defendants. The lower appellate Court has found in favour of the defendants on this point and this being a finding of fact cannot be questioned in second appeal: *Har Parshad* v. *Bhagat Singh* (1). But the learned counsel for the appellant has urged that the burden of proof in this respect was on the defendants and the finding is vitiated owing to the Courts below having treated the issue as though the burden was on the plaintiff and have thus judged the evidence from a wrong point of view. The learned counsel for the defendants has, on the other hand, urged that the plaintiff had filed objections in the executing Court under O. 21, R. 58, Civil P. C., and these objections having been dismissed after a summary inquiry on the ground that the gift was made to defraud the creditors, the burden of proof lay on the plaintiff in the present suit to prove not only that there was an ostensible deed of title in her favour, but also that the transaction was genuine. In support of this contention a large number of authorities including a decision of their Lordships of the Privy Council has been cited: see inter alia *Mahomed Ali Mahomed Khan* v. *Bismillah Begam* (2), *Mahadeo Misir* v. *Ram Prashad* (3) and *Janki Das* v. *Gulzar* (4). The learned counsel for the appellant has referred to other authorities like *Bhagwat Appaji* v. *Kedari Kashenath* (5) and *Jwala Singh* v. *Fattah* (6), *A. I. R.* 1928 *All.* 476. But these authorities do not deal with suits under O. 21, R. 63, Civil P. C., and are easily distinguishable. In view of the authorities cited by the defendants I hold that the burden lay on the plaintiff in this case to prove the genuineness of the gift. There is therefore no valid ground for interference with the lower appellate Court's finding of fact in this respect. The appeal must accordingly be dismissed with costs.

K. S. *Appeal dismissed.*

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1. (1916) 102 P R 1916=36 I C 594.
2. AIR 1930 P C 255=128 I C 647.
3. AIR 1929 Pat 579=119 I C 74=8 Pat 890.
4. AIR 1932 Lah 174=131 I C 383=12 Lah 763.
5. (1901) 25 Bom 202=2 Bom L R 986.
6. (1921) 60 I C 825.

A. I. R. 1933 Lahore 538

JAI LAL, J.

Sant Ram—Plaintiff—Petitioner.

v.

Ishar Das and *others* — Defendants—Opposite Parties.

Civil Revn. Petn. No. 694 of 1932, Decided on 8th March 1933, from order of Senior Sub-Judge, Attock, D/- 30th May 1932.

Civil P. C. (1908), S. 115—Court refusing to summon proper witness acts with illegality and not only with material irregularity—Punjab Courts Act (9 of 1919), S. 44.

Certain objections were filed against an award alleging that the arbitrator had held the inquiry in the objector's absence. The objector wanted to summon the arbitrator as a witness to substantiate his allegations. The Court refused to summon him and filed the award:

Held: that the conduct of the Court in not summoning the arbitrator under the circumstances was not only a material irregularity, but it was an illegality, and the order passed by it filing the award and passing a decree on its basis was improper. [P 539 C 1]

Shamair Chand—for Petitioner.

Nand Lal—for Opposite Parties.

Judgment.—In a suit for accounts and dissolution of partnership the parties referred their dispute to the arbitration of Khan Sahib Mohammad Zaman Khan, the Revenue Officer of Campbellpur. The agreement to refer is dated 14th October 1931, and extensive powers were given to the arbitrator as it was provided in the agreement that he was not bound to hear any evidence, but that he could act on the evidence which was already on the record. He was also allowed to engage an assistant to go into the accounts. The arbitrator gave his award on 24th April 1932, and presented it in Court on the same day.

Objections to this award were filed by the petitioner on 2nd May 1932, but the majority of the objections need not be referred to here: mention may however be made of two. One was that the arbitrator had held the inquiry in the absence of the objector and the other was that he had made the award after the expiry of the time fixed by the Court. On 3rd May 1932, that is to say, the day after the objections were filed, the plaintiff made an application to the Court that the arbitrator be summoned as a witness on his behalf to enable him to substantiate his objections. This application was rejected by the Court on the same day on the ground that it was not necessary to summon the arbitrator. On the presentation of the objections on the

2nd May the learned Judge had fixed the 30th May for the hearing of the objection. It would therefore be observed that the application by the plaintiff was made promptly and that the object of summoning the arbitrator was specified in that application. Finally, on the 30th May, without any evidence or rather without recording the statement of the arbitrator the trial Judge rejected the objections holding that the arbitrator had not depended on any secret inquiry and that he had sufficient materials before him to dispose of the case; and the Judge in disposing of this objection travelled into the merits of the case which he had no power to do. With regard to the objection as to the award having been filed after the expiry of the time fixed by the Court the Judge merely observed that the parties appeared before the arbitrator throughout the proceedings and it was not open to them to say that the arbitrator did not apply to the Court each time the proceedings were adjourned by him.

Now, these two are important objections and the first one particularly could not be disposed of by the learned Judge without evidence and the arbitrator was the best witness to give evidence on the subject. The plaintiff therefore had every justification for applying to the Court to summon the arbitrator. The conduct of the Court in not summoning the arbitrator under the circumstances was not only a material irregularity, but it was an illegality, and the order passed by it filing the award and passing a decree on its basis was improper. On this ground alone this petition must be accepted. I set aside the order, dated 30th May 1932, passed by the Subordinate Judge, and direct him to proceed with the objections of the plaintiff after examining the arbitrator and such other witnesses as may be produced by the parties in support or in rebuttal of the plaintiff's objections. The respondents will pay the costs of the petitioner in this Court.

M.N. *Petition accepted.*

A. I. R. 1933 Lahore 539

DALIP SINGH, J.

Pars Ram—Defendant—Appellant.

v.

Kehr Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 1389 of 1932, Decided on 13th February 1933, from decree of Dist. Judge, Ludhiana, D/- 10th May 1932.

Hindu Law — Alienation—Ancestral property—Property gifted to next heir retains its character of being ancestral.

A gift of ancestral property to the next heir does not make the property cease to be ancestral in the hands of the heir. And if he alienates such property a suit by a reversioner for declaration that the alienation is not binding upon him can be maintained: *AIR* 1926 *Lah* 171 and 62 *I C* 855, *Foll.* [P 539 C 2]

Jhanda Singh—for Appellant.

Badri Das—for Respondents.

Judgment.—In this case the plaintiff, Kher Singh, brought the usual declaratory suit that an alienation effected by Kishen Singh, defendant 1, in the form of an exchange of certain other land plus Rs. 2,000, should not affect his reversionary rights. The trial Court decreed the suit, holding that the exchange would not affect plaintiff's reversionary rights except to the extent of Rs. 550. On appeal the learned District Judge dismissed the appeal of the defendant with costs and accepted the plaintiff's appeal and disallowed the whole amount. The defendant has come in second appeal. The first point taken is that the land is not proved to be ancestral. The pedigree table of the parties is given in the judgment of the learned District Judge. It appears that the land belonged to one Dewa. On his death the land was mutated in favour of his widow Mt. Partapo. Kishen Singh, defendant 1, the alienor, disputed the right of Mt. Partapo. The matter was compromised and half of Dewa's land was mutated in favour of Kishen Singh and the other remained in possession of his widow, Mt. Partapo. The land in suit is the half of the land that went to Kishen Singh. The question is whether this land should be considered ancestral. Both the Courts below held that in the circumstances mentioned above the land must be held to be ancestral property in the hands of Kishen Singh. The learned District Judge stated that the land must be taken to have been gifted by Mt. Partapo in favour of Kishen Singh. The point is not altogether free from difficulty, but learned counsel for the respondent has cited two Division Bench rulings, *Khizar Hayat* v. *Allahyar Shah* (1) and *Imam Din* v. *Ram Rattan* (2), where it was held that a gift of ancestral property to the next heir does not make the property cease to be ancestral in the hands of the alienor. Following these Division Bench rulings I hold that there is no force in the contention of the appellant *qua* this point.

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1. AIR 1926 Lah 171=93 I C 1009=7 Lah 4.
2. (1921) 62 I C 855.

As regards necessity for the item of Rs. 2,000, it is a finding of fact that the sum of Rs. 1,450 is not proved to have been a pre-existing debt. The item of Rs. 150 has not been contested before me and the only item left is of Rs. 400. The learned counsel for the appellant contends that as this item is due on a mortgage to the plaintiff himself the plaintiff cannot contest its necessity. On the other hand it is admitted that item has not yet been paid to the plaintiff. It seems to me that provided the alienee pays this item to Kehr Singh, plaintiff and mortgagee, he must be entitled to a charge for this amount on the property in question. I would therefore accept the appeal and vary the decree of the learned District Judge by giving the plaintiff a declaration that the exchange shall not affect his reversionary rights after the death of the alienor, but that provided the alienee pays Rs. 400 during the lifetime of Kishen Singh alienor, defendant 1, he will be entitled to a charge of Rs. 400 against this land. As the appellant has failed in his main contentions, I order him to pay the respondent's costs of this appeal.

V.S. *Order accordingly.*

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* A. I. R. 1933 Lahore 540

ADDISON AND BHIDE, JJ.

Qaim—Plaintiff—Appellant.

v.

Ghulam Din and *another*—Defendants—Respondents.

Second Appeal No 2224 of 1928, Decided on 28th March 1933, from decree of Dist. Judge, Rawalpindi, D/- 7th June 1928.

*** Transfer of Property Act (1882), S. 51—Exchange — Mutation refused by Revenue Officer owing to absence of party — Such party believing in good faith to be owner, erecting building on land got by exchange—Subsequent sale in favour of such party by person who had given in exchange—Right of pre-emption in respect of sale can be exercised only on payment of costs for building also—Pre-emption.**

Two persons exchanged lands and on application for mutation, owing to the absence of one of the parties, mutation was refused to be effected in his name. Such person believed in good faith to be the owner of the land and erected a building thereon. When mutation was refused, the opposite party who had given the land in exchange executed a sale-deed in favour of the person who had built on it. Thereupon a collateral of the vendor applied for pre-emption:

Held: that he was entitled to do so only on the payment of the full sale value of the land and the cost of the building erected thereon and that S. 51, T. P. Act, applied to the case. [P 541 C 1]

Nand Lal—for Appellant.

Narotam Singh—for Respondents.

Addison, J.—In 1922, Qadir Bakhsh, defendant 1, and Ghulam Din, defendant 2, exchanged certain land. A mutation was entered in the Mutation Register with respect thereto, but this mutation was finally rejected early in 1924 because Ghulam Din was not present before the Revenue Officer on the date when it came up for attestation. At that time he was absent in Baluchistan. Immediately after the exchange had been effected in 1922 Ghulam Din, built certain houses on the land which he had got in exchange from Qadir Bakhsh. When the mutation of exchange was rejected for the reason given, Qadar Bakhsh sold the land, on which Ghulam Din had built, to Ghulam Din for Rs. 600. It was recited in the deed that the buildings already there had been built because of the exchange of the land, but that the land was now sold instead of being exchanged as the mutation in respect of the exchange had not been sanctioned. Just before the period of limitation expired Qaim Din, plaintiff, a collateral of Qadri Bakhsh, sued to pre-empt the land sold on payment of Rs. 100. The lower appellate Court has found that the transaction of exchange was bona fide entered into and that the buildings were erected by Ghulam Din who believed in good faith that the land was his and that he was entitled to build thereon. It further held that the full sum of Rs. 600 had been paid. As the buildings had been erected in good faith by Ghulam Din, believing himself to be the full owner, the lower appellate Court also allowed Rs. 1,078, as the value of the buildings. Against this decision the plaintiff has preferred this appeal.

The principal ground argued was that the lower appellate Court was not justified in awarding the sum of Rs. 1,078, being the value of the buildings, to Ghulam Din and that the plaintiff should have been held entitled to pre-empt on payment of Rs. 600, Ghulam Din being merely allowed to remove his building materials. It seems to me that this argument cannot be allowed to prevail. There is a clear finding that the transferee, believing in good faith that he was absolutely entitled to the property, built on the land. Had the transaction of exchange been sanctioned, no pre-emption suit would have lain. It fell through because the Revenue Officer insisted on the presence of Ghulam Din instead of issuing interrogatories as is usually done when a party is living at a distance. The parties then took the easier way of executing a sale-deed, in which all the former circumstances were recited. There can therefore be no doubt that Ghulam Din acted in good faith and that he built on the property believing that he was absolutely entitled thereto. In these circumstances the principle enunciated in S. 51, T. P. Act, applied and the District Judge was right in awarding the sum of Rs. 1,078 to Ghulam Din for the value of the buildings erected by him.

There was an attempt to argue that the lower appellate Court was wrong in ordering the parties to bear their own costs throughout. There is no force in this as the plaintiff tried to pre-empt on payment of Rs. 100 only. He certainly therefore was not entitled to his costs. For the reasons given I would dismiss this appeal with costs.

Bhide, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 541

TEK CHAND AND MONROE, JJ.

Ghulam Mohammad — Plaintiff—Appellant.

v.

Usman and *others*—Defendants—Respondents.

First Appeal No. 1945 of 1926, Decided on 7th April 1932, against decree of Senior Sub-Judge, Mianwali.

Limitation Act (1908), S. 14—Appeal presented to wrong Court on mistaken but bona fide advice by pleader—Time during which appeal remains pending should be excluded —Limitation Act, S. 5.

An appellant presenting an appeal to a wrong Court on the mistaken advice given bona fide by his pleader, is entitled to exclude the period during which the appeal remains pending in the wrong Court. The appellant should not be penalized for having acted on the mistaken advice given bona fide by his pleader: *AIR* 1918 *P C* 135 and *AIR* 1928 *Cal* 468, *Foll.*

[P 541 C 2; P 542 C 1]

Jeremy for *M. L. Batra* and *S. R. Laul* —for Appellant.

Hargopal—for Respondents.

Tek Chand, J.—This appeal arises out of a suit instituted by the plaintiff-appellant to pre-empt the sale of 2103 kanals of land, effected by defendants 1 and 2, in favour of defendants 3 to 5, on 12th November 1923, for Rs. 8,000. The plaintiff alleged that the sale price mentioned in the deed was fictitious and that the amount actually paid was Rs. 1,051-8-0 only. The defendants admitted the plaintiff's right of pre-emption, but pleaded that the price mentioned in the deed had been paid in full and that the market value of the land was also the same. The learned Senior Subordinate Judge held that Rs. 8,000, had been fixed as the price in good faith and that it also represented the market value of the land sold. He accordingly passed a decree in favour of the plaintiff for possession of the land on payment of Rs. 8,000 within four months from the date of the decree. The plaintiff being dissatisfied with this decree has preferred a first appeal to this Court and the sole question for determination is the amount on payment of which the plaintiff should be allowed to take over the bargain.

At the hearing a preliminary objection was taken by the learned counsel for the respondents that the appeal was barred by limitation. It appears that the appeal was orginally presented in the Court of the District Judge, Mianwali, within 30 days of the decision by the trial Court. On 1st July 1926, on objection taken by the defendant-respondents the learned District Judge held that the real value of the appeal for purposes of jurisdiction was Rupees 8,000, and therefore the appeal lay to this Court. He accordingly returned the memorandum of appeal to the plaintiff-appellant for presentation in the proper Court and, on 8th July 1926, the memorandum of appeal was duly presented in this Court. Mr. Hargopal contends that, in view of the Full Bench decisions in *Abdur Rahman* v. *Charag Din* (1) and *Sundar Das* v. *Mt. Umdajan* (2), the forum of appeal was to be determined by the amount which the trial Court had held payable by the plaintiff to the defendant-vendees and that, with the exercise of a little care and caution on the part of the plaintiff and his legal advisers, it should have been discovered that the appeal did not lie to the District Court and therefore the period during which the memorandum of appeal remained in that Court should not be excluded. It appears however that the appeal was presented in the District Court under the advice of Lala Sita Ram Maini, a leading pleader of Mianwali, who has filed an affidavit that on the authority of certain rulings of the Allahabad and other High Courts he thought that the appeal lay to the District Judge and he had advised the appellant accordingly. In these circumstances I am of opinion that the plaintiff should not be penalized

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1. (1908) 19 P R 1908 (FB).
2. AIR 1925 Lah 1=62 I C 614=5 Lah 481 (FB).

for having acted on the mistaken advice given bona fide, by his pleader. The case falls within the rule laid down in *Sunder Bai* v. *Collector of Belgaum* (3) and *Ambika Ranjan Majumdar* v. *Manikgunge Loan Office Ltd.* (4), and I hold that, under the circumstances, the appellant is entitled to exclude the period during which the appeal remained pending in the District Court. Deducting this period the appeal is admittedly within time. I would therefore overrule the preliminary objection. (His Lordship went into the facts of the case and dismissed the appeal).

Monroe, J.—I agree.

R M./R.K. *Appeal dismissed.*

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3. AIR 1918 P C 135=52 I C 897=43 Bom 376 =46 I A 15 (PC).
4. AIR 1928 Cal 468=111 I C 708=55 Cal 798.

A. I. R. 1933 Lahore 542

SHADI LAL, C. J. AND BROADWAY, J.

Mangal Sain—Plaintiff—Appellant.

v.

Labhu Mal—Defendant—Respondent.

Letters Patent Appeal No. 128 of 1929, Decided on 17th February 1933, from judgment of Jai Lal, J, in Civil Appeal No. 1936 of 1928, D/- 26th June 1929.

Civil P. C. (1908), O. 2, R. 2—In order to apply O. 2, R. 2 causes of action should be clearly same.

In order to make the provisions of O. 2, R. 2, applicable it is necessary that the causes of action should be clearly the same. Where careful perusal of the plaint in the first case indicated that the plaintiff was confining his claim to certain specific items said to have been appropriated by the respondent quite apart from his liability to render accounts as an agent which was the subject-matter of the second suit:

Held: that the second suit was not barred by O. 2, R. 2. [P 542 C 2]

N. C. Pandit and *Chiranjiva Lal Aggarwal*—for Appellant.

Gobind Ram Khanna — for Respondent.

Broadway, J.—On 4th June 1927, one Mangal Sain instituted a suit against Labhu Mal for rendition of accounts on the allegation that Labhu Mal had been his gumashta or agent and had ceased to act as such in September 1924. Labhu Mal pleaded that the suit was incompetent owing to the fact that Mangal Sain had instituted a suit against him on the same cause of action on 26th May 1925, which suit had been dismissed and that therefore under the provisions of O. 2, R. 2, Civil P. C., the present suit could not proceed. This plea was given effect to by the trial Court, but an appeal by Mangal Sain to the District Court was successful and the case was remanded for decision on the merits. Against this order of remand Labhu Mal preferred a second appeal to this Court. It was heard by a Single Bench and proved successful, the learned Judge in Chambers holding that the cause of action in both the cases was the same and that therefore the second suit was barred under O. 2, R. 2, Civil P. C., Mangal Sain has now preferred this appeal under Cl. 10, Letters Patent, and the only question for determination is whether the provisions of O. 2, R. 2, Civil P. C., are applicable. Mr. Nanak Chand Pandit for the appellant has urged that in the first suit it was specifically set out that the defendant had misappropriated certain ornaments, money and other articles which had been lent to him and that the reference to the fact tha Labhu Mal had been the plaintiff's gumashta or agent was merely intended to explain the reason why the loan had been made. An examination of the plaint in the first suit showed that it related to a loan of (a) ornaments, (b) a specific sum of money and (c) the price or value of certain produce and empty bags which Labhu Mal was alleged to have brought to his own personal use and which he had specifically undertaken to return early in 1925.

In the second suit all that is demanded is a rendition of accounts. It is clear to my mind that the cause of action in the former suit so far as it related to (a) ornaments and (b) money advanced was different from the cause of action set out in the second suit. So far as the first suit related to the produce and empty bags said to have been utilised by the respondent for his own purposes, the matter is not free from doubt. It has however been held that in order to make the provisions of O. 2, R. 2, Civil P. C., applicable it is necessary that the causes of action should be clearly the same. In the present case I do not think it can be said with absolute definiteness that the causes of action in the two cases are identical. A careful perusal of the plaint in the first case indicates that the plaintiff was confining his claim to certain specific items said to have been appropriated by the respondent quite apart from his liability to render accounts as an agent. I would therefore accept this appeal and restore the order of the learned District Judge, leaving the parties to bear their own costs in this Court.

Shadi Lal, C. J.—I concur.

K.S. *Appeal allowed.*

A. I. R. 1933 Lahore 543

TEK CHAND AND COLDSTREAM, JJ.

Karam Chand and *others*—Defendants—Appellants.

v.

Ram Lal and *another*—Plaintiff and Defendant—Respondents.

First Appeal No. 2344 of 1929, Decided on 23rd March 1933, from preliminary decree of Senior Sub-Judge, Hoshiarpur, D/- 7th March 1929.

Hindu Law—Joint family—Debt contracted by manager for family necessity — Only minor's share in joint family property is liable—His separate property is not liable unless he ratifies debt on attaining majority.

In the case of a debt contracted by the Manager of a joint Hindu family for family necessity one of the members is a minor, only the minor's share in the joint family property and not his separate property is liable for the debt and the decree is not executable against him personally. His separate property is liable only if it is proved that he has ratified the debt on attaining majority. [P 543 C 2]

Fakir Chand—for Appellants.

M. C. Sud—for Respondents.

Coldstream, J.—On 17th October 1922, Thakar Das and Gujjar Mal, who was the son of Mela Mal, Thakar Das's uncle, mortgaged certain properties which belonged to their joint family to Pandit Ram Lal, the respondent in the appeal before us for Rs. 10,000. The deed recorded that the mortgage was effected by the mortgagors as proprietors of the property and also by Gujjar Mal as guardian of his minor brother Karam Chand. On 9th October 1927, Pandit Ram Lal sued for recovery of the mortgage debt by sale of the property mortgaged. By this time Thakur Das and Gujjar Mal were dead and suit was brought against Karam Chand who had just attained majority, Telu Mal and Parkash Chand, sons of Gujjar Mal, who were minors and Mt. Dhan Devi, widow of Thakar Das. Mt. Dhan Devi died during the pendency of the suit. It was pleaded by the defendants that the mortgage was not for family necessity, but this plea was overruled by the Senior Subordinate Judge who passed a decree entitling the decree-holder to recover the amount by which the debt found due exceeded the sale-proceeds of the mortgaged property from the person and other property of the defendants, Karam Chand, Telu Mal and Parkash Chand. Against this decree the judgment-debtors have appealed to this Court through Mr. Fakir Chand, on the ground that the decree is improper in so far as it involves the personal liability of the defendants who were minors at the time of the mortgage and the liability of their property other than their shares in the joint family property.

The correctness of the contention that in the case of a debt contracted by the manager of a joint Hindu family, where one of the members is a minor, only the minor's share in the joint family property, and not his separate property is liable for the debt, is not disputed by Mr. Mehr Chand Sud, who appears for the respondent decree-holder. Mr. Mehr Chand admits accordingly that the decree must be rectified so far as Telu Mal and Parkash Chand are concerned. He contends however that the contract of debt was ratified by Karam Chand when he attained majority. But there is no proof on the record that there was any such ratification by Karam Chand. Mr. Mehr Chand relied, it seems, solely upon the statement in para. 5 of the plaint, that though Karam Chand was a minor when the mortgage was effected he has become major and is the manager of the joint Hindu family. So far as I understand him, Mr. Mehr Chand's argument is that Karam Chand must be deemed to have ratified the contract because it is not shown that he repudiated it. But he has not been able to cite any authority in support of this proposition, for the application of which I can see no good reason in this case. It follows that the decree must be modified so far as it relates to all the three judgment-debtors. I would accordingly accept the appeal and modify the decree of the Senior Subordinate Judge so as to provide that the decretal amount in excess of that recovered by the sale of the property will be recoverable from the remaining property of the joint family, the separate property, if any, of the defendants not being liable and the decree not being one executable against them personally. I would leave the parties to bear their own costs in this Court.

Tek Chand, J.—I agree.

K.S. *Decree modified.*

A. I. R. 1933 Lahore 544

HARRISON AND ADDISON, JJ.

Mt. Lalita Devi—Defendant—Appellant.

v.

Ishar Das and *others*—Plaintiff and Defendants—Respondents.

First Appeal No. 1890 of 1926, Decided on 5th April 1932, against decree of Sub-Judge, First Class, Amritsar, D/- 9th June 1926.

Hindu Law—Will — Ancestral property—Will by father—Subsequently born son—Will becomes void.

Where a Hindu governed by the Mitakshara school wills away his ancestral property in favour of his wife and subsequently sons are born to him, the will becomes void, for he has nothing to leave. He can only dispose of what is his at the time of death, the testamentary disposition only operating thereafter. His death and the merging of his interest in the property in the other coparceners are contemporaneous and merely different aspects of the same fact. [P 544 C 2]

Shamair Chand, Nawal Kishore and *Qabul Chand*—for Appellant.

Devraj Sawhney and *Har Gopal*—for Respondents.

Harrison, J.—The plaintiff in this case is a decree-holder against one Durga Das and the minor sons of one Mangtu Mal. The decree is based on hundis executed by the firm Durga Das-Banarsi Das of which the deceased Mangtu Mal was a member. Mt. Lalita Devi, defendant 1, the widow of Mangtu Mal, objected to the attachment and her objection prevailed and the property was released from attachment. The plaintiff now prays for a declaration that the property is liable to attachment and sale in execution of his decree. He is met by a will executed by Mangtu Mal when 23 years of age at a time when he had no sons ,but one daughter. In this will he left the property in dispute to his wife Mt. Lalita Devi. The suit was decreed, the findings of the trial Court being that the property was ancestral property, that the will was made for a specific purpose and in contemplation of the possible death of the testator on a pilgrimage which he was about to undertake, and that the subsequent birth of sons after his return had the effect of cancelling it. On appeal it is urged that the property is not ancestral, that the will was never revoked and that though it may be voidable at the instance of the interested parties, namely, the sons, the decree-holder has no locus standi to impugn it, and that, unless and until the sons take action, it is good against all the world. The first point as to the ancestral nature of the property is given up and counsel concedes that it is ancestral. If the will be void and not merely voidable, it is I think clear that the decree-holder has every right to ignore it and to obtain a declaration that the property is liable and can be proceeded against in execution of his decree. There is only one point to be decided and that is the effect and value of this will. Many rulings have been quoted such as *Sitaram* v. *Khandu* (1), *Jhari Koeri* v. *Bijai Singh* (2), *Saraswati Kaur* v. *Mahabir Prasad* (3) and *Mt. Piari* v. *Kishori Ravanji Maharaj* (4) and *A. I. R.* 1928 *Lah.* 9. These cases all deal with gifts and there is some conflict as to how far a father can dispose of any ancestral property during his lifetime. The position of a will however is very different. As explained in Mulla at p. 421, Edn. 6:

> "according to the Mitakshara Law, no coparcener, not even a father, can dispose by will of his undivided coparcenary interest even if the other coparceners consent to the disposition. The reason is that at the moment of death, the right by survivorship of the other coparceners is at conflict with the right by devise. Then the title by survivorship, being the prior title takes precedence to the exclusion of that by devise."

A simpler way, perhaps, of looking at it is that the father has nothing to leave. He can only dispose of what is his at the time of death, the testamentary disposition only operating thereafter. His death and the merging of his interest in the property in the other coparceners are contemporaneous and merely different aspects of the same fact. It is not so much that the one results from the other as that on his extinction he is automatically replaced not succeeded, but replaced, by the others. There is strictly speaking no conflict between the two claimants, but rather there can be no contest regarding a right to succeed to what does not exist. As a matter of fact I do not think the view taken by the trial Court is correct as to the cancellation of the will, and the analogy which he draws between the facts of this case and those of another in which it was stated that the gift was to have effect in the event of the testator dying within a specified time is not sound. This however is not very important, for the view I take leads to the same result. This is that the will was wholly void in that it purported to dispose of that which had

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1. AIR 1921 Bom 413=59 I C 480=45 Bom 105.
2. AIR 1924 All 109=74 I C 865=45 All. 613.
3. AIR 1928 All 476=109 I C 272.
4. AIR 1930 Lah 223=122 I C 734.

or could have no existence. The property devised could only come into existence as a separate and hereditable entity on an impossible event occurring, namely, on Mangtu Mal dying without that property merging and being absorbed by his survivors, the other members of his joint Hindu family. It was absorbed in accordance with and in obedience to the law of its own being. I would therefore dismiss this appeal with costs.

Addison, J.—I agree.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 545 (1)

ADDISON, J.

Mohammad Ali Khan—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1402 of 1931, Decided on 22nd January 1932, reported by Dist. Magistrate, Sialkot, D/- 24th November 1931.

Cantonments Act (1924), Ss. 187 and 268—Conviction of persons for disobeying notice issued by executive officer is illegal.

Section 187 states that a Cantonment Authority may by notice in writing require the removal of an encroachment. Consequently a person cannot be convicted for disobeying a notice issued by the executive officer for removal of encroachment on Government land. Subsequent confirmation of the action of the executive officer by the Cantonment Board is of no avail as the notice disobeyed is the notice from the executive officer: *AIR* 1926 *Cal* 1073, *not Foll*; 32 *P R* 1881 *Cr*, *Ref.* [P 545 C 2]

Shamair Chand—for Petitioner.

Nand Lál—for the Crown.

Facts.—The Executive Officer, Sialkot Cantonment, being of opinion that the petitioner had without the permission of the Cantonment Authorities constructed a wall forming an encroachment upon Government land, served the petitioner with a notice dated 27th October 1930, ordering him to remove the same within three days. This order was not complied with and a complaint was then filed in the Court of Mr. Kohli, Magistrate, First Class. The Magistrate has found that the wall constructed by the petitioner is in fact an encroachment; and for the offence of failing to comply with the notice he has sentenced the petitioner under S. 268, Cantonments Act, to pay a fine of Rs. 25, or in default to undergo simple imprisonment for ten days.

Grounds.—Section 187 states that a Cantonment Authority may by notice in writing require the removal of an encroachment. "Cantonment Authority" is defined in S. 2, sub-S. (v) of the Act as a Cantonment Board, or, where a board has not been constituted or has ceased to exist, the Commanding Officer of the Cantonment. In this case however the notice was issued suo motu by the Executive Officer who though he is competent under S. 253 of the Act to sign a notice is not a member of the Cantonment Board and under S. 13 of the Act cannot be. Subsequent to the issue of the notice dated 27th October 1930, the Cantonment Board passed a resolution No. 67 dated 26th November 1930, (Ex. P. D.), which was intended to confirm the Executive Officer's action in issuing notice in this case; but the fact remains that the notice which was disobeyed was not a notice from the Cantonment Authority but a notice from the Executive Officer. The learned Magistrate in convicting the accused has relied upon *A. I. R.* 1926 *Cal.* 1073, where it was held that permission to prosecute in a case of this kind is a general permission covering not only the actual institution of suits, but also matters relating thereto such for example as the issue of notice in this case. The contrary opinion was however taken in *Gobind Ram* v. *Empress* (1), and in any case there remains the plain fact that the notice which was disobeyed in this case was not a notice issued by or with the approval of the Cantonment Authority. I am therefore of opinion that the conviction cannot be sustained and I refer the papers to the High Court with the recommendation that the conviction be set aside and that the fine which has been paid, be ordered to be refunded.

Order.—For reasons given by the learned District Magistrate, I accept the petition, set aside the conviction of the petitioner, and direct that the fine, if paid, be refunded.

P.N./R.K. *Conviction set aside.*

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1. (1881) 32 P R 1881 Cr.

A. I. R. 1933 Lahore 545 (2)

BROADWAY, J.

Lachhman—Petitioner.

v.

Babu—Complainant—Opposite Party.

Criminal Revn. Petn. No. 1525 of 1932, Decided on 3rd March 1933, from order of Dist. Magistrate, Ludhiana, D/- 10th August 1932.

Criminal P. C. (1898), S. 250—Notice to person getting compensation is not compulsory.

There is no provision of law that requires notice to issue to the person to whom compensation has been awarded under S. 250, but very often notice in such cases is desirable: 14 *P R* 1888 *Cr* and *AIR* 1927 *Lah* 357, *Rel on.* [P 546 C 1]

Balwant Rai—for Petitioner.

Order.—Admittedly there is no provision of law that requires notice to issue to the person to whom compensation has been awarded under S. 250, Criminal Procedure Code. Apparently in Calcutta there is a practice to do so and in Madras it has been held that notice ought to issue. This however is not the view taken in this Court. In *Empress* v. *Lal* (1), it was laid down by a Division Bench that such a person had "no right to be heard in a proceeding relating merely to the order for compensation," and Harrison, J., took a similar view in *Rashid Muhammad Khan* v. *Emperor* (2). In these circumstances I am unable to hold that the order complained of was bad in law. While I must therefore dismiss this petition, I think that very often notice in such cases is desirable.

R K. *Petition dismissed.*

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1. (1888) 14 P R 1888 Cr.
2. AIR 1927 Lah 357=101 I C 192=28 Cr L J 416=8 Lah 568.

A. I. R. 1933 Lahore 546

SHADI LAL, C. J. AND BROADWAY, J.

Sheo Chand and *another*—Appellants.

v.

Bhola—Respondent.

Letters Patent Appeal No. 148 of 1927, Decided on 19th April 1932, from Judgment of Dalip Singh, J., D/- 8th June 1927.

Evidence Act (1872), S. 115—Estoppel—Held on facts that there was no estoppel.

Appellants who had purchased a portion of land from a widow applied for mutation which was objected to by *S* and *M*, who claimed as representing the entire proprietary body of the village, the lands left by the husband of the widow. Before the mutation was allowed in the name of the appellants, *S* and *M* filed a suit as representing the entire proprietary body claiming the land by reversion and they filed an application required under O. 1, R. 8. Notice of this was sent to appellants but they did not take any steps to be made parties. This suit was decreed and in a suit for partition appellants objected to their portion being included in the land to be partitioned and they were referred to a separate suit:

Held: that their inaction on receipt of notice cannot be regarded as waiver of their exclusive claims to the land and that as they were openly asserting their exclusive right to the knowledge of *S* and *M*, they were not estopped from bringing this suit. [P 547 C 1]

Mehar Chand Mahajan — for Appellants.

Shamair Chand and *Qabul Chand*—for Respondent.

Broadway, J.—Har Dayal was the holder of some 16 bighas 11 biswas of land in Mantanhail. On his death he was succeeded by his son, Har Narain, on whose death the land came into possession of Mt. Nanhi, widow of Har Dayal. On the death of this lady the land passed to her daughter Mt. Ladho. On 8th January 1914, Mt. Ladho sold 3 bighas 10 biswas of this land to Sheo Chand and Sheo Ram, two of the proprietors in the village, Mutation was applied for but objected to by Shadi and Mathra, two other proprietors, with the result that it was not finally sanctioned till 23rd February 1915. In the meantime while these proceedings were pending the said Shadi and Mathra, on 3rd April 1914, instituted a suit against Mt. Ladho alleging that she was not entitled to any of the 16 bighas odd left by Har Narain, and claiming that the holding had reverted to the entire proprietary body of Panna Harsa. They claimed to be suing as representatives of that proprietary body and filed the application required by O. 1, R. 8, Civil Procedure Code. Notice of this application was directed to issue and it has been assumed that it did issue. Sheo Chand and Sheo Ram, whose names were in that application must, therefore, be taken to have knowledge of these proceedings; neither of them, however, took any steps under O. 1, R. 8 (2), Civil Procedure Code, to be made a party to the suit.

As has been said above, they continued to press for mutation regarding the sale to them. The suit against Mt. Ladho was decreed on 14th April 1915, and symbolical possession of the land was given on 25th March 1918. Sheo Chand and Sheo Ram, however, continued to be in actual pssoession of the land bought by them. On 25th January 1925, the proprietors asked for partition of the whole 16 bighas whereupon Sheo Chand and Sheo Ram objected to the inclusion of the 3 bighas 10 biswas in the land to be partitioned. They were directed to establish their claims in the Courts and instituted a suit accordingly which was dismissed on 29th March 1926, but decreed on appeal by the Senior Subordinate Judge on 12th October 1926. A second appeal was then preferred to this Court by the defendants which proved successful, the Judge hearing it coming to the conclusion that the plaintiffs must be held to have waived their exclusive title, if any, "to 3 bighas 10 biswas" and, therefore, were "estopped from now alleging to the contrary."

Their suit having thus been dismissed, Sheo Chand and Sheo Ram have preferred this appeal under clause 10 of the Letters Patent.

The only point for determination is whether on the facts found any estoppel arises. Now it is clear, and indeed has been admitted, that the appellants were not parties to the litigation between Shadi and Mathra and Mt. Ladho. I am unable to see that when Sheo Chand and Sheo Ram received notice of that suit, they were bound by any law to take any action. The suit had been instituted after the sale to them and they had taken definite and active steps towards getting the land bought by them mutated in their names. Both Shadi and Mathra were aware of these mutation proceedings and it was obviously as a result of their obstruction that those proceedings were so protracted. I am further unable to see that their inaction on receipt of the notice of the application under O. 1, R. 8, Civil Procedure Code, can be regarded as a "waiver" of their exclusive claims. Indeed, as was within the special knowledge of Shadi and Mathra, while the suit was proceeding, they were openly asserting their exclusive right to the land now in suit, and it is difficult to understand how their action or inaction could possibly have led the plaintiffs in that suit to alter their position in any way. In these circumstances I am of opinion that the appellants were not estopped from bringing this suit, and I would therefore accept this appeal and remand the case to the Single Judge for a decision of the other points involved. Costs of this appeal to follow the event.

Shadi Lal, C. J.—I concur.

K.S. *Case remanded.*

A. I. R. 1933 Lahore 547

HARRISON AND ADDISON, JJ.

Debi Das—Defendant—Appellant.

v.

Jaini Mal—Plaintiff—Respondent.

Second Appeal No. 1413 of 1927, Decided on 22nd February 1932.

Civil P. C. (1908), O. 41, R. 27—Scope—Conditions laid down in R. 27 must exist before Judge is entitled to call for additional evidence.

An appellate Court in calling for additional evidence must consider whether there is any inherent lacuna or defect in the evidence already on record and whether it can pronounce judgment without it. It is only when the conditions laid down in O. 41, R. 27, Civil P. C., are found to exist that a Judge is entitled to call for additional evidence: *AIR* 1931 *P C* 143, *Foll.*

[P 548 C 1]

Nawal Kishore and *Ajit Prasad*—for Appellant.

Bishen Narain and *Basant Krishen* for *Dev Raj Sawhney*—for Respondent.

Harrison, J.—The plaintiff in this case sued upon a promissory note and was met by the plea of the minority of defendant at the time of execution. The trial Court, after hearing the evidence, came to the conclusion that the plea was true that the defendant was a minor at the time the promissory note was executed. It accordingly dismissed the suit. On appeal the learned Additional District Judge reversed this finding and gave the plaintiff a decree for the full amount claimed, namely, Rs. 2,800. On second appeal it is urged that the above finding of the Additional District Judge is entirely based upon additional evidence, which he permitted to be called on an application presented to him by the plaintiff-appellant. Counsel contends that the ruling recently delivered by their Lordships of the Privy Council: *Parsotim Thakur* v. *Lal Mohar Thakur* (1), lays down that this evidence should not have been admitted, inasmuch as the Court did not act in the manner prescribed in the Code and did not come to the conclusion which alone would justify the passing of such an order. Counsel further contends that in consequence of taking this evidence the Judge's attitude towards the remainder of the evidence became unduly suspicious and that he rejected the whole of the material on which the trial Court had come to its conclusion regarding the age of the defendant and did so because he accepted this additional evidence and not only accepted it, but attached a value to it which it never possessed. When examined, it will be found that this evidence is of no value whatever, as it merely recited that a son of Damodar Das had died in Delhi on a certain date. Damodar Das is an extremely common Hindu name and particularly common in the vast city of Delhi.

The first point to be decided is whether the Additional District Judge should have admitted this additional evidence. Counsel for the respondent, endeavours to support the action taken on the application put in to the Additional District Judge by a Delhi counsel. It is there stated that the trial Court had called the original evidence of the registers and the clerk who explained them, after the conclusion of

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1. AIR 1931 P C 143=132 I C 721=58 I A 254 =10 Pat 654 (P C).

the arguments, and the Court is given to understand that the plaintiff knew nothing about this evidence, which was taken behind his back. The minute grain of truth is that the evidence was taken after there had been some argument for the case was argued more than once, certainly twice and possibly three times. It was after one of the unfinished arguments had been broken off, that this additional evidence of the registers and the clerk was called. This evidence was taken in open Court. Counsel for the plaintiff cross-examined the clerk at length and four days later argued the case on the whole of the evidence. Another counsel was then engaged to put forward the application which does not stop short at misrepresentation and includes deliberate misstatements. The argument therefore that the Additional District Judge was justified in calling additional evidence on improper or insufficient grounds, because the trial Court had acted in the similar way, falls to the ground, the action of the trial Court having been perfectly correct throughout. In calling for this additional evidence the Additional District Judge did not apparently consider whether there was any inherent lacuna or defect and whether he could or could not pronounce judgment without it. He called it on the application of the counsel without, perhaps, considering the matter deeply or coming to any conclusion as to whether the provisions of the Code were being strictly observed. As laid down in *Parsotim Thakur* v. *Lal Mohar Thakur* (1), at p. 669, there previously existed some doubt as to the meaning of the incidental remarks in an earlier judgment: *Indarjit Pratap Sahi* v. *Amar Singh* (2). Those doubts have now been set at rest and it has been clearly explained that the loose practice which had grown up in the past, must cease and that it is only when the conditions laid down in O. 41, R. 27, Civil P. C., are found to exist that a Judge is entitled to call for additional evidence. This will occur very rarely.

Putting aside this additional evidence, worthless as it is, and considering the case as a whole as it presented itself to the trial Court, the finding that the defendant was a minor at the time the document was executed is based on evidence which we can see no reason to reject. There is the evidence of the mother of the minor, of the father-in-law of Rai Bahadur Amba Parshad, of the registers and of the clerk who explained them. The entry, on which the Subordinate Judge has relied, being an old entry is very much more valuable than such entries are at present, for it gives not only the name of the father, but also the name of the grandfather and it is clear that it does refer to the family of the defendant. We think the Additional District Judge has been unduly impressed by the evidence which should not have been admitted and has attached an undue value to it, which has prejudiced him in considering the statements of the witnesses named above. In our opinion, the finding of the trial Court must be restored and the suit dismissed with costs throughout. The cross-objections are also dismissed with costs.

W.D./R.K. *Appeal allowed.*

✲ A. I. R. 1933 Lahore 548

BHIDE, J.

Sham Sundar Lal — Defendant—Appellant.

v.

Babu Lal—Plaintiff—Respondent.

Second Appeal No. 1110 of 1932, Decided on 11th January 1933, from decree of Dist. Judge, Delhi, D/- 16th April 1932.

✲ Limitation Act (1908), Arts. 80, 74 and 75 — Instalment bond — Interest payable monthly and principal payable in instalments after three years—On default in payment of interest promisee entitled to sue for principal—Cause of action arises on default of interest and Art. 80 applies.

A bond provided that the interest was to be paid every month and that the principal amount was to be paid in instalments after three years. It was also provided that the promisee was entitled to sue for entire sum on default of payment of interest in any month. The debtor committed default in payment of interest after six months: *Held*: the bond did not fall strictly within Arts. 74 or 75, but that it fell under Art. 80 and that the cause of action arose on the first default committed for the payment of interest: *AIR* 1932 *Nag* 1 (*FB*) and 188 *P R* 1883, *Rel on*; 66 *P R* 1904; 71 *P R* 1915; 2 *All* 322 and *AIR* 1923 *All* 1 (*FB*), *Ref*; 74 *P R* 1901, *Dist*. [P 550 C 1]

Kishen Dayal—for Appellant.

Shamair Chand—for Respondent.

Judgment.—This was a suit for recovery of Rs. 630 on the basis of a bond. The bond wes executed on 1st December 1925. According to the terms of the bond interest was to be paid monthly and principal amount was to be paid in certain instalments after the lapse of the first three years. The suit was instituted on 22nd November 1930. The plaintiff alleged that the defendant

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2. AIR 1923 P C 128=74 I C 747 =50 I A 183 =2 Pat 676 (P C).

had paid interest only for the first six months and consequently the whole amount had become due. The defendant admitted execution of the bond, but denied that any consideration had passed. He also pleaded that the suit was barred by time. The trial Court found that the defendant had only paid interest for the first six months as alleged by the plaintiff and that the cause of action for the whole amount arose as a result on the date of the first default, i. e., on 1st July 1926. The suit having been instituted on 22nd November 1930 was therefore held to be barred by time and dismissed. An appeal was preferred to the District Judge who accepted the trial Court's finding that the whole amount became due on 1st July 1926, owing to the defendant's failure to pay interest after the first six months. But he disagreed with the trial Court on the question of limitation. The learned Judge was of opinion that the bond being payable by instalments the suit was governed either by Art. 74 or 75, Limitation Act, and, as the time for payment of any instalment had not yet arrived when the suit was instituted, the suit was within time under either of the said articles. The appeal was accordingly accepted and the plaintiff was granted a decree. From this decision a second appeal has been preferred to this Court by the defendant.

The only point which the learned counsel for the appellant has urged before me is that of limitation. It is argued that, although the principal amount of the bond was payable by certain instalments, the bond also provided that, in default of payment of interest month by month the whole amount whould become payable at once, and consequently the bond cannot be said to fall strictly within the purview of Art. 74 or Art. 75, Limitation Act. It was contended that the proper article applicable was Art. 80 and, since the whole amount fell due on 1st July 1926, the suit was barred under that article. The learned counsel for the respondent on the other hand contended that according to the true construction of the bond, the whole amount did not become payable merely on default of payment of interest. The wording of the bond bearing on this point is as follows:

> *"Aghar hasab sharayat bala zar-i-asal wa aud ada na kare to malik rupaya ko inkhtiar hoga ki kul rupaya yakmusht wasul kare," etc., etc.*

It was urged that this condition means that the plaintiff would be entitled to recover the whole amount if there was default both in payment of interest as well as principal. As stated already the principal was payable in certain instalments after the lapse of the first three years and admittedly no default had yet occurred in the payment of the principal. It was therefore urged that the whole amount had not become payable at all. But this contention is opposed to the case set up by the plaintiff himself. The plaintiff himself claimed the whole amount of the bond as a result of the default in payment of the monthly interest. The learned counsel urged that this was a mistake on the part of the plaintiff and that the proper construction of the bond was the one suggested by him. I am unable to accept this contention. The proper interpretation of the terms of the bond depends mainly on the intention of the parties. The wording of the bond though not happy is, in my opinion, capable of the construction placed upon it by the Courts below and the fact that the plaintiff himself placed that construction on it may be safely taken as a good indication that that was the intention of the parties. I therefore see no reason to dissent from the view taken by the Courts below on this point.

It was urged next that the plaintiff was merely given the option to claim the whole amount in the event of a default and that limitation could not begin to run, unless he chose to take advantage of the default and claim the whole amount. *Wasuram* v. *Mahomed Bakhsh* (1), was cited in support of this contention. But that case is clearly distinguishable, as according to the wording of the bond therein, the whole amount did not become due unless the creditor made a demand. There is no such condition in the present case. The learned counsel for the appellant has invited my attention to a Full Bench ruling of the Punjab Chief Court reported as *Khairuddin* v. *Atu Mal* (2) in which it was held that even in cases where the creditor is given the option to claim the whole amount in the event of a default, limitation begins to run as soon as the first default occurs and that mere forbearance to sue does not amount to waiver of such default. This ruling was followed in *Mir Shah* v. *Atar Singh* (3) and *Sham Sundar* v. *Harbans Singh* (4). There is some conflict of authority on the point, but the view taken in *Khairuddin* v. *Atu Mal* (2), was re-

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1. AIR 1930 Lah 124=121 I C 80.
2. (1883) 188 P R 1883.
3. (1904) 66 P R 1904=138 P L R 1903.
4. (1915) 71 P R 1915=30 I C 517.

cently adopted by a Full Bench of the Judicial Commissioners' Court at Nagpur: vide, *A. I. R.* 1932 *Nag.* 1, after a consideration of the various authorities on the point. I am therefore of opinion that the cause of action arose on 1st July 1926, when the first default in payment of interest took place, as held by the Courts below.

The next point urged was that the bond in question being payable by instalments, limitation must be governed either by Art. 74 or Art. 75 and hence the suit was within time as held by the learned District Judge. This argument does not seem to me sound. Art. 74 and Art. 75 seem to deal with cases in which the suit is based on a default in payment of the instalments as regards the principal amount of the bond and not to cases of the present type where the claim is based on a default in payment of interest: cf. the wording of the third column in Art. 74 and Art. 75: *Ball* v. *Stowell* (5) and *Shib Dayal* v. *Meherban* (6). In the present instance it is true that the principal amount of the bond was also payable in certain instalments, but that was not the only condition and the suit was not based on any default in payment of any instalment of the principal amount. In the circumstances, it seems to me that the proper article applicable is the residuary Art. 80 and according to that article the suit would seem to be clearly time-barred. The learned counsel for the appellant has drawn my attention to *Sobha* v. *Ram Partab* (7), but in that case there was no provision as regards the whole amount becoming due on default in payment of interest and the question of the applicability of Art. 80 also was not considered. Holding that the claim in the present suit was barred under Art. 80, Limitation Act, I accept the appeal and dismiss the plaintiff's suit, but in view of the legal point involved, which is not free from difficulty, I leave the parties to bear their costs throughout.

K.S *Appeal accepted.*

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5. (1879) 2 All 322.
6. AIR 1923 All 1=69 I C 981=45 All 27 (FB).
7. (1901) 74 P R 1901=111 P L R 1901.

A. I. R. 1933 Lahore 550

BHIDE, J.

Biru—Plaintiff—Appellant.

v.

Mula and *others*—Defendants—Respondents.

Second Appeal No. 1121 of 1932, Decided on 22nd December 1932.

Civil P. C. (1908), O. 21, R. 63—Dismissal of objection to execution on basis of gift—Suit by objector under O. 21, R. 63—Plaintiff should prove genuineness of gift even though defendant has not specifically pleaded that gift is collusive.

Where an objection to an execution on the basis of a gift deed is dismissed on the ground that gift is collusive and the objector files a suit under O. 21, R. 63, he should prove not only that the gift has been duly effected in his favour, but also that it is not collusive, and the mere omission of the defendant to plead that the gift was collusive does not relieve the plaintiff of his duty to prove the above facts: *A R* 1930 *P C* 255; 30 *I C* 855; 12 *Bom* 270; *AIR* 1928 *Mad* 1259; *AIR* 1929 *Lah* 455 and 107 *I C* 782, *Ref.* [P 551 C 1]

Tek Chand—for Appellant.

Shamair Chand—for Respondents.

Judgment.—The house in dispute in the present case was sold in execution of a decree. The plaintiff preferred an objection in the course of the execution proceedings alleging that the house had been gifted to him by his uncle Atma Ram. This objection was dismissed by the executing Court, holding that the alleged gift was collusive. The plaintiff then instituted the present suit for possession under O. 21, R. 63, Civil P. C., to prove his claim. Various issues were framed in the case, but the trial Court found that the plaintiff had failed to prove either his title or his possession within 12 years and therefore dismissed the suit. On appeal the learned Senior Subordinate Judge differed from the finding of the trial Court on the question of ownership and possession, but held that the alleged gift was made with intent to defeat the claims of the creditors of the judgment-debtor and was as such invalid. On this finding the appeal was therefore dismissed. From this decision plaintiff has preferred a second appeal. The main contention of the learned counsel for the appellant is that the ground on which the learned Senior Subordinate Judge has dismissed the appeal was neither pleaded nor put in issue. It is true that the defendants in this case did not specifically plead that the gift in question was made to defeat the creditors, but the learned counsel for the defendants urges that in a suit of this type under O. 21, R. 63, when a decision has been given against the plaintiff by an execution Court the burden of proof lies on the plaintiff to prove not only title, but also the good faith of the transaction relied on by him. In support of this contention a number of authorities have been cited, including one by their Lordships of the Privy Council, namely, *Mahomed Ali Mahomed*

Khan v. *Bismilah Begam* (1), *Jamahar Kumari* v. *Askaram Boid* (2) and *Govind Atmaram* v. *Santai* (3), *A. I. R.* 1928 *Mad.* 1259; *A. I. R.* 1929 *Lah.* 455 and *Ralla Ram* v. *Md. Ayub Khan* (4).

The learned counsel for the appellant did not dispute the correctness of the proposition in support of which these authorities were cited, but contended that the present case is distinguishable inasmuch as the defendants did not specifically plead that the transaction in dispute was fraudulent and was effected to defeat the creditors. I do not think the contention has force. According to the authorities relied on by the defendants, owing to the decision in execution proceedings that the gift in question was collusive, it was incumbent on the plaintiff to prove that not only the gift had been duly effected in his favour, but also that it was not collusive. It was for the plaintiff therefore to allege and prove these facts in order to get rid of the decision in the execution proceedings and the mere omission of the defendants in the circumstances to plead that the gift was fraudulent cannot, I think, help him. In my opinion the plaintiff has failed to establish one of the material facts which he had to prove in the present suit under O. 21, R. 63, and therefore he cannot succeed. I do not see any adequate ground for allowing the plaintiff to amend the plaint and re-open the whole case at this stage. The execution proceedings appear to have been already delayed for a long time by various objections of this type. The gift on which the plaintiff relied was a gratuitous transfer and considering all the circumstances, the learned Senior Subordinate Judge has held that it was made to defeat and delay the creditors. I see no valid ground for interference with the finding of fact and dismiss the appeal with costs.

K.S. *Appeal dismissed.*

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1. AIR 1930 P C 255=128 I C 647 (P C).
2. (1915) 30 I C 855.
3. (1888) 12 Bom 270.
4. (1928) 107 I C 782.

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* A. I. R. 1933 Lahore 551

TEK CHAND AND MONROE, JJ.

Fazal Hussain and *others*—Appellants.

v.

Jiwan Shah and *another*—Respondents.

First Appeal No. 3070 of 1927, Decided on 28th November 1932, from decree of Senior Sub-Judge, Jhang, D/-9th August 1927.

(a) Civil P. C. (1908), S. 11—Res judicata does not arise unless former Court is competent to try subsequent suit.

Under S. 11 a decision in a former suit cannot be pleaded as res judicata in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and to decide not only the particular matter in issue but also the subsequent suit itself, in which the issue is subsequently raised: *AIR* 1926 *Lah* 603 *held not correctly decided ; Case law discussed.* [P 552 C 1]

(b) Civil P. C. (1908), S. 11—Construction—Interpretation of Statutes.

Section 11 is not exhaustive of the law of res judicata and the general principles underlying that rule can be invoked in reference to matters on which the section is silent or with regard to proceedings to which it does not apply. But with regard to matters which are specifically provided for in the Code, the Courts are bound to limit the operation of the rule in accordance with the phraseology used by the Legislature, and have no power to ignore the express provisions of the Statute in order to give effect to the general principles of law. [P 552 C 1]

***(c) Transfer of property Act (1882), S. 3—Attestation does not fix attestor with knowledge of contents.**

Attestation of a deed proves no more than that the signature of an executing party had been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed, nor fix him with notice of its provisions: *AIR* 1916 *P C* 110 and *AIR* 1922 *P C* 20, *Foll.* [P 553 C 1]

Ghulam Mohy-ud-din and *Dev Raj Sawhney*—for Appellants.

J. L. Kapur, *Jowahar Singh Dhillon*, *Noin Singh Gauba* and *Mehr Chand Sud*—for Respondents.

Tek Chand, J.—The plaintiffs' suit was dismissed by the learned trial Judge on the ground inter alia that the question of his relationship with Ghiragh Shah, the husband of Mt. Jintan Bibi deceased, was res judicata by reason of a previous decision by Sardar Ghulam Haidar Khan, Munsif, First Class, dated 24th November 1914, in re: *Umid Ali Shah* v. *Ahmad Shah*, printed at p. 67 of the paper book. In coming to this decision the learned Judge followed a ruling of the Division Bench reported as *Sahibzadi Begam* v. *Muhammad Umar* (1). It is clear, however that Sardar Ghulam Haidar Khan, who decided the previous suit, was a Munsif of the First Class, and was not competent to try the present suit. This being so, his decision cannot be res judicata in the present case in view of the provisions of S. 11, Civil P. C., which expressly lays down that in order that a decision in a former case be res judicata in a subsequent suit the Court which tried the former suit must

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1. AIR 1926 Lah 603=96 I C 1002=8 Lah 15.

be competent to try such subsequent suit. In *Gokul Mandar* v. *Padmanand Singh* (2), the question came up before their Lordships of the Privy Council in reference to the identical provision in S. 13 of the Code of 1882, and it was ruled that under that section a decision in a former suit:

> "cannot be pleaded as res judicata in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and to decide not only the particular matter in issue, but also the subsequent suit itself, in which the issue is subsequently raised."

Lord Davey in delivering the judgment of their Lordships observed that:

> "in this respect the enactment went beyond the previous Act 10 of 1877 and also beyond the law laid nown in the *Duchess of Kingston's* case (3).

This decision of their Lordships has been followed in numerous cases in this Court as well as the other Courts in India. In *Sahibzadi Begam* v. *Muhammad Umar* (1), however a Division Bench without reference to the Privy Council decision aforesaid held that notwithstanding the provisions of S. 11 the judgment in a former suit will operate as res judicata in a subsequent suit by reason of "the general principles of law," even where the Judge who decided the former suit was not competent to try the subsequent one. With all deference to the learned Judges, who decided that case, I am of opinion, that the law has not been laid down correctly in it. It is no doubt true that S. 11 is not exhaustive of the law of res judicata, and that the general principles underlying that rule can be invoked in reference to matters on which the section is silent or with regard to proceedings to which it does not apply: see *Ram Kirpal* v. *Rup Kuari* (4), *George Henry Hook* v. *Administrator-General of Bengal* (5), *Ramchandra Rao* v. *Ramchandra Rao* (6) and *Lachhmi* v. *Bhulli* (7). But with regard to matters which are specifically provided for in the Code, the Courts are bound to limit the operation of the rule in accordance with the phraseology used by the Legislature, and have no power to ignore the express provisions of the Statute in order to give effect to the "general principles of law." In *Nirbhe Ram* v. *Moolchand* (8), this view was taken by Fforde, J., himself, who was one of the Judges who decided *Sahibzadi Begam* v. *Muhammad Umar* (1) and it was held that:

> "though the rule of res judicata is not limited to the provisions of S. 11, Civil P. C., the doctrine of res judicata on general principles cannot be invoked in such a manner as to render the provisions of the said section nugatory."

Further in *Hussain Shah* v. *Ghulam Nabi* (9), which was decided by Dalip Singh, J., sitting singly, the learned Judge observed that he had had the advantage of discussing the matter with Fforde, J., and he understood it from him that *Sahibzadi Begam* v. *Muhammad Umar* (1)

> "does not lay down nor purport to lay down any rule of law contrary to the Privy Council ruling reported as *Gokul Mandar* v. *Pudmanund Singh* (2)."

In *Qasim Ali* v. *Puran Mal* (10), the learned Chief Justice and Agha Haidar, J., did not follow *Sahibzadi Begam* v. *Muhammad Umar* (1), and held that

> "if a case is covered by the provisions of S. 11 the general doctrine of res judicata cannot be invoked."

I must therefore hold that *Sahibzadi Begam* v. *Muhammad Umar* (1), was not correctly decided and must respectfully refuse to follow it. The finding of the lower Court on this point is therefore erroneous and cannot be sustained. On the finding by this Court that the judgment of Sardar Ghulam Haidar Khan does not operate as res judicata in the present case, Mr. Kapur for the respondent urges that he should be allowed an opportunity to produce evidence which was led by his client before Sardar Ghulam Haidar Khan and accepted by him in coming to a finding in his favour, but which his client did not think necessary to produce in the present case in the belief that the judgment in the former suit was decisive of the issue as to the relationship. In my opinion, Mr. Kapur's prayer is reasonable and must be granted in the interests of justice. Mr. Ghulam Mohy-ud-din for the appellant does not raise any objection, but asks for permission to lead evidence in rebuttal. This prayer also is reasonable and must be granted.

As neither party desires to lead fresh oral evidence and both sides wish to file documents or certified copies thereof, it is not necessary to send the case to the lower Court for the purpose. Both counsel have filed today list of

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2. (1902) 29 Cal 707=29 I A 196=8 Sar 323 (P C).
3. (1776) 2 Sm L C 10th Ed, 713.
4. (1884) 6 All 269=11 I A 37 (P C).
5. AIR 1921 P C 11=60 I C 631=48 I A 187=48 Cal 499 (P C).
6. AIR 1922 P C 80=67 I C 408=49 I A 129=45 Mad 320 (P C).
7. AIR 1927 Lah 289=104 I C 849=8 Lah 384 (FB).
8. AIR 1929 Lah 781=117 I C 83.
9. (1928) 107 I C 623.
10. (1929) 117 I C 68.

the documents on which they rely. The documents or copies thereof shall be filed on or before 15th June 1932. The documents produced shall be translated at the expense of the party producing them. It is not necessary to have the translations printed, but it will be sufficient to have four typed copies prepared, two for the Judges who will hear the case and one for each counsel. The office will take steps to have the additional paper book prepared with as little delay as possible.

Monroe, J.—I agree.

(The copies of the documents on which the parties wished to rely, having been filed and translated, their Lordships discussed the facts of the case and in the course of their judgment observed:)

Tek Chand, J.—Counsel next relied on Exs. P. W. 2/2 and P. W. 2/3 which are deeds of alienation by Karam Haidar Shah in favour of third parties and are admittedly attested by Jiwan Shah, defendant. In these deeds Karam Haidar Shah described himself as the son of Muhammad Shah, and it is argued that this is a clear admission of the parentage of Karam Haidar Shah and is binding on the defendant. In my opinion this contention is without force. It is now settled law that the attestation of a deed proves no more than that the signature of an executing party had been attached to a document in the presence of a witness. As observed by their Lordships of the Privy Council it

> "does not involve the witness in any knowledge of the contents of the deed, nor fix him with notice of its provisions": *Banga Chandrudhur* v. *Jagat Kishore* (11) and *Pandurang Kishnaji* v. *Markandaya Tukaram* (12)."

These documents therefore do not carry the case of the plaintiffs any further. The plaintiffs having failed to establish their contention that their grandfather, Karam Haidar Shah was the legitimate son of Muhammad Shah, the appeal was dismissed with costs.

Monroe, J.—I agree.

K.S. *Appeal dismissed.*

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11. AIR 1916 P C 110=35 I C 420=43 I A 249=44 Cal 186 (P C).
12. AIR 1922 P C 20=65 I C 954=49 I A 16=49 Cal 334=18 N L R 1 (P C).

A. I. R. 1933 Lahore 553

ADDISON AND BHIDE, JJ.

Mt. Jatan and *another*—Appellants.

v.

Jiwan Singh and *others*—Respondents.

Second Appeal No. 1214 of 1926, Decided on 22nd March 1933.

(a) Custom (Punjab)—Succession—Garewal Jats of Ludhiana District — Collaterals exclude widowed daughter even in respect of ancestral property.

According to the custom governing the Garewal Jats of the Samrala Tahsil of Ludhiana District collaterals are entitled to succeed in preference to widowed daughter even to the property which is not ancestral *qua* the collaterals: 29 *P R* 1911 and 25 *P R* 1912, *Rel on.* [P 553 C 1; P 554 C 1]

(b) Riwaz-i-am—Presumption of reference to ancestral property can be rebutted.

In the absence of any indication to the contrary, entries in the riwaj-i-am should be taken to refer to ancestral property. But the use of expressions that certain persons are excluded from succession "in any case" or "under any circumstances" without reference to ancestral character of property or otherwise shows that the exclusion operates on self-acquired properties also: *AIR* 1926 *Lah* 210 and *AIR* 1920 *Lah* 9, *Ref.* [P 554 C 1, 2]

(c) Custom (Punjab) — Burden of proof is shifted by favourable entry in riwaz-i-am.

The riwajiam, if in favour of the plaintiffs, is by itself sufficient to shift the burden of proof to the defendants: *AIR* 1916 *P C* 129, *Ref.* [P 554 C 2]

(d) Evidence Act (1872), S. 13—Custom recognized in previous judgments—They are admissible but not conclusive—Custom (Punjab).

Judgments in other cases on the point of custom are admissible in evidence under S. 13, only as instance in which the custom in question was judicially recognized, but are not conclusive. [P 554 C 2]

Balwant Rai—for Appellants.

Amar Nath Chona for *Dev Raj Sawheny*—for Respondents.

Bhide, J.—Plaintiffs, who are the collaterals of one Lakha, sued in this case for a declaration that the gift of certain land and houses made by Mt. Karmon, her widowed daughter, shall not affect their reversionary rights. The suit was decreed by the trial Court and the decision was upheld by the District Judge on appeal. The defendants have now preferred a second appeal to this Court, supported by a certificate from the District Judge on the question of custom under S. 41 (3), Punjab Courts Act. The decision of the case turned mainly on the question whether, according to the custom governing the parties (who are Garewal Jats of the Samrala Tahsil of the Ludhiana District), plaintiffs as collaterals of Lakha are entitled to succeed to the property in dispute, in preference to his widowed daugher, Mt. Karmon, after the death of Mt. Jatan, his widow, who holds a life interest in it at present. It has been held that the property in dispute was not proved to be ancestral *qua* the plaintiffs and this finding is not now challenged.

The learned District Judge has held relying chiefly on *Mt. Ishar Kuar* v. *Raja Singh* (1) and *Pratap Singh* v. *Punjabu* (2), that the plaintiffs have a preferential right to succeed to the property, although it was not proved to be ancestral *qua* plaintiffs. An attempt was made to challenge the correctness of the above decisions before the learned District Judge on the ground that the entries in the riwajiam of the Ludhiana District on which the decisions were based to a certain extent should have been taken to refer to ancestral property only. The learned District Judge however refused to go into this question and felt himself bound to follow the aforesaid decisions. The same argument which was put forward before the learned District Judge was reiterated before us. There is no doubt, that there are rulings of this Court in which it was held that, in the absence of any indication to the contrary, entries in the riwajiam should be taken to refer to ancestral property: see, e. g., *Sham Das* v. *Mt. Moolu Bai* (3), *Ghulam Mahomed* v. *Gauhar Bibi* (4) and *Rahmat Ali Khan* v. *Mt. Sadiqulnisa* (5). In the present instance however an examination of the riwajiam will show that the language of the answers to the questions which relate to the point now under discussion is very wide and may reasonably be taken to cover non-ancestral property as well. For example in the riwajiam of the Samrala Tahsil (to which the parties belong) prepared in the year 1882, the following question and answer appear:

Question.—Under what circumstances do daughters inherit? If a son or a widow or a near collateral is alive, do daughters inherit or not? Upto what degree of relationship has a near collateral a right prior to that of a daughter?

Answer.—In our community, daughters, whether married or virgin, major on minor, do not succeed in any case. Father's collaterals, however distantly related, succeed to the property. They have got a preferential right.

In the column of "instances and memoranda" it is further noted: "This is a universal practice, that a daughter does not inherit under any circumstances." (vide Ex. P-2). The question was not in any way restricted to ancestral property, and if a daughter succeeded to self-acquired property, one would have expected the fact to be mentioned in the answer. The absence of any such mention and the use of expressions such as "in any case" and "under any circumstances" would seem to indicate that daughters do not succeed even to self-acquired property. The above view received support from the remarks of the author of the Customary law of the Ludhiana District prepared at the settlement of 1882: vide para. 79 at p. 40, to the effect that no distinction between self-acquired and ancestral property was, as a rule, recognized in the answers of the tribesmen with regard to the rules of succession, alienation, etc. The answer to question 43 in the Customary law of the Ludhiana District prepared in the year 1911 shows a change in the custom with regard to the rights of unmarried daughters, but, so far as married daughters are concerned, it is again mentioned in unqualified language that "they have no right of succession whatever." It may be mentioned here that it appears from the answers to some of the questions in this volume of Customary law that the spokesmen of the tribes did distinguish between self-acquired and ancestral property when any such distinction was recognized: see, e. g., Q. 34 and the answer thereto. It would thus appear that the riwajiam of the district is in favour of the plaintiffs, and this evidence by itself would be sufficient to shift the burden of proof to the defendants: cf. *Beg* v. *Allah Ditta* (6).

In addition to the entries in the riwajiam of the district, we have also two decisions of the Punjab Chief Court, viz., *Mt. Ishar Kuar* v. *Raja Singh* (1) and *Pratap* v. *Punjabu* (2), which support the above interpretation of the riwajiam and are clearly not in favour of the defendants. Both of these cases relate to Garewal Jats of the Ludhiana District. In the former case an eleborate enquiry was made through a Local Commissioner, who visited fourteen or fifteen villages and examined over a hundred witnesses and it was found that collaterals excluded daughters in the matter of succession to self-acquired property. This ruling was followed in *Pratap* v. *Punjabu* (2.) It is true that these decisions cannot be treated as conclusive on the point. They are strictly speaking, admissible in evidence under S. 13, Evidence Act, only as instances in which the custom in question was judicially recognized. It was open to the defendants to rebut them by adducing fresh evidence to show that the custom was not correctly

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1. (1911) 29 P R 1911=9 I C 608.
2. (1912) 25 P R 1912=13 I C 177.
3. AIR 1926 Lah 210=95 I C 337=7 Lah 124.
4. AIR 1920 Lah 9=54 I C 419=1 Lah 284.
5. AIR 1932 Lah 353=138 I C 280=13 Lah 404.
6. AIR 1916 P C 129=38 I C 254=44 I A 89=44 Cal 749=45 P R 1917 (P C).

ascertained in those cases or that it had since been modified. But the defendants have entirely failed to produce any such evidence. They relied merely on the oral testimony of three witnesses, which is altogether vague and inadequate to rebut the evidence in favour of the plaintiffs, which has been referred to above. I see therefore no reason to interfere with the decree of the learned District Judge and would dismiss the appeal. But in view of all the circumstances I would leave the parties to bear their costs in this Court.

Addison, J.—I agree.

M.N. *Appeal dismissed.*

A. I. R. 1933 Lahore 555

JAI LAL AND AGHA HAIDAR, JJ.

Karim Bakhsh and *others*—Defendants—Appellants.

v.

Mt. Rahmon—Plaintiff—Respondent.

First Appeal No. 1918 of 1927, Decided on 29th March 1933, from decree of Senior Sub-Judge, Lyallpur, D/- 2nd July 1927.

(a) Transfer of Property Act (4 of 1882), S. 6 (a)—Spes successionis — Death of occupancy tenant leaving wife and daughter—Declaratory suit by daughter that she and not collaterals was legal heir to her father and entitled to properties left by him is maintainable—Specific Relief Act (1877), S. 42.

On the death of an occupancy tenant leaving a widow and daughter, the property was mutated in favour of the widow for her life or till remarriage. After about 20 years the widow applied to have the occupancy rights transferred in the name of her daughter. This was objected to by the collaterals and it was ordered that the party interested should file a suit in civil Court and obtain a decree to the effect that she was the heir of the deceased tenant. Accordingly the daughter filed a declaratory suit that she was the legal heir and entitled to the property. The collaterals contended that the suit amounted only to an assertion of a spes successionis and as such was not maintainable:

Held: the suit was maintainable: *AIR* 1929 *Lah* 465 and *AIR* 1929 *Lah* 58, *Rel on*; *AIR* 1928 *Lah* 831, *not Foll.* [P 556 C 1]

(b) Custom (Punjab)— Succession—Daughter succeeds to self-acquired property of father in preference to collaterals.

The custom in the Punjab is that so far as self-acquired property is concerned, a daughter has a preferential right to succeed to her father against the collaterals: *AIR* 1921 *Lah* 378, *Rel on.* [P 556 C 1]

(c) Riwaj i-am—Entries generally relate to ancestral property—Custom, Succession.

As a rule, the entries in riwajiam regarding customary succession relate to ancestral lands and not to self-acquired property. [P 556 C 1]

Har Gopal—for Appellants.

Abdul Karim—for Respondent.

Agha Haidar, J. — One Karim Bakhsh, an Arain of Ludhiana, migrated to Lyallpur, and was granted occupancy rights in one square of land. He died in September 1904, leaving him surviving his widow, Mt. Begi, and a daughter, Mt. Rahmon, plaintiff-respondent, who at the time of her father's death, was an infant, aged about two years. On 2nd February 1905, mutation was effected by the Colonization Officer in favour of Mt. Begi as the widow of the deceased tenant, Karim Bakhsh, for her lifetime or till her remarriage. Some time in 1924 the widow, Mt. Begi, made an application to the Revenue Authorities, asking that the occupancy rights, which stood in her name, may be transferred in the name of her daughter, Mt. Rahmon. This application was opposed by the collaterals of the deceased Karim Bakhsh. On 15th October 1924, the Revenue Assistant made a report that the party interested should file a suits in a Civil Court and obtain a decree to the effect that Mt. Rahmon, and not the objectors, was the heir of the deceased tenant. This report was accepted by the Deputy Commissioner, Lyallpur, on 18th October 1924. As a result of these proceedings Mt. Rahmon brought the present suit for a declaration that she was the legal heir to her father and entitled to succeed to the property acquired and left by her father, and that the defendants, the collaterals of her father, had no concern with it. This suit was decreed by the Senior Subordinate Judge, Lyallpur, and the defendants have come up in appeal to this Court.

Mr. Hargopal, the learned counsel for the defendants-appellants, argued that the plaintiff could not maintain the present suit because, in substance, her claim merely amounted to the assertion of a spes successionis. He relied upon a Division Bench decision of this Court reported as *Mt. Sharifan Bibi* v. *Mt. Aishan Bibi* (1). This decision, the facts of which are somewhat similar to those of the present case, undoubtedly lends support to the argument of the learned counsel, inasmuch as it lays down that a suit for a mere change to succeed on the death of the present holder of property could not be maintained. But a contrary view was taken by a Division Bench of this Court, of which one of us was a member, in the case of *Shahamad* v. *Mt. Mohammad Bibi* (2). In that case,

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1. AIR 1928 Lah 831=110 I C 248=9 Lah 467.
2. AIR 1929 Lah 58=116 I C 189=10 Lah 485.

although the decision in *Mt. Sharifan Bibi* v. *Mt. Aishan Bibi* (1), was not specifically mentioned, the argument, which was accepted by the Division Bench, was to the effect that a suit, like the one before us, did not relate to a mere spes successionis, but that the real object of the suit was to obtain a declaration that the plaintiff was entitled to succeed to her mother as the heir of the last tenant and then to approach the Colonization Authorities, under the provisions of S. 19, Colonization of Government Lands Act, (Local Act 5 of 1912), with a view to obtain their consent to the contemplated transfer by the mother in her favour by way of acceleration of succession. In a case which was decided shortly afterwards and is reported as *Said* v. *Mt. Said Bibi* (3), the case of *Mt. Sharifan Bibi* v. *Mt. Aishan Bibi* (1), was not followed and the view of law as laid down in *Shahmad* v. *Mt. Mohammad Bibi* (2), was accepted. It is satisfactory to find that, when the question came up before the learned Judge who delivered the judgment of the Court in *Mt. Sharifan Bibi* v. *Mt. Aishan Bibi* (1), he accepted the view of the law as laid down in the two cases mentioned above. The result therefore is that the plaintiff can maintain the present suit and the contention of the learned counsel fails.

On the merits, the learned counsel argued that, according to the customary law applicable to the parties, a daughter had no preferential right of succession in the presence of collaterals. This argument is contrary to the well established custom of this Province that, so far as self-acquired property is concerned, a daughter has preferential right to succeed to her father against the collaterals. This rule was accepted in the case of *Mt. Jaina* v. *Nur Mohammad* (4), and has been consistently followed in subsequent decisions. The learned counsel placed reliance upon the entries in the Rawajiam of the Ludhiana District, but it is well-known that entries in these documents relate, as a rule, to ancestral lands and not to self-acquired property. Three witnesses have been cited on behalf of the defendants in support of the alleged custom that collaterals succeed to the self-acquired property to the exclusion of daughters. One of these witnesses is the defendant himself and therefore being a highly interested party, much weight cannot be attached to his evidence. The evidence of the remaining two witnesses consists of bald statements in support of the custom relied upon by the defendants-appellants. They do not quote any instance and both of them seem to be related to the defendants and cannot therefore be called disinterested and independent witnesses. Therefore on the merits, too there is no force in the contention raised by the learned counsel for the appellants. These were the only two points argued before us and, as already stated, on both of them the learned counsel has failed to satisfy the Court. In my judgment, the decision of the Senior Subordinate Judge dated 2nd July 1927, was correct, and I would therefore dismiss with costs the appeal preferred by the defendants.

Jai Lal, J.—I agree.

K.S. *Appeal dismissed.*

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3. AIR 1929 Lah 465=118 I C 398=10 Lah 489.
4. AIR 1921 Lah 378=58 I C 793=1 Lah 365

A. I. R. 1933 Lahore 556

TEK CHAND AND COLDSTREAM, JJ.

Municipal Committee, Gujranwala—Defendant—Appellant.

v.

Prabhu Dial and *another*—Plaintiffs—Respondents.

First Appeal No. 888 of 1928, Decided on 16th March 1933, from decree of Senior Sub-Judge, Gujranwala, D/-22nd December 1927.

(a) Limitation Act (1908), S. 5—Death of respondent in appeal—Appellant, Municipal Committee, not impleading legal representative within time—Time cannot be extended under S. 5 in absence of good ground—Civil P. C. (1908), O. 22, Rr. 4 and 9.

Where a respondent in an appeal dies and the appellant, the Municipal Committee within whose Municipal limits the respondent has died fails to implead the legal representative of such respondent within time, no extension of time under S. 5 should be given in the absence of good grounds. [P 557 C 1]

(b) Civil P. C. (1908), O. 22, Rr. 4 and 9—Two respondents in appeal being co-owners each entitled to half share in property—Death of one of them and failure of appellant to implead legal representative within time—Appeal does not abate wholly.

Where one of two respondents in an appeal, who are co-owners, each being entitled to half share in the property, dies and the appellant fails to implead the legal representative of the deceased respondent within time, the appeal does not abate wholly, but abates only in respect of deceased respondent's share in the decree appealed against: *AIR* 1928 *Lah* 572, *Foll.* [P 557 C 2]

(c) Contract Act (1872), S. 73 — Sale of property —Failure of vendor to give possession to vendee—Suit for recovery of amount paid and damages—Interest by way of damages can be allowed — Held, 1 per cent, per

mensem is reasonable and Interest Act has no application—Interest Act (1839), S. 1.

Where a vendor fails to give possession to the vendee of the property sold, and the vendee files a suit for recovery of the amount paid and damages, interest by way of damages can be allowed for breach of the contract even though the formalities required by the Interest Act have not been complied with as the Interest Act has no application to such cases. Interest at 1 per cent. per mensem was held to be a reasonable assessment of the damages. [P 557 C 2]

Mehar Chand and *Muhammad Rafiq*—for Appellant.

Kidar Nath Chopra—for Respondents.

Coldstream, J. — On 20th January 1924, the Municipal Committee of Gujranwala sold some building sites in the Municipal area to Prabh Dayal for Rs. 6,050. Subsequently, Prabh Dayal with the consent of the Municipal Committee associated with him as partner in this purchase one Kirpa Ram who became co-owner of the property with Prabh Dayal. Parbh Dayal and Kirpa Ram completed their part of the contract by depositing the price in the manner agreed upon, but the Municipal Committee were unable to put the vendees in possession of the area sold because it was found that a part of it was the property, not of the Municipal Committee, but of the Government in the Public Works Department. After making several ineffectual demands to be put in possession of the land purchased, Prabh Dayal and Kirpa Ram instituted a suit, from which this appeal arises, on 18th January 1927, praying for refund of the price paid, i. e., Rs. 6,050, together with Rs. 2,173-14-6 as interest, by way of damages, and a further sum of Rs. 506, on account of damages for "physical and other troubles." The Senior Subordinate Judge, Gujranwala, decreed the claim in full. Against this decree the Municipal Committee have preferred an appeal to this Court in respect of the items of Rs. 2,173-14-6 and Rs.506, allowed on account of damages. In or about October 1930, Kirpa Ram died. In August 1931, the Committee applied under O. 22, Rr. 4 and 9, Civil P. C., for an order allowing Kirpa Ram's sons to be impleaded as his representatives. By this time the appeal had abated and the Committee have asked for an extension of limitation in their favour under S. 5, Limitation Act. For such an extension I am unable to see any good ground.

The petitioner is not an ignorant villager or a pardanashin lady, or other person with no facilities for keeping in touch with the opposite party. On the contrary, the Committee was in a peculiarly favourable position in this respect, for deaths in the Municipal limits must be reported to the Committee, and the Municipal staff is a large one and includes inspectors and others who would naturally in the course of their duties come to know the death of a citizen. I would accordingly dismiss this application. The appeal will not however wholly abate. The respondents were admittedly co-owners, each entitled to a half-share in the property concerned. In such cases the principle to be followed is laid down in *Sant Singh* v. *Gulab Singh* (1) in accordance with which it must be held that the appeal has abated only in respect of Kirpa Ram's share in the decree. Upon the merits I am unable to see force in the appeal, so far as it concerns the item of Rupees 2,173-14-6. It is urged by Diwan Mehr Chand that interest ought not to be allowed as the formalities required by the Interest Act, 1839, were not complied with. But the Interest Act has no applicability in the circumstances of this case, for the money sued for is not a debt or sum payable at a certain time or otherwise. What is being sought in this case is damages for breach of contract. The assessment of the damages at an amount equivalent to interest at one per cent for the period during which the plaintiffs were deprived of their property seems to me to be reasonable. We have it from the statement of Bihari Lal, P. W. 6, himself a Municipal Commissioner, that the ordinary rate of interest at the time of the suit was 1 per cent per mensem. So far as it concerns this part of the decree the appeal must therefore be dismissed.

For the award of the sum of Rupees 506 on account of other expenses there does not appear to be any justification. There is no evidence on the record to show that the plaintiffs were subjected to any peculiar mental worry and as regards this part of the case there is merely a vague statement to the effect that Prabh Dayal had to go to Gujranwala several times from Ferozepore in order to take possession of the property. The actual expenses incurred for this have not been proved, nor has it been shown that any journeys for this purpose were necessary. I would accordingly accept the appeal in respect of the item of Rs. 506 and modify the decree so as to make it one in favour of Prabh Dayal for Rs. 4,111-15-3,

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1. AIR 1928 Lah 572=114 I C 417=10 Lah 7.

affirming the decree for Rs. 4,364-15-3 in favour of Kirpa Ram. The order of the lower Court as regards the future interest and costs will stand. The respondents will get their costs in this Court.

Tek Chand, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 558

TEK CHAND, J.

Gyan Singh—Plaintiff—Petitioner.

v.

Budha—Defendant — Opposite Party.

Civil Revn. Petn. No. 126 of 1932, Decided on 20th July 1932, from order of Senior Sub-Judge, Gujrat, D/- 7th December 1931.

(a) Evidence Act (1872), S. 57 (9)—Court is bound to take judicial notice of public holidays.

Under S. 57 (9) the Court is bound to take judicial notice of public holidays notified in the Official Gazette, and the plaintiff is entitled to presume that the Court would take such notice thereof: *AIR* 1920 *Oudh* 80, *Ref.* [P 558 C 2]

(b) Civil P. C. (1908), O. 9, R. 9—Plaintiff not getting notice of transfer of case to another Court—Other Court dismissing suit for default—Plaintiff applying for restoration of suit—Suit should be restored.

A suit was originally pending in the Court of the Subordinate Judge at *P*. On the Judge's report, it was transferred to the Court of Sub-Judge at *D*. After the order of transfer, the record was placed before the Judge at *P* in the presence of the plaintiff's counsel and the defendant and that officer passed an order that the parties should appear in the Court of the Subordinate Judge at *D* on 30th March. This order was not passed in the presence of the plaintiff and there was nothing to show that he was aware of it. When the case was called at *D* on the 30th March, there was no appearance by or on behalf of the plaintiff and the suit was dismissed in default. The plaintiff applied for restoration of the suit on the 30th April, the 28th and 29th being public holidays. The application was rejected as being barred by limitation:

Held : that the plaintiff was entitled to a personal notice of the transfer of his case and that notice to his counsel at *P*, who was presumably engaged for conducting the proceedings there, that the case would be heard at *D* on a certain date was not sufficient notice to him. There was thus sufficient cause for his non appearance and his application should have been granted as being within time and suit restored to file. [P 559 C 1]

Ganesh Datta—for Petitioner.

Judgment.—This is a petition for revision of the order of the Senior Subordinate Judge, Gujrat, confirming on appeal the order passed by the Subordinate Judge, Fourth Class, Dinga, rejecting the plaintiff's application for restoration of a suit which had been dismissed in default. The learned Judge has held that the application was barred by time and that no sufficient cause for non-appearance of the petitioner on the date fixed had been shown. The suit was dismissed in default on 30th March 1931 and the application for restoration should have been filed on or before 29th April 1931. It was actually presented on 30th April 1931. It is admitted that 28th and 29th April were gazetted public holidays. The learned Senior Subordinate Judge has however held that as no exemption on this ground was claimed in the application as required by O. 7, R. 6, Civil P. C., the Court was debarred from taking judicial notice of the fact that 29th April was a gazetted holidy. He has accordingly held the application for restoration to be time-barred. I have no doubt that this conclusion is erroneous. Under S. 57, Cl. (9), Evidence Act, the Court is bound to take judicial notice of any public holidays notified in the Official Gazette, and as pointed out in *Jai Narayan* v. *Bajrang Bahadur Singh* (1), the plaintiff is entitled to presume that the Court would take such notice thereof. He need not therefore have specifically asked for exemption in the application. Further, even if the learned Senior Subordinate Judge is technically right, which, in my opinion, he is not, the proper course for him was to require the plaintiff to amend the petition and not to dismiss it. I hold therefore that the plaintiff had applied within time to have the suit restored.

The suit was originally pending in the Court of the Subordinate Judge of Phalia who reported to the District Judge that for certain reasons he did not want to try it and that it should be transferred to some other Court. The District Judge accordingly transferred the case to the Subordinate Judge at Dinga for trial. After the order of the District Judge was passed the record was placed before the Subordinate Judge at Phalia on 21st March 1931 in the presence of the plaintiff's counsel and the defendant, and that officer passed an order that the parties should appear in the Court of the Subordinate Judge at Dinga on 30th March 1933. This order was not passed in the presence of the plaintiff and there is nothing to show that he was aware of it. When the case was called at Dinga on 30th March there was no appearance by or on behalf of the plaintiff and the suit was dismissed in default. In my opinion in the circumstances mentioned above, the plaintiff was entitled to personal notice of

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1. AIR 1920 Oudh 80=56 I C 826.

the transfer of the case. His counsel at Phalia was presumably engaged for conducting the proceedings at that place and the notice to him that the case would be heard at Dinga a few days later was not sufficient notice to the plaintiff in the circumstances. I hold that there was sufficient cause for the non-appearance of the petitioner and the suit should have been restored. I accept the petition, set aside the order of the Courts below and direct that the suit was restored to its original number and reheard from the the stage at which it was when the District Judge had transferred it to Dinga. As the respondent has not appeared to oppose the petition, I pass no order as to costs.

K.N./R.K. *Petition allowed.*

A. I. R. 1933 Lahore 559

Coldstream, J.

Aya Ram—Accused—Petitioner.

v.

L. Gobind Lal Verma—Complainant—Opposite Party.

Criminal Revn. Case No. 1186 of 1932, Decided 22nd December 1932, from order of Sess. Judge, Rawalpindi, D/- 31st August 1932.

Criminal P. C. (1898), Ss. 181 (2) and 179 —Charge of criminal misappropriation or breach of trust—What Courts have jurisdiction stated—Penal Code (1860), S. 409.

Section 181 (2) overrides and is not qualified by S. 179, Criminal P. C. Hence a trial on a charge of criminal misappropriation or breach of trust can only be tried by a Court within the limits of whose jurisdiction any part of the property concerned was received or retained by the accused person or the offence was committed.

The existence of a contractual or other obligation to deliver property at a certain place or the fact that loss is caused at that place will no empower the Court having jurisdiction there to try a person who misappropriated it elsewhere. [P 560 C 2]

Accused received money honestly at *N* but misappropriated at *R*.

Held: the offence was triable either in *N* or at *R*: *AIR* 1923 *Rang* 81, *Dist.* [P 561 C 1]

Nawal Kishore—for Petitioner.

Jhanda Singh—for Opposite Party.

Facts.—Aya Ram, proprietor of the Krishna Motor Agency, is being prosecuted under S. 409, Penal Code, upon a complaint instituted by Gobind Lal Verma, Agent of Messrs. Spencer & Company, Limited, Rawalpindi. After the accused had appeared in Court as a result of the service of a warrant which was effected in Bannu, he contested the jurisdiction of the Court. The trial Magistrate heard arguments of counsel for prosecution and defence and decided that the case was within jurisdiction of the Rawalpindi Criminal Courts and directed that it should proceed upon its merits. The accused comes up in revision urging that the Rawalpindi Courts have no jurisdiction. At present the only evidence upon the record in addition to the complaint itself is contained in the statements of the complainant who was examined both before and after the appearance of the accused. It appears from those statements that the following facts are alleged: The Murree Brewery Company, carrying on business in Rawalpindi, has appointed Spencer & Company of Rawalpindi as its selling agent and can sell no beer in the North West Frontier Province except through Spencer & Company. It is however the duty of the Murree Brewery to deliver the beer to the purchasers. The Brewery Company has therefore entered into an agreement with Aya Ram for the transport of beer from Rawalpindi to purchasers in the North West Frontier Province. The complainant alleges that by a subsequent oral agreement between Spencer & Company and Aya Ram, the latter agreed to collect the price of the beer from the purchasers in all cases where they had agreed with Spencer & Company to pay cash on delivery and had agreed to pay the receipts over to Spencer & Company. It is alleged by the complainant that the accused has collected various sums from purchasers in the North West Frontier Province and has failed to deliver those sums to Spencer & Company, thereby committing criminal breach of trust in his capacity as agent.

Grounds.—The learned counsel for the petitioning accused cites *Panbu* v. *Emperor* (1), a decision by the Chief Justice of the Lahore High Court of 1923, subsequently followed in that Court in 1924, and again, in 1928, in cases reported as *Dina Nath* v. *Tulsi Ram* (2) and *Durga Prashad* v. *Banwari Lal* (3). The principles therein laid down are that the offence of criminal misappropriation is one for which there is a local jurisdiction laid down by S. 181 (2), Criminal P. C., which overrides the general law as to jurisdiction contained in S. 179, and that the offence is complete when the subject-matter is received or retained and

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1. AIR 1923 Rang 81=77 I C 419=25 Cr L J 371 =11 LBR 412.
2. AIR 1925 Lah 171=83 I C 696=26 Cr L J 136.
3. (1928) 108 I C 901.

must be tried at the place of receipt or retention. The section adds that it can be tried where the offence was committed and it has been argued for the respondent that the offence was not completed until failure to deliver money to Spencer & Company. It has been argued for the respondent that the complainant gave the headquarters of the accused as being in Rawalpindi and indicated that the oral contract had been made at that place. He relies upon *A. I. R.* 1926 *Lah.* 119, which followed a Calcutta ruling reported as *A. I. R.* 1925 *Cal.* 613, whereas the petitioner urges that the Hon'ble Judge who followed the Calcutta ruling had not his attention drawn to the previous rulings of the Lahore High Court and it is also urged that the Calcutta High Court has itself departed from the principles laid down in 1925 in a case reported as *A. I. R.* 1931 *Cal.* 532. After consideration of these rulings it appears to me that in the Punjab the Courts are bound to follow the decision in *Panbu* v. *Emperor* (1), and that prima facie, the Rawalpindi Courts have no jurisdiction in the present case. It has been alleged by counsel for the respondent-complainant that the complainant had not himself been a party to the oral agreement and was not personally cognizant of all its terms, that two witnesses were present, but were not examined, whose evidence might have satisfied the trial Magistrate, that the money was to be handed over in Rawalpindi and that no offence was committed until the accused refused to pay it in that place. Counsel has also stated that a notice was issued to the accused to pay the money in Rawalpindi with which he did not comply; but there is no proof of this upon the record. For the petitioner it is urged that jurisdiction should be decided on a consideration of the complaint alone and that subsequent evidence should only be in support of the complaint and should not be anticipated as introducing new features. In spite of my view on the legal point involved which I have given above, I would hesitate to make a reference to the High Court if I consider that subsequent evidence might show that there is jurisdiction in Rawalpindi. For, by making such a reference the proceedings must be delayed. In view however of the fact that the parties are already engaged in civil litigation concerning the same matter, I am unable to see that delay in the criminal proceedings will be prejudicial and this consideration therefore carries no weight. I hereby stay proceedings in the Court of the trial Magistrate and refer the case under S. 438 to the High Court with a recommendation that the proceedings in Rawalpindi be quashed and that the complainant be left to institute criminal proceedings in a Court of proper jurisdiction, if so advised.

Order.—It appears to be settled law that S. 181 (2) overrides and is not qualified by S. 179, Criminal P. C. A trial on a charge of criminal misappropriation or breach of trust can only be tried by a Court within the limits of whose jurisdiction any part of the property concerned was received or retained by the accused person or the offence was committed. In the present case it is admitted that the property concerned was received in the North West Frontier Province. The accused can therefore be tried in that province. The question however is whether the case is or is not triable at Rawalpindi. In *Panbu* v. *Emperor* (1) the learned Chief Justice has held in a case where it was found as a matter of fact that the property had been received and retained in Karachi the accused could not be tried at Lyallpur. Neither that ruling nor any of the others to which I have been referred by counsel deals with facts on all fours with those of the present case.

The accused Aya Ram has an office in Rawalpindi and there is a presumption that he was expected to pay over and ordinarily would have paid over at that place the money which he is accused of having misappropriated. This fact alone will not however give jurisdiction to the Court at Rawalpindi, for the existence of a contractual or other obligation to deliver property at a certain place or the fact that loss is caused at that place will not empower the Court having jurisdiction there to try a person who has misappropriated it elsewhere. This does not however mean that in spite of the clear words in S. 181 (2), a charge of cirminal misappropriation or breach of trust can only be tried by a Court having jurisdiction at the place where the property was received. As has often been pointed out the offence of criminal misappropriation or breach of trust is committed when the property is retained or converted with dishonest intention and it is easy to imagine cases where this dishonest intention is not entertained until long after the money has been received. There is evidence in this case that Aya Ram sent cash and a cheque to the complainant from his office at Rawalpindi saying that he would send the rest of the sum due later on. If Aya Ram received the money honestly in the North West Frontier Province and criminally misappropriated it at Rawalpindi, his offence is triable there as well as the North West Frontier Province.

For the complainant Mr. Jhanda Singh states that his client had witnesses ready in the trial Court to prove that the misappropriation took place in Rawalpindi, but these were not heard as the Court decided the question of jurisdiction in his favour without calling for such evidence. It appears to me to be necessary in this case to decide, if possible, where the alleged misappropriation took place before the question of jurisdiction can be determined. I accept the recommendation of the learned Sessions Judge to this extent: that I set aside the trial Court's order and remit the case to that Court for re-decision upon the evidence produced by the parties on the point of jurisdiction in the light of the remarks made above. The trial Court, I note, has given no reasons for its decision that it had jurisdiction.

K.S. *Case remitted.*

A. I. R. 1933 Lahore 561

TEK CHAND, J.

Diwan Singh and *others* — Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1668 of 1932, Decided on 24th February 1933, from order of Sess. Judge, Delhi, D/- 3rd December 1932.

(a) Criminal P. C. (1898), S. 436—Order of discharge can be set aside though no additional evidence is to be produced.

In an appropriate case the Sessions Judge has the power under S. 436 to set aside an order of discharge passed by the Magistrate, even though no additional evidence is sought to be produced. [P 563 C 1]

(b) Criminal P. C. (1898), S. 436—In what cases further inquiry after discharge should be ordered.

Generally speaking further inquiry after discharge is improper unless the order of discharge was perverse or foolish or was based upon a record of evidence which was obviously incomplete. In determining whether the order of the Magistrate discharging the accused was "foolish or perverse," it ought not to be sufficient to pick out holes in his judgment on matters of detail, but what is to be seen is whether taking a broad view of material points requiring decision in the case, and on consideration of the whole of the evidence, the order could have been passed by a Judge, fairly and impartially dealing with the case. Further inquiry should be undertaken only in exceptional cases and for good reasons shown. The order of the Magistrate may not commend itself to the District Magistrate, the Magistrate may or may not have attached too much importance to the discrepancies and too little to the probabilities, but unless the order can be said to be perverse or foolish, it will not be interfered with. [P 563 C 1, 2]

(c) Criminal P. C. (1898), S. 436 — Discharge amounting to acquittal—Further inquiry should generally not be ordered.

Where a man is discharged under circumstances which make the order of discharge equivalent to one of acquittal, no further proceedings should be ordered to be taken against him under S. 436. [P 563 C 2]

(d) Criminal P. C. (1898), S. 436—Further inquiry should not be ordered merely in the interests of justice.

Further inquiry should not be held merely because the revisional Court thinks that "in the interests of justice" it is necessary to do so. [P 563 C 2]

(e) Criminal P. C. (1898), S. 436—Burden lies on prosecution to show why further inquiry should be ordered.

An order of discharge ought not to be set aside merely because the Sessions Judge considers that the "prosecution case is not entirely groundless," and it is not for the accused person to convince the Court of revision why further inquiry should not be ordered against him, but that it is for the prosecution to bring the case within the rule laid down in 10 *P R* 1911 *Cr* (*FB*). [P 564 C 1]

(f) Witness—Expert—Evidence is generally prejudiced—Evidence Act (1872), S. 45.

An expert witness, however impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. The mere fact of opposition on the part of the other side is apt to create a spirit of partisanship and rivalry, so that an expert witness is unconsciously impelled to support the view taken by his own side. Besides, it must be remembered that an expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to its interests. [P 566 C 2]

(g) Criminal P. C. (1898), S. 540—Court can call any material witness at any time—Such evidence must be considered while passing order under Criminal P. C. (1898), S. 254.

The Court has under S. 540 ample powers to summon any material witness at any stage of any inquiry and can call and examine a prosecution witness at the instance of the accused and once such evidence has been admitted on the record, the Magistrate is bound to consider it while deciding whether a charge should or should not be framed: 21 *W R* 61 (*Cr*), *Ref.* [P 566 C 2]

(h) Evidence Act (1872), S. 137 — Unfinished testimony when admissible indicated—Evidence.

No general rule can be laid down in respect of unfinished testimony. If it is substantially complete and the witness is prevented by sickness or death or other causes (mentioned in S. 33) from finishing his testimony, whether viva voce or by deposition it ought not to be rejected entirely. But if not so far advanced as to be substantially complete it must be rejected. [P 567 C 1]

Bevan Petman, M. L. Puri, Bhagwan Singh and *B. B. Tawakley*—for Petitioners.

C. H. Carden Noad and *Abdul Rahman*—for the Crown.

Judgment.—This is a petition presented by Diwan Singh, Azfar Hussain and Nazar Hussain, petitioners, for revision of the order of the Sessions Judge, Delhi, passed under S. 436, Criminal P. C., setting aside the order of Mr. A. Isar, Additional District Magistrate, Delhi, discharging the petitioners in a criminal case which was instituted against them and one Qamarulnabi on a complaint filed by Khwaja Mohammad Akram Khan, Inspector-General of Police, Bhopal State, under Ss. 292, 500 and 501, read with Ss. 109 and 511, Penal Code. The first petitioner, Diwan Singh, is the proprietor, editor, printer and publisher of a weekly newspaper called "The Riyasat" issued from Delhi. Azfar Hussain is a resident of Amroha in the United Provinces and a caligraphist by profession, who was serving on the staff of the Riyasat. Nazar Hussain also belongs to Amroha and worked as a correspondent of the Riyasat for some time. The fourth accused Qamarulnabi is a caligraphist, doing job work for various presses at Delhi. On 6th January 1930, a complaint was lodged in the Court of the Additional District Magistrate, Delhi, by Khwaja Mohammad Akram Khan against Azfar Hussain alone under Ss. 292, 500 and 501/109, 511, Penal Code, on the allegation that he, with the assistance of certain other persons, was secretly preparing for publication, with a view to harm the reputation of the complainant a highly obscene pamphlet containing defamatory matter against the complainant. The Magistrate after briefly examining the complainant, issued a number of search-warrants, in pursuance of which several houses were searched and a large number of documents seized. One of the persons from whose house documents which the prosecution describe as incriminating, were recovered is Fakharuddin, (P. W. 12), who was at the time sub-editor of the Riyasat. He is a person with not very creditable antecedents, having been previously convicted in a case in which he was tried on charges of embezzlement, forgery and falsification of accounts. It is admitted by the prosecution that soon after the search, Fakharuddin "got into touch" with the complainant and other Police Officials of Bhopal and after some time received a "pardon" from the complainant on condition of his agreeing to give evidence against Diwan Singh.

Though it was on 7th January 1930, that most of the documents on which the prosecution rely came into their possession, and shortly afterwards they are stated to have succeeded in winning over to their side an important witness like Fakharuddin, no proceedings were taken on this complaint for about five months. The explanation offered is that during this period an attempt was being made by the complainant to obtain the sanction of the Local Government to prosecute Azfar Hussain and his alleged confederates for conspiracy under S. 120-B, Penal Code. The Local Government however declined to grant the sanction, and eventually on 13th June 1930, Khwaja Mohammad Akram Khan lodged a second complaint under Ss. 292, 500, 501/109 and 511, Penal Code, against Diwan Singh, Azfar Hussain, Nazar Hussain and Qamarulnabi. Proceedings on this complaint continued in the Magistrate's Court for a period of two years and three months, in the course of which 43 witnesses were examined on behalf of the prosecution, and the Magistrate also recorded, at the request of the defence, the statement of Mr. R. Stott, Government Examiner of Questioned Documents, as he was leaving India on long leave. The record of the Magistrate covers over 2,000 pages of closely typewritten matter, besides a large mass of documentary evidence produced by both parties. On 23rd September 1932, the Magistrate passed a lengthy order by which he discharged Diwan Singh, Azfar Hussain and Nazar Hussain holding that the prosecution had failed to establish a prima facie case against them, but framed charge under Ss. 116, 511/500 and 116, 511/292, Penal Code, against the fourth accused Qamarulnabi, who is still awaiting his trial in the Magistrate's Court.

Against the order of the Magistrate discharging the first three accused, the complainant presented a petition for revision under Ss. 435 and 436, Criminal P. C., in the Court of the Sessions Judge, Delhi. The learned Sessions Judge in a lengthy order has set aside the order of discharge and has directed "further inquiry" against the petitioners by another Magistrate. The petitioners have moved this Court under S. 439, Criminal P. C., and have urged that the order of discharge has been set aside by the learned Judge on inadequate and improper grounds and that it should be vacated. I have carefully examined the judgments of the Magistrate and the learned Sessions Judge and have spent considerable time in reading the record. I have also had the advantage of hearing the whole case ably and exhaustively argued for full five days by Mr. Bevan Petman and Mr. Tawakley for the petitioners, and the learned Government Advocate assisted by Khan Bahadur Abdul Rahman on behalf of the complainant. Before dealing with the points which have been raised in the course of arguments before me I think it necessary to mention that the prayer for further inquiry was not based on the ground that the prosecution intended to produce additional evidence. It was stated by counsel for the complainant in the Sessions Court, and this has been repeated in this Court that the prosecution had produced before the Magistrate the whole of the evidence on which they relied in support of their case.

It may also be mentioned that before the learned Sessions Judge it was objected on behalf of the petitioners that as the Magistrate had recorded his findings on the entire evidence on which the prosecution had rested their case and had written a lengthy order which virtually amounted to an order of acquittal, it was not competent to the Sessions Judge to set aside that order under S. 436, Criminal P. C. This objection was overruled by the learned Judge, and Mr. Bevan Petman on behalf of the petitioners has very frankly and properly admitted before me that the contention is without force, and that in an appropriate case the Sessions Judge has the power to set aside an order of discharge passed by the Magistrate, even though no additional evidence is sought to be produced. S. 436 of the Code (as amended) like the corresponding S. 437 in the earlier Code, is couched in somewhat general terms and has been the subject of much discussion and comment in the various Courts, but judicial opinion may now be said to have settled the principles on, and the circumstances in, which the Court of revision should interfere with an order of discharge. In the Punjab the leading case on the subject is *Emperor* v. *Kiru* (1). In that case Kensington, J., who delivered the judgment of the Full Bench, laid down that

> "generally speaking further inquiry after discharge is improper unless the order of discharge was perverse or foolish or was based upon a record of evidence which was obviously incomplete."

The learned Judge pointed out that, while no invariable rule could be laid down and each case must depend on its peculiar facts and circumstances, it was well-settled that further inquiry should be undertaken only in exceptional cases and for good reasons shown. It was also observed that

> "Where a man is discharged under circumstances which make the order of discharge equivalent to one of the acquittal, no further proceedings should be taken against him under S. 437 (S. 436 of the amended Code)."

This rule has been followed in a long succession of cases and it has been repeatedly held that, unless the view taken by the Magistrate is palpably unreasonable or perverse, the Sessions Judge or the District Magistrate should not order further inquiry on the same materials simply because he was inclined to take a view of the evidence different from that of the Magistrate. As pointed out by Chevis, J., in *Dani* v. *Emperor* (2):

> "the mere fact that the District Magistrate places a different value on the evidence from that placed by the trial Court is not a good reason for directing further inquiry under this section."

Similarly, Harrison, J., in *A. I. R.* 1927 *Lah*. 815, observed that:

> "the order of the Magistrate may not commend itself to the District Magistrate, the Magistrate may or may not have attached too much importance to the discrepancies and too little to the probabilities, but unless the order can be said to be perverse or foolish, it will not be interfered with."

Another important case is *Dost Mahomed* v. *Asa Ram* (3) in which Broadway, J., held that further inquiry should not be held merely because the revisional Court thinks that "in the interests of justice" it is necessary to do so. Counsel for both parties are agreed that the view of the law stated above is correct, and the question for determination is, whether the learned Sessions Judge has followed these principles in setting aside the order of discharge in this case. Mr. Bevan Petman has referred me to the penultimate paragraph of the judgment of the learned Sessions Judge in which he has summed up his conclusions in the following words:

> "I am unable to accept the reasons given by the learned Magistrate for holding the prosecution case to be entirely groundless and that the defence has not succeeded in convincing me that a further inquiry should not be ordered."

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1. (1911) 10 P R 1911 Cr=11 I C 132 (FB).
2. AIR 1921 Lah 214=60 I C 55=22 Cr L J 199.
3. AIR 1922 Lah 409=72 I C 890=24 Cr L J 474.

He has also drawn my attention to an earlier passage in the same paragraph where the learned Judge has observed:

> "that there has in fact been no proper inquiry and that a further inquiry is necessary in the interests of justice."

It is argued that these passages show that the learned Sessions Judge had misdirected himself as to the law applicable to revision petitions against orders of discharge and that his conclusions are opposed to the principles laid down by the Full Bench and the other Benches of this Court. It is no doubt true that an order of discharge ought not to be set aside merely because the Sessions Judge considers that the "prosecution case is not entirely groundless," and it is beyond dispute that it is not for the accused person to convince the Court of revision why further inquiry should not be ordered against him, but that it is for the prosecution to bring the case within the rule laid down in the Full Bench judgment. I think however that in a case of this magnitude too much emphasis should not be laid on a sentence here or a sentence there in the judgment of the Sessions Judge, but that his judgment must be considered as a whole, in order to see if it offends against the well-settled rule laid down above. Similarly, in determining whether the order of the Magistrate discharging the accused was "foolish or perverse," it ought not to be sufficient to pick out holes in his judgment on matters of detail, but what is to be seen is whether taking a broad view of material points requiring decision in the case and on a consideration of the whole of the evidence, the order could have been passed by a Judge, fairly and impartially dealing with the case.

A perusal of the judgment of the learned Sessions Judge shows that the main defects which he had discovered in the judgment of the Magistrate are that he had made unwarranted assumptions of fact and had not based his findings on a proper appreciation of the whole of the evidence in the case, nor had he considered the evidence of each witness on its merits, but had rejected it because he felt that the witness belonged to a class of persons whose evidence does not ordinarily carry conviction in a Court of law. It seems to me however that this criticizm is not justified in respect of most of the points mentioned by the Sessions Judge and that such of the errors as exist in the judgment of the Magistrate relate to matters which are not very material to the ultimate decision of the case. It does not appear to me to be necessary to enter into a detailed discussion of all the points mentioned by the learned Judge and I shall deal with a few important ones only. Before doing so however a few preliminary facts may be stated with regard to which there is no substantial disagreement between the parties.

It is common ground that in 1924 a very acute controversy arose over the succession to the Gaddi of the State of Bhopal, which was at that time occupied by Her Highness Begam Sultan Jahan. The Begam was advanced in years and the heir-apparent, her eldest son, Nasrullah Khan, was expected to succeed her. In September 1924 however Nasrullah Khan died leaving two sons of whom the elder was Habib Ullah Khan. The second son of the Begam, Obedullah, Khan, had died a few months earlier in June 1924, and her sole surviving male issue was the youngest son, Hamid Ullah Khan. On Nasrullah Khan's death disputes arose between Habib Ullah Khan and Hamid Ullah Khan, as to the succession to the Begam, in which important personages in Bhopal and outside appear to have arrayed themselves in rival camps. Some newspapers in British India espoused the cause of Habib Ullah Khan while others lent their support to Hamid Ullah Khan. The Riyasat, of which the first petitioner Diwan Singh is the proprietor and editor admittedly sided with Habib Ullah Khan and wrote a series of articles supporting his claims as against those of his uncle Hamid Ullah Khan, who was believed to be the favourite of Her Highness the Begam. The question however was set at rest in 1926 by the Paramount Power announcing its decision in favour of Hamid Ullah Khan. Shortly, after this announcement, the Begam abdicated and Hamid Ullah Khan succeeded her as the ruler of Bhopal. Habib Ullah Khan and his supporters however were not silenced by this decision and the controversy continued for some years longer. (The Court after pointing out mistakes in the judgments of both the lower Courts proceeded). As stated already, the complaint against the petitioners was filed under Ss. 292, 500 and 501/109 and 511, Penal Code, in respect of a pamphlet which the accused persons were alleged to have prepared for publication.

Admittedly, the so-called pamphlet had not seen the light of the day. Indeed, according to the prosecution themselves, it had not even been printed. All that is alleged, is that it had been copied and written on yellow lithographic paper and was ready for the press, when the complainant got information and arranged to have portions of it seized by the police. These portions and the original transcript in long hand are Exs. P. G. and P. F. both alleged to be in the handwriting of Qamarulnabi, against whom the Magistrate has framed charges under Ss. 500 and 292/511 and whose case is not before me. In order to connect the three petitioners with the preparation of this pamphlet the prosecution relied upon a number of documents and the oral testimony of certain witnesses. So far as Dewan Singh is concerned, the only document which is alleged to contain his writing is Ex. P. N., which purports to be the draft of a letter meant to be sent by Diwan Singh to some person on the staff of Prince Habib Ullah Khan, who was residing at the time in Poona. The draft is written in caligraphic Urdu by a copyist and contains several corrections and interlineations in Shikasta Urdu apparently made by another person. These corrections and interlineations are alleged to be in the hand-writing of Diwan Singh, who is also alleged to have affixed his signatures at the end. Diwan Singh denies that the signatures or the corrections and interlineations are in his hand-writing. This document (Ex. P. N.) therefore had an important bearing on the case, and naturally was the subject of much discussion before the Magistrate and the Sessions Judge and of considerable argument before me. Besides Ex. P. N., the prosecution relied strongly on several documents in "Ex. P. J. series," which were recovered from Fakharuddin, (P. W. 12), when his house was searched on 7th January 1930. These documents appear to contain the "material" on which the draft-pamphlet (Exs. P. F. and P. G.) was based, and some of them are stated to be in the hand-writing of Azfar Hussain, and others are letters alleged to have been written by Nazar Hussain to Diwan Singh. Azfar Hussain and Nazar Hussain denied that any of these documents was in their hand-writing and Diwan Singh declared that he had never received or seen them before. The question of their genuineness or otherwise was therefore one of the points for decision in the case.

In order to prove that Ex. P. N. had been signed by Diwan Singh and contained corrections in his hand and that the documents in Ex. P. J. series had been written by Azfar Hussain, and Nazar Hussain ,the prosecution relied on the evidence of: (1) two handwriting experts; (2) persons claiming to be familiar with the writings of the petitioners, and (3) the oral testimony of witnesses who stated that they had seen the documents in question with one or other of the petitioners. The learned Magistrate rejected the evidence of all these witnesses as unsatisfactory and held that the prosecution had failed to establish their contention in respect of any of the documents in dispute. The learned Sessions Judge has strongly criticized the Magistrate's consideration of this evidence and has come to the conclusion that the witnesses had been disbelieved without a proper appreciation of their testimony. In order to satisfy myself as to whether this criticizm is justified, I have examined the whole of the evidence, but find myself unable to agree with the Sessions Judge.

A large part of the record is taken up with the evidence of the handwriting experts, of whom two were produced by the prosecution. One of them is a gentleman "who describes himself" as Russel Gregory Afzal of Lucknow, (P. W. 26), and the other is Charles Hardless (Junior) of Allahabad, (P. W. 40). When the evidence for the prosecution was being led the defence brought it to the notice of the Magistrate that one of the persons who could throw light on the case was Mr. R. Stott, Government Examiner of Questioned Documents, who had been asked by the Political and Foreign Department of the Government of India, at the instance of the Bhopal Durbar, to give his opinion in respect of the alleged writings of Diwan Singh on Ex. P. N., but who had not been called by the prosecution as a witness, as his opinion was unfavourable. It was pointed out that the defence proposed to summon him as a witness if it became necessary for them to do so, but as Mr. Stott was leaving the country on long leave, it was prayed that in the interests of justice the Magistrate should summon him as a Court witness under S. 540, Criminal P. C. The learned Magistrate decided to examine Mr. Stott at that stage of the inquiry, but a question arose as to who was to pay his fees. The prosecution were naturally unwilling to do so, and as it was a private prosecution, the Crown could not be burdened with the expense. It was therefore arranged that the defence should pay the necessary fees, and accordingly Mr. Stott was examined and cross-examined on 23rd and 24th October 1931. In his examination-in-chief Mr. Stott expressed his opinion that the signatures and the interlinear writings in Ex. P. N. were not in the hand of Diwan Singh, but that they bore indications of an attempt by the writer to imitate his hand-writing. The witness gave elaborate reasons in support of his conclusion and was cross-examined at length by counsel for the complainant. His evidence as recorded covers 23 pages of the record, but before the cross-examination could be completed, Mr. Stott had to leave Delhi for other Government work and he sailed from Bombay on 28th October 1931.

The learned Magistrate has rejected the evidence of Messrs. Afzal and Hardless (Junior) and in doing so has relied inter alia on the evidence of Mr. Stott. It was argued before the learned Sessions Judge that the evidence of this witness was not admissible as his cross-examination had not been completed before he left India. The learned Judge overruled this objection, but, while holding that the evidence was admissible, he has passed strictures on the Magistrate for remarking that further cross-examination of the witness was not likely to make him change his opinion, formed after an examination of the document and its enlargements with the necessary instruments, as

> "experience shows that once a hand-writing expert had recorded his opinion, no amount of cross-examination subsequently alters his first opinion."

In this connexion the Magistrate incidentally referred to the evidence of Messrs. Afzal and Hardless (Junior) who, in spite of the lengthy cross-examination occupying several days and covering over 200 pages of type-written matter, had not modified in the least their original opinion. The learned Sessions Judge has taken these observations as indicative of the biassed standpoint from which the Magistrate had approached the whole case, and this appears to have largely influenced him in holding that the order of the Magistrate discharging the petitioners was perverse and foolish. After reading the evidence of the experts however I cannot say that the learned Magistrate was not right in his estimate of the testimony of Messrs. Afzal and Hardless, nor, if I may say so with all respect, does the Magistrate appear to me to be alone in holding the view of expert evidence, which he has expressed, somewhat bluntly and perhaps not in very elegant language. In this connexion it will be interesting to refer to a passage at p. 127 of Ryen of Criminal Evidence in India, which has been cited with approval by a Division Bench of this Court presided over by the Hon'ble the Chief Justice and Leslie-Jones, J., in *Hari Singh* v. *Lachmi Devi* (4), (at p. 226 of 59 *I. C.*):

> "It must be borne in mind that an expert witness, however impartially he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him The mere fact of opposition on the part of the other side is apt to create a spirit of partisanship and rivalry, so that an expert witness is unconsciously impelled to support the view taken by his own side. Besides, it must be remembered that an expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to its interests."

Similarly, Taylor in his great work on the "Law of Evidence," (Edn. 12), Vol. 1, p. 59, para. 58, observes:

> "Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These witnesses are usually required to speak, not to facts, but to opinions; and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond when the wishes or the interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think, but their judgments become so warped by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of forming an independent opinion. Being zealous partisans, their belief becomes synonymous with faith as defined by the apostles, and it too often is; but 'the substance of things hoped for, the evidence of things not seen' ".

The learned Government advocate has however repeated before me the objection that the evidence of Mr. Stott ought not to have been relied on by the Magistrate because: (1) he was not a witness for the prosecution, but had been produced at the instance of the defence and consequently his statement was not "evidence" which the Magistrate could have considered under S. 254, Criminal P. C., at that stage of the inquiry; and (2) the witness had not been fully cross-examined by the prosecution before he left the country. In my opinion, both these contentions are devoid of force and must be rejected. As stated above, the defence applied to the Court to examine Mr. Stott under S. 540, which gives the Court ample powers to summon any material witness "at any stage of any inquiry, trial or other proceeding under the Code." It has been held that under

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4. AIR 1921 Lah 126=59 I C 220.

this section the "Magistrate may admit evidence on behalf of either side at the trial" *Queen* v. *Kassy Singh* (5), and once such evidence has been admitted on the record, the Magistrate is bound to consider it while deciding whether a charge should or should not be framed. Nor can Mr. Stott's evidence be ruled out as inadmissible simply because his cross-examination was technically incomplete. As stated already, the defence had cross-examined him for nearly two days and he had had to leave Delhi under circumstances over which the Magistrate or the petitioners had no control whatever. Admittedly, his attendance before the conclusion of the inquiry could not be procured without any amount of delay and expense which would be unreasonable. As observed in an American case cited at p. 330 of Sarkar's Law of Evidence, Edn. 5:

> "no general rule can be laid down in respect of unfinished testimony. If substantially complete and the witness is prevented by sickness or death or other causes (mentioned in S. 33, Evidence Act) from finishing his testimony, whether viva voce or by deposition, it ought not to be rejected entirely, but submitted to the jury, with such observations as the particular circumstances may require. But if not so far advanced as to be substantially complete, it must be rejected."

In my opinion, the Courts below were right in holding that Mr. Stott's evidence was admissible. The value to be attached to it was however a matter primarily for the Magistrate, and after giving due weight to the arguments of counsel for the complainant I cannot say that the Magistrate acted foolishly or perversely in regarding Mr. Stott as an unbiassed witness and preferring his opinion to that of the experts produced by the prosecution. But even if Mr. Stott's evidence were excluded, it seems to me that the learned Magistrate was not wrong in rejecting the evidence of Messrs. Afzal and Hardless Junior. It is no doubt true that in his judgment, which covers over 29 pages of closely typed matter, the Magistrate has not entered upon an elaborate examination of the evidence of these witnesses and has not set out in detail the technical grounds given by them to support their conclusion; but, I think, that the Magistrate has given ample reasons for not accepting their opinion. I have read the decisions of both these witnesses with great care and am constrained to say that the impression which they have left on my mind is far from favourable. Indeed, the claim of one of them, Mr. Afzal, to be an expert in hand-writing appears to me to be highly pretentious. After passing the Senior Cambridge Examination at the age of eighteen, he proceeded to England and joined the University College, London, with a view to obtain a degree. He was there for nearly seven years, but did not sit for the Degree Examination as he "went up for the I. C. S.," in which he was unsuccessful. He returned to India in 1928 and set himself up as a handwriting and finger-print expert. In the printed advertisement (Ex. D-86) which he has issued to the public he described himself as:

> "Russell Gregory Afzal,
> (London University, France, Germany).
>
> * * * *
>
> Document, Hand-writing and Finger-print expert, Analyses of age and type of ink, paper, etc., Documents micro-photography, Bullet or Gun-markings."

In his evidence before the Magistrate he explained that the advertisement was not intended to convey the idea that he was an expert trained in the London University, or that he had studied the subject in any institutions in France or Germany; but stated that the reference to the London University was made because in London his Professor of English had given him a "course of lectures on hand-writing." He also stated that he had used the word "France" in the advertisement as his father (and not he) had studied the subject of hand-writing under an expert Bertillon, and that though personally he did not know much of French, his wife was a graduate with honours in French and had translated into English a book on Criminology by a French author, whose name he had forgotten. His connexion with Germany is of an equally flimsy character. He appears to have had very little practical experience; he came to India only two years before he appeared as a witness in the case ,and he frankly admitted that he had not made a special study of Urdu caligraphy. Further, a comparison of the evidence of the two experts shows that their conclusions do not agree on all points. For instance, with regard to Ex. D-71, which is stated to be an important document in the case, they have given contradictory evidence. While Mr. Afzal was of opinion that it was in the hand-writing of Diwan Singh, Mr. Hardless was emphatic that it was not the original document, but was a tracing from the original.

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5. (1874) 21 W R 61 Cr.

The next set of witnesses claimed to be familiar with the hand-writing of one or other of the petitioners and pretended to identify the alleged writing of Diwan Singh on Ex. P. N., and of the other petitioners on various other documents. As stated already, the Magistrate found himself unable to accept their evidence and has rejected it as unsatisfactory or unreliable. The reasons given by him for coming to this conclusion have not been accepted by the Sessions Judge, and have been commented upon by the learned Government advocate. He has read the evidence of these witnesses before me and, after considering it, I cannot say that the view taken by the Magistrate is palpably unreasonable, perverse or foolish so as to bring the case within the rule enunciated above. Indeed it seems to me that it would have been highly unsafe to rely on the testimony of these witnesses as to the identity of hand-writing, more especially when we find that with regard to several documents they have expressed opinions contradictory to those of the experts produced by the prosecution themselves.

For instance, Ex. D-22 was described by Fakharuddin, (P. W. 12) as being in the hand-writing of Diwan Singh. while both Messrs. Afzal and Hardless have declared it to be a tracing. Similarly, Fakharuddin stated that Ex. D-25 had been written by Diwan Singh, but P. W. Shamasuddin stated that it was not in Diwan Singh's hand and the two experts have deposed that this document also was a tracing. There are several other discrepancies of this kind, but it is not necessary to set them out in detail here. It will be sufficient to say that with these materials on the record the Magistrate had ample justification for rejecting the testimony of these witnesses. (His Lordship then considered other evidence and proceeded). After giving the case most anxious and careful consideration I have reached the conclusion that there is no ground for holding that the Magistrate's order was foolish or perverse or was based on a record which was obviously incomplete. It may be that with regard to certain matters of detail the learned Magistrate has fallen into error; it may be that in some passages in his judgment he has used language stronger than was perhaps necessary; it may also be that in some others he has not expressed himself clearly; but I have no doubt that, taken as a whole, his decision was not such as could be justifiably set aside by the Sessions Judge under S. 436, Criminal P. C. I therefore hold that the learned Sessions Judge was in error in setting aside the order of the Magistrate and directing further inquiry on the same materials. I accordingly accept this petition, set aside the order of the Sessions Judge, dated 3rd December 1932, and restore that of the Additional District Magistrate dated 23rd September 1932, discharging the petitioners.

In conclusion, it may be mentioned that a faint-hearted attempt was made on behalf of the complainant to argue that the order of the Magistrate dismissing the first complaint instituted on 6th January 1930, against Azfar Hussain was erroneous as no "inquiry" had been made on it; in fact no evidence had been recorded at all. It was conceded however that the subject-matter of the first complaint was included in the allegations made in the second complaint which was much more comprehensive, and that all the evidence that could have been produced in support of it was actually brought before the Magistrate in the course of the inquiry into the second complaint. In view of my finding that the decision of the learned Magistrate on the second complaint was correct and that no prima facie case had been established for framing a charge against any of the petitioners, the first complaint must automatically fail. In these circumstances, it would be a travesty of justice to order "further inquiry" into the same allegations and on the same materials, on the highly technical ground that no formal order had been passed consolidating the two complaints. I therefore restore the order of the Magistrate dismissing the complaint of 6th January 1930 also.

M.N. *Petition accepted.*

A. I. R. 1933 Lahore 568

HARRISON AND ADDISON, JJ.

Uttam Chand — Defendant — Appellant.

v.

Vishan Das, *Bhagwan Das* and *others* —Plaintiffs—Respondents.

First Appeal No. 1982 of 1926, Decided on 4th April 1933, from decree of Senior Sub-Judge, Multan, D/- 18th May 1925.

(a) Punjab Courts Act (6 of 1918), S. 39—In account suit value of amount decreed determines Court of appeal.

In an account suit it is the value of the amount decreed that determines the Court of appeal.

Where therefore the amount decreed is over Rs. 10,000 the appeal lies to the High Court. [P 569 C 1]

(b) Limitation Act (1908), S. 5—Bona fide mistake.

A legal adviser's mistake to justify extension of limitation must be a bona fide one, that is, it must be done with due care and attention: *AIR* 1918 *Lah* 67, *Foll.* [P 569 C 1]

(c) Limitation Act (1908), S. 5—Preferring appeal to wrong Court after consulting counsel — There is no bona fide mistake—Limitation Act (1908), S. 14.

Where an appellant preferred an appeal to the District Court instead of preferring it to the High Court, which he did after the stipulated period of limitation and prayed for extension of time on the ground that he had consulted the counsel who presented the memorandum to the District Judge: *Held*: that there was no bona fide mistake and hence limitation could not be extended. [P 569 C 1]

R. C. Manchanda—for Appellant.

Achhru Ram—for Respondents.

Judgment.—The plaintiffs sued for dissolution of partnership and for accounts. Ultimately, on 18th May 1925, they obtained a final decree against the defendants for Rs. 10,042-6-6. Hari Ram preferred an appeal against this decree to the extent of Rupees 4,941-5-3 to the District Judge on 13th July 1925. The memorandum of appeal was returned to him later on by the District Judge for presentation in the proper Court. Thereupon the memorandum of appeal was presented in this Court on 7th August 1926.

A preliminary objection was taken at the hearing that the appeal was barred by limitation and that there was no sufficient ground for extending the period within which the appeal should have been presented in this Court. There has never been any doubt as to the law in the Punjab. In an account suit it has always been held that it is the value of the amount decreed that determines the Court of appeal. As the amount decreed was over Rs. 10,000 the appeal, therefore lay to this Court. The appellant shelters himself behind the plea that he consulted counsel who presented the memorandum of appeal to the District Judge. This Court has always held that a legal adviser's mistake to justify extension must be a bona fide one, that is, it must be done with due care and attention. This was laid down by a Division Bench in *Risal Singh* v. *Shadi* (1) and in many other rulings. Here the law was clear and there was therefore no bona fide mistake. Admittedly, the appeal was long time-barred when it was presented to this Court on 7th August 1926. As there is not sufficient ground for extending the time, the appeal must be dismissed with costs as time-barred.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 569

DALIP SINGH, J.

Bhola—Defendant—Appellant.

v.

Sheo Chand and *another* — Plaintiffs and Defendants—Respondents.

Second Appeal No. 377 of 1927, Decided on 4th January 1933, from decree of Senior Sub-Judge, Rohtak, D/- 12th October 1926.

(a) Civil P. C. (1908), O. 2, R. 2—Applies only to plaintiffs.

Order 2, R. 2 cannot apply to defendants at all and can only apply to plaintiffs. [P 569 C 2]

(b) Civil P. C. (1908), S. 11—Res judicata between co-plaintiffs—Essentials stated.

Before there can be any res judicata between co-plaintiffs there must have been a conflict between them. That conflict should have been necessary for the decision of the previous case and an actual decision should have been given: *AIR* 1931 *P C* 114 and *AIR* 1931 *P C* 231, *Ref.* [P 570 C 1]

Shamair Chand—for Appellant.

M. C. Mahajan—for Respondents.

Judgment.—The facts of the case are fully given in my judgment dated 8th June 1927, (106 *I. C.* 484), in which I held that the plaintiffs were estopped from raising the question of the title of Mt. Ladho as against the present defendants. That judgment was set aside by the Letters Patent Bench on 19th April 1932, and the case has been sent back to me for disposal on the other points. The judgment of the learned Senior Subordinate Judge held that as the defendants' decree for possession was not lawfully executed within three years, they could not now claim the land in dispute. This may or may not be correct, but it is not the point in issue, for the question is whether the plaintiffs have established their title to the land or their right to retain exclusive possession of it in partition. The learned Senior Subordinate Judge also held that O. 2, R. 2, sub-Cl. (3), Civil P. C., stood in the way of the defendants. As regards that, it is sufficient to say: (1) that O. 2, R. 2 (3), Civil P. C., could not apply even if the present defendants were plaintiffs. Nor do I see that any other clause of O. 2, R. 2, applies. Secondly, O. 2, R. 2, Civil P. C., cannot apply to defendants at all and can only apply to plaintiffs. This being the position, the learned counsel for the appellants has further contended that the suit is barred

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1. AIR 1918 Lah 67=43 I C 817=95 P R 1917.

by the rule of res judicata. His contention is that a declaration was obtained in a representative suit, that Mt. Ladho had no title to the property of Har Dayal. This decision binds all the proprietors and Mt. Ladho. The plaintiffs are members of the proprietary body and also claim title from Mt. Ladho. Hence the question is barred by the rule of res judicata for in the previous suit it was held that Mt. Ladho had no title.

The position is certainly curious. The plaintiffs in one capacity claim under the plaintiffs in the previous suit because that suit was a representative suit, and by virtue of explanation 6 S. 11, Civil P. C. They also represent in another capacity the title of Mt. Ladho, defendant in the previous suit, for they claim to be alienees from Mt. Ladho in an alienation which took place prior to the previous suit. As representatives of Mt. Ladho being alienees prior to the previous suit I do not see how they can be held bound by the decision. As representatives of persons claiming under the plaintiffs in the prior suit, their position is that of co-plaintiffs and before there can be any res judicata between co-plaintiffs there must have been a conflict between them. That conflict should have been necessary for the decision of the previous case and an actual decision should have been given: see *Munni Bibi* v. *Triloki Nath* (1), and *A. I. R.* 1931 *P. C.* 231. I am unable therefore to hold that they are bound as representatives of the proprietors or as members of the proprietary body. The result is certainly curious as remarked, and it may be that I have not fully appreciated the point, but the Letters Patent Bench have held that there is no estoppel and I am unable to see that there is any res judicata. (The remaining portion is not necessary for purpose of this report).

K.S. *Case remanded.*

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1. AIR 1931 P C 114=132 I C 598=58 I A 158 =53 All 103 (P C).

✻ A. I. R. 1933 Lahore 570

CURRIE, J.

Hans Raj—Appellant.

v.

Karam Chand and *others* — Respondents.

Misc. Second Appeal No. 299 of 1932, Decided on 11th January 1933, from order of Dist. Judge, Gurdaspur, D/-18th November 1931.

(a) Judgment—Judge mentioning specifically points argued before him—Scope of presumption that other points in memorandum of appeal are abandoned—Practice.

Where a Judge mentions specifically certain points which were argued before him and the judgment is silent on other points taken in the memorandum of appeal, it may be presumed that such points have been abandoned; but where the Judge after mentioning the points specifically argued before him, states that on merits too there is no force in the objections taken, it cannot be held that the other points have been abandoned: *AIR* 1923 *Lah* 124, *Dist.*; *AIR* 1924 *Lah* 107, *Ref.* [P 572 C 1]

✻ **(b) Civil P. C. (1908), S. 47 and O. 21, R. 90—Limitation of 30 days under O. 21, R. 90 does not apply to filing objection under S. 47—Limitation Act (1908), Arts. 181 and 166.**

Limitation for lodging objections under S. 47, Civil P. C., is governed by Art. 181 and not by Art. 166. Hence the limitation of 30 days prescribed for objections under O. 21, R. 90, Civil P. C., does not apply in a case where objections are lodged under S. 47, Civil P. C., and in such cases a second appeal is competent: *AIR* 1926 *Pat* 397; 37 *I C* 827; *AIR* 1924 *Mad* 431 (*FB*) and *AIR* 1932 *Lah* 530, *Ref.* [P 573 C 1]

Chiranjiva Lal—for Appellant.

Faquir Chand—for Respondents.

Judgment.—On 9th February 1928, one Atma Ram obtained a compromise decree against the present appellant, Hans Raj and others. The agreement which was embodied in the decree was that the judgment-debtors should pay the sum of Rs. 2,112, by 9th June 1928. In default of payment the amount was to be recovered from the mortgaged property and other property of the judgment-debtors. On 6th March 1929, Karam Chand, the present respondent, to whom the decree had been transferred, applied for execution by attachment and sale of the mortgaged property and the arrest of Hans Raj judgment-debtor. Notice was issued under O. 21, R. 66, Civil P. C., and was served on Hans Raj. A date for sale was fixed, but on 16th July 1929, the decree-holder's counsel stated that there had been a mistake as regards the number of the house which was mortgaged. He therefore asked that the application be filed and said that he would get the decree amended. This he failed to do, but on 4th August 1929 he filed a fresh application for execution against Hans Raj getting house No. 6446 attached in the place of No. 7390. Notice was again issued on 19th October 1929. Hans Raj was served and the sale was fixed for 24th March 1930. On the 28th March a report was submitted to the effect that the sale had been concluded in favour of the decree-holder who had bid Rs. 500. On this the executing Court ordered the decree-holder to deposit the commission money and directed that the purchase money should be credited against his claim. The Court also directed that allowing 30 days for objections the case should come up on the 30th April. Hans Raj had already, on 22nd March 1930, filed objections under S. 47, Civil P. C., his contention being that this property was only liable to be put to sale after the mortgaged property had been sold in the event of the proceeds failing to meet the decree. This application had also been fixed for decision on the 30th April.

Eventually, on the 21st June the decree-holder's counsel agreed that the mortgaged property should be sold first and the rest of the property should remain under attachment. The judgment-debtor's counsel also agreed to this course. The order of the Court was that the plan of the mortgaged property should be put in, notice should issue under O. 21, R. 66, Civil P. C., and the remainder of the proprty should remain under attachment. The case was fixed for 12th July 1930. Notice was served on Hans Raj and eventually the sale took place on 2nd April 1931, being concluded in favour of the decree-holder who bid Rs. 300. On the 18th April the Court ordered that the case should come up for objections on the 6th June. On the 6th June, Hans Raj filed objections described as being under S. 47, Civil P. C., and O. 21, R. 92, Civil P. C. (sic). On this date the Court dismissed the objections, remarking "they have been filed after more than thirty days. Therefore they are not tenable." In another order of the same date the execution Court remarking that the objections, which were filed by the judgment-debtor, had been disallowed as barred by time, confirmed the sale of both houses for Rs. 300 and Rs. 500 respectively in favour of the decree-holder. Hans Raj lodged an appeal in the Court of the District Judge against the order of the Subordinate Judge dated 6th June 1931. This was dismissed by the learned District Judge on the ground that the objections were clearly time-barred. The learned District Judge further remarked:

> "On merits too there is no force in the objections. The objector's counsel is not prepared to pay more than Rs. 800 for the property which was put to auction."

Against this order this second appeal has been preferred. Mr. Chiranjiva Lal, Aggarwal has urged that the executing Court erred in confirming the first sale for Rs. 500, as well as the second for Rs. 300. He contends that the result of order, dated 21st June 1930, on the objection preferred by Hans Raj was that the sale of the first house for Rs. 500 was cancelled and the property merely remained under attachment. He contends that consequently the proper course would have been to put the property to sale a second time and that the Court could not, as apparently it did, treat the sale as being merely held in suspense for confirmation of the same. He contended further that his objections were preferred under S. 47, Civil P. C., and therefore were not barred by limitation and that a second appeal lay.

It has been further argued that as the auction-purchaser was himself the decree-holder, any differences between him and the judgment-debtor should be dealt with under S. 47 and not by way of objections under O. 21, R. 90, Civil P. C. Mr. Faqir Chand argued that the original order passed by the executing Court was under O. 21, R. 92, and from that an appeal lay under O. 43, R. 1 (j) and no second appeal lay. He further contended that in any case the judgment of the learned District Judge was silent on this point and therefore it must be held that the point had been abandoned and could not now be raised. As already noted the executing Court had not given any clear decision on the first objection on the question of which house should be auctioned first, though apparently the judgment-debtor's objection was accepted.

In his second application presented on the 6th June, Hans Raj urged, in the first place, that there had been material irregularities in conducting the sale of the house. He also urged again that the second house could only be sold after the house which had been mortgaged had been put to sale. No decision was given by the executing Court or by the District Judge on this point which is clearly one which would be covered by S. 47, Civil P. C. The memorandum of appeal is described as being under S. 96, that is to say, from a decree which would be an order under S. 47. In the original memorandum of appeal filed in Urdu the appeal is described as being against the order of the executing Court rejecting the appellant's objections regarding the cancellation of the sale and the irregularities in the conduct thereof. The grounds of appeal filed relate mainly to the objections urging material irregularities in the conduct of the sale. The first ground however is that the lower Court has erred in dismissing the objections filed by the appellant regarding the illegality in the sale of the property attached. It is contended that the property sold in the first sale is the only property that was attached and therefore the question as regards the necessity for selling the mortgaged property first was raised in that ground. It appears that the house sold for Rs. 500 was the only property that was attached, the house sold for Rs. 300 not having been attached, but being sold as mortgaged. This contention would thus appear to have some force, but Mr. Faqir Chand argues that as it is not discussed by the learned District Judge it must have been abandoned and therefore should not be entertained. In this connexion he cites *A. I. R.* 1923 *Lah.* 124 and *Harji Mal* v. *Devi Ditta Mal* (1). In the latter ruling it was held that, where the judgment of the appellate Court states specifically that certain points were argued before it and is silent as to other points taken in the grounds of appeal, it must be presumed that those points were abandoned. That argument however would not apply in the present case as the remark of the learned District Judge that, on the merits, too, there is no force in the objection, indicates that something may have been said on this point. In view of that remark it is impossible to hold definitely that this point was abandoned.

As regards the question of limitation it is argued that the limitation of 30 days prescribed for objections under O. 21, R. 90, Civil P. C., does not apply in a case where objections are lodged under S. 47, Civil P. C., and that in such cases a second appeal is competent. In this connexion reference has been made to *Ramaswamy Chetty* v. *Maung Tah* (2), *Rajagopal Aiyar* v. *Ramanuja Chariar* (3), *A. I. R.* 1926 *Pat.* 397 and *Mt. Rashid Jahan Begam* v. *Niadar Mal Ranji Lal* (4). In the last mentioned case it was held that the second appeal against an order refusing to set aside a sale in execution of a decree was incompetent. The Madras ruling was distinguished on the ground that in that case the decree-holder was the auction-purchaser whereas in the Lahore case the decree-holder had no longer any interest in the matter. In *Rajagopal* v. *Ramnuja* (3) it was held that if a party files an application to have the sale set aside either under S. 47, Civil P. C., or otherwise, it is governed by Art. 181, Limitation Act, and not by Art. 166. It is further held that an application to set aside a Court sale not only on the ground of irregularity in the sale, but also on the ground that no notice was given of the application for attachment and sale of the property, falls within S. 47, Civil P. C., and hence there is a second appeal. In *A. I. R.* 1926 *Pat.* 397, it was held that an application to set aside execution sale on the ground of want of notice under O. 21, R. 22, was governed by the three years' rule of limitation under Art. 181 and that the question whether notices under O. 21, R. 22, Civil P. C., were not served must be regarded as orders under S. 47 and the second appeal lay. In *Ramaswami Chetty* v. *Maung Tah* (2) it was held that where objections in a petition to set aside an execution sale relate not only to material irregularity in publishing or conducting the sale, but go further and include objections to the whole procedure starting with illegal attachment, the petition is admissible under S. 47, Civil P. C., and is not time-barred though filed beyond the 30 days allowed for an application under O. 21, R. 90, Civil P. C. In *A. I. R.* 1928 *Pat.* 272, it was held by Adami, J., that a prayer under S. 47, Civil P. C., can be joined with a prayer under O. 21, R. 90 in one application. It is only reasonable that the executing Court should deal with every objection which the judgment-debtor puts forward in one and the same proceeding.

For the appellant it is contended that the decree was in reality a mortgage-decree and therefore the property of the judgment-debtors other than that mortgaged could only be proceeded against after the mortgaged property had been put to sale and the proceeds had proved to be insufficient to meet the decree, that is to say, that the whole of the first sale was irregular. Mr. Fakir Chand contended that the decree was a simple compromise decree and the decree-holder could execute it against any other property. He cited *Total Das* v. *Utumal* (5). This point was never dealt with by either the executing Court or the appellate Court and it is not clear whether it was ever raised in this precise form. It is unnecessary for me to discuss this point in view of the order I propose to pass. From a

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1. AIR 1924 Lah 107=77 I C 398=4 Lah 364.
2. (1917) 37 I C 827.
3. AIR 1924 Mad 431=80 I C 92=47 Mad 288 (FB).
4. AIR 1932 Lah 530=140 I C 883.
5. (1911) 4 S L R 244=10 I C 975.

consideration of the objections preferred by the judgment-debtor it is clear that the principal contention, viz., that the mortgaged house must be sold before the other property could be put to sale was one that falls under S. 47, Civil P. C. A second appeal is therefore clearly competent. In view of the rulings cited above the Courts below were wrong in rejecting the application as time-barred as the limitation would be governed by Art. 181 and not Art. 166, Limitation Act. The judgment-debtor is entitled to have his objections considered and decided on the merits. I therefore accept the appeal and setting aside the order of the learned District Judge remand the case for re-decision on the merits. As much of the confusion that has arisen has been due to the inartistic way in which the appellant's grounds of appeal were drafted in the District Court, the parties will bear their own costs in this appeal. Stamp on appeal to be refunded.

K.S. *Case remanded.*

✻ A. I. R. 1933 Lahore 573

SHADI LAL, C. J. AND BROADWAY, J.

Wazir Chand — Plaintiff—Appellant.

v.

Karam Chand and *another* — Defendants—Respondents.

Letters Patent Appeal No. 149 of 1927, Decided on 20th February 1933, from decree of Addison, J., in C. A. No. 2801 of 1926, D/- 6th June 1927.

(a) Civil P. C. (1908), O. 21, R. 63—Whether judgment-debtor is necessary party — (*Quaere*).

In the class of suits contemplated by O. 21, R. 63 the judgment-debtor whether is a necessary party? (*Quaere*). [P 574 C 1]

✻(b) Civil P. C. (1908), S. 11—Fraud or collusion—Decision does not operate as res judicata.

A judgment obtained by fraud or collusion cannot operate as res judicata. Where therefore fraud has been successfully perpetrated and the particular decision in the former suit has been arrived at owing to the fact that fraud had been practised and that there was collusion between the parties, the rule of res judicata does not apply. [P 574 C 1, 2]

M. L. Puri—for Appellant.

M. C. Mahajan—for Respondents.

Broadway, J.—In the execution of a money decree against Karam Chand in favour of Baldeo Das-Sunder Lal, the decree-holders obtained the attachment of a one-third share in the house belonging to the judgment-debtor. The attachment was effected on 19th February 1906. On 20th February 1906, one Beli Ram applied to the executing Court alleging that he was the mortgagee in possession of the property in question, and that, therefore the property could not be brought to sale without recognizing his mortgagee rights. His objections were dismissed on 5th May 1906. Beli Ram did nothing till 3rd May 1907, when he instituted the suit contemplated by O. 21, R. 63, Civil P. C., in which he alleged that he was the mortgagee and that his rights as such should be duly given effect to. The decree-holders and Karam Chand were both impleaded as defendants in this suit. Karam Chand allowed the case to go ex parte and the suit was contested by the decree-holders alone. The plaintiff was finally given a decree on 3rd February 1911, it being held in the suit that the mortgage set up had been executed in good faith and for consideration.

On 19th August 1925, one Wazir Chand instituted a suit for recovery of Rs. 1,000, by the sale of the property mortgaged to Beli Ram. In the plaint he alleged that Beli Ram had been acting on behalf of a joint Hindu family and that subsequent to the mortgage in question a disruption of the family had taken place and its property divided amongst its members, this particular claim having fallen to the share of Wazir Chand. Karam Chand contested the suit, alleging that the property was still in his possession and that no consideration had passed for the mortgage which had been fraudulently entered into to defeat the rights of the decree-holders, Baldeo Das-Sunder Lal. The trial Court decreed the plaintiff's suit, which was however dismissed on appeal by the learned Additional District Judge on the ground that Karam Chand could in law plead fraud and that he had succeeded in proving his assertion that the mortgage had been entered into without consideration and with the fraudulent intention of defrauding the decree-holders, Baldeo Das-Sunder Lal, and had actually attained that object. He also held that the question of the validity of the mortgage was not concluded by the rule of res judicata by reason of the decision in the former suit between Beli Ram and Baldeo Das-Sunder Lal and Karam Chand.

Against this decision Wazir Chand preferred a second appeal to this Court which came up for hearing before a Single Judge and resulted in a dismissal, it being held that this Court was bound by the finding of the lower appellate Court on the question as to whether the mortgage was without consideration and had been entered into for a fraudulent purpose. It was also held that Karam Chand was in law entitled to raise the question of fraud although he himself was a participant in it. Finally it was held that the rule of res judicata did not come into operation, inasmuch as, to all intents and purposes, Beli Ram was, in the former suit, fighting Karam Chand's battle and therefore there was no contest between these two parties. Wazir Chand has now preferred this appeal under Cl. 10, Letters Patent and on his behalf we have heard Mr. Mukand Lal Puri, while Mr. Mehr Chand Mahajan has argued the case on behalf of Karam Chand. It is not disputed that this Court was bound by the findings of fact arrived at by the learned Additional District Judge as to the factum of the fraud. It has also been admitted that the question as to whether Karam Chand can be allowed to raise the plea of fraud has been concluded by the decision of the Full Bench of this Court in *Qadir Bakhsh* v. *Hakam* (1) in which the decision now under consideration, (which is to be found reported in *Wazir Chand* v. *Karam Chand* (2), was specifically referred to with approval.

Mr. Puri however urged that the decision of the Single Judge on the question of res judicata was incorrect. He contended that Karam Chand was a necessary party to the former suit brought by Beli Ram and that as Beli Ram and Karam Chand were arraigned on opposite sides, any decision arrived at in that suit is binding on Karam Chand, although the proceedings against him were ex parte. On the other hand, Mr. Mahajan contended that in the class of suits contemplated by O. 21, R. 63, Civil P. C., the judgment-debtor was not, strictly speaking, a necessary party and that therefore any decision arrived at could not be binding on him even if he had been made a party. Whether Karam Chand was or was not a necessary party to the former suit, is perhaps a matter for argument, but I do not think it necessary to express any opinion upon the point, as it seems to me that there is force in Mr. Mahajan's further contention that a judgment obtained by fraud or collusion cannot operate as res judicata. At p. 59 of Mullah's Commentary on the Civil Procedure Code appears the following question:

> "Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of justice. . . . It avoids all judicial acts, ecclesiastical or temporal."

In the present case it has been found as a matter of fact that a fraud was successfully perpetrated and, there can be no doubt that the particular decision in the former suit was arrived at owing to the fact that fraud had been practised and that there was collusion between, Beli Ram and Karam Chand. In these circumstances the rule of res judicata does not, in my judgment, apply in the present case. I would therefore dismiss this appeal with costs.

Shadi Lal, C. J.—I concur.

R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 574

BHIDE, J.

Kishan Chand and *others*—Defendants—Appellants.

v.

Dina Nath and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 582 of 1929, Decided on 20th October 1932, from decree of Addl. Dist. Judge, Lahore, D/- 13th November 1928.

(a) Registration Act (1908), S. 49 — Unregistered document relating to partition admissible to prove mere separation in status —Evidence Act (1872), S. 91.

An unregistered document relating to partition may be admissible to prove a mere separation in status, but not to prove that a particular item had ceased to be joint and has fallen to a particular share: *AIR* 1923 *Lah* 495; *AIR* 1927 *Nag* 113 and *AIR* 1923 *Lah* 392, *Dist.* [P 575 C 1]

(b) Registration Act (1908), S. 49—Factum of partition of debts is clearly "transaction."

In a suit by plaintiffs as reversioners of *B*, for the recovery of their share of certain debts due to *B* which were alleged to have been realized by the defendants, the defendants pleaded that the property left by *B* had been partitioned and that the debts had fallen to their share. For this they relied on certain unregistered document purporting to relate to that partition:

Held: that the factum of partition of debts which the defendants seek to prove was clearly a "transaction affecting the property" and consequently the defendants could not rely on the documents even for proof of that fact. [P 575 C 1, 2]

Shamair Chand—for Appellants.

Achhru Ram—for Respondents.

Judgment.—The pedigree table of the parties concerned is given in the judgments of the Courts below. Plaintiffs claiming to be reversioners of Mt. Bhagwanti, sued for the rocovery of their share of certain debts due to her, which were alleged to have been realized by the defendants. Defendants pleaded

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1. AIR 1932 Lah 503=139 I C 17=13 Lah 713 (FB).
2. (1928) 107 I C 110.

that the property left by Mt. Bhagwanti had been partitioned and that the debts had fallen to their share. They relied on certain documents purporting to relate to that partition. These documents were held to be inadmissible in evidence for want of registration and the plaintiffs were granted a decree by the learned District Judge on appeal. The defendants have preferred a second appeal. The learned counsel for the appellants has not seriously challenged the finding of the Court below that the documents relating to the partition referred to above were inadmissible in evidence to prove the terms of the partition. He has, however, urged that S. 49 of the Indian Registration Act or S. 91 of the Indian Evidence Act is no bar to the factum of the partition being proved. It was further contended that once it is proved the property left by Mt. Bhagwanti was no longer joint, the plaintiffs' claim must fail.

The learned counsel for the appellants has relied upon *Qadar Baksh* v. *Mangha Mal* (1), *Jiji Bai* v. *Ratan Singh* (2) and *Narsingh Das* v. *Uttam Chand* (3), in support of the above contentions. In the first ruling it was held that though an unregistered sale-deed was inadmissible to prove the sale, it could be taken into consideration to ascertain the nature of the possession held by the vendees at the date of the sale. In *Jiji Bai* v. *Ratan Singh* (2), it was held that though an unregistered deed of partition was inadmissible to prove its terms, there was no objection to the document being admitted to prove that the Hindu family was no longer joint in status. To the same effect is the decision in *Narsing Das* v. *Uttam Chand* (3). I do not think these rulings can help the defendants in the present case. The defendants do not want to prove mere separation in status. What the defendants want to prove is that the property left by Mt. Bhagwanti had been partitioned and that the debts realized by them were not joint. I think the defendants are precluded from proving this fact by the provisions of S. 49 of the Indian Registration Act, which lays down (inter alia) that the unregistered document shall not "be received as evidence of any transaction affecting such property" Now the factum of partition of the debts which the defendants seek to prove is clearly a "transaction" affecting the property and consequently it seems to me that the defendants cannot rely on the documents even for proof of that fact. I therefore uphold that decree of the learned District Judge and dismiss the appeal, but in view of all the circumstance leave the parties to bear their costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 575

Special Bench

JAI LAL, MONROE AND BHIDE, JJ.

S, A Barrister-at-law, Sheikhupura, In the matter of.

Civil Misc. Appeal No. 138 of 1933, Decided on 11th April 1933.

Legal Practitioner— Receipt of money by advocate for filing appeal—Appeal not filed as being time barred and application of money received not satisfactorily explained — Client withholding correct information from Court—Held advocate should not be removed or suspended from practice but should return money received.

An advocate received money from a client for filing an appeal. He did not file the appeal as he found out later that the appeal was barred by time. The explanation given by the advocate as to the application of the money was not quite satisfactory nor did the client give out the correct and true information to the Court, and the client's conduct also was not consistent with what normally would have happened under the circumstances of the case:

Held: that having admitted the receipt of money, though it was for the advocate to account for its application, there was no reasonable cause established to enable the Court to remove or suspend the advocate from practice, that the Court cannot be uninfluenced by the conduct of the client in withholding the correct information and that the advocate should return the money received. [P 577 C 1]

Carden Noad—for the Crown.

J. N. Aggarwal, *B. P. Puri*, *Abdul Aziz*, *N. C. Pandit*, *Amar Das* and *Shah Nawaz*—for Respondent.

Jai Lal, J.—Mr. *S.* an advocate of this Court, whose ordinary place of business is at Sheikhupura, has appeared before us to show cause why, under Cl. 8 of the Letters Patent of this Court, he should not be removed or suspended from practice. The facts on which the learned Government Advocate has moved this Court to take action are these: On 3rd July 1930, Mr. *S* was engaged by one Vir Singh to file an appeal against a decree granted by Diwan Sri Ram, Subordinate Judge, against him, for Rs. 613-15-4 in favour of one Mul Chand. The decree, it appears, had been passed on 27th May 1930 and, consequently on 3rd July, an appeal from the same would normally have

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1. AIR 1928 Lah 495=78 I C 889=4 Lah 249.
2. AIR 1927 Nag 113=99 I C 448.
3. AIR 1928 Lah 392=76 I C 852.

been barred by time. It is alleged that an application for a copy of the judgment was made on 2nd or 3rd July and as the respondent was not informed of the date of the judgment he was, therefore, unable to say whether an appeal could be filed. He therefore asked Vir Singh to see him in about a week's time when he could let him know whether the appeal was filed. He was paid Rs. 110, Rs. 35 out of which was on account of his fees and the rest for expenses. A separate sum of Rs. 15 was given to his Munshi for expenses for the copies etc. Vir Singh went to the counsel as arranged about a week afterwards but was told that the copies had not been received and, therefore, he should come again He however, did not go to the Advocate but some time later he received summonses to appear in the Court of the Additional District Judge of Lyallpur. He thought that the summonses were in connection with the appeal filed on his behalf and, therefore, went to Lyallpur on the date fixed but there he discovered that it was in connection with another case that he had been summoned as a respondent, and that the appeal in the case in which he had engaged Mr. *S* had not been filed at all. After making several attempts to obtain a refund of the amount paid by him to the respondent he made an application to the Additional District Magistrate. The matter was finally referred to this Court and an enquiry by the District Judge was ordered. The District Judge has accordingly recorded the statements of Vir Singh, the respondent, and his witnesses, and has submitted a report to the effect that

> "Mr, *S* has not rendered a satisfactory explanation of the sum of Rs. 110 that was advanced to him by Vir Singh."

In consequence of this a formal charge has been framed against the respondent and we have heard the learned Government Advocate on behalf of the Crown and Mr. Abdul Aziz, advocate for the respondent. After a careful consideration of the material placed before us, I am of opinion that the true circumstances relating to this affair have not been disclosed by either party. Mr. *S* says that he received Rs. 110 as stated by Vir Singh but as a copy of the judgment had not been received on that date he, therefore, asked Vir Singh to see him again, that he received the copy a few weeks later and found that the limitation for an appeal had already expired and, therefore, he returned the copy to Vir Singh. He admits that on the date he did not return the money paid to him by Vir Singh. He however, says that a murder had been committed in the village of Vir Singh whose uncle Dula Singh had asked him to appear for the prosecution and had asked him to credit Rs. 80 out of the amount paid to him by Vir Singh towards the fees in that case, the balance being allowed to be retained by him for his trouble in the matter of obtaining copies and giving advice to his client. This arrangement with Dula Singh, however, was admittedly made after the copies had been returned to Vir Singh. Vir Singh denies that he received the copies or that he agreed Mr. *S* to explain why he did not return as fees in the murder case. We asked Mr. *S* to explain why he did not return the fees at the same time when the copies were returned. He could give no explanation. We have also examined the register of fees of Mr. *S* and find that there is an entry of Rs. 35 having been received by him from Vir Singh as his fees in the civil case and that on 28th August there is another entry of his having received Rs. 60 as part of his fees in the murder case but, if Rs. 35 or a part thereof, and a portion of the expenses paid to him for expenses of the appeal were credited towards the fees in the murder case, one should expect a record to that effect at any rate against the entry relating to Rs. 36. Mr. *S* also is unable to explain this omission. He says that his clerk used to write the entries and he might have omitted to do so.

On the other hand Vir Singh says that, subsequent to his second visit a week after the payment of the amount, he never went to Mr. *S* and that he went direct to Lyallpur after he had received the summonses from the Court. Now, if he really believed that he had been summoned in the appeal filed by the counsel on his behalf, the normal course for him to adopt would have been to inform the counsel of the date fixed in the appeal and to ask him to appear on his behalf. He, however, did nothing of the sort. The conduct of Vir Singh thus is not consistent with what he should normally have done, when he says that after the second visit to the counsel he never went near the respondent till he appeared in the Court of the Additional District Judge and discovered that he had been summoned in a different case. While therefore the explanation of Mr. *S* is not quite satisfactory, and probably all this trouble would have been avoided, if in the

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the first instance he had chosen to give a straightforward statement of what really happened. Vir Singh's own conduct is not consistent with what normally should have happened and I am of opinion that he also withheld the correct information about this affair from this Court. Under the circumstances I do not think it would be safe to take any action against the respondent on the bare statement of Vir Singh. It is true that, having admitted the receipt of the money, it was for the respondent Advocate to account for its application but we cannot be uninfluenced by the conduct of Vir Singh when deciding whether a reasonable cause has been established to enable this Court to remove or suspend the Advocate from practice. Under the circumstances I would take no further action in the matter. Mr. *S.* has offered to return the amount received by him from Vir Singh, and I have no doubt that he will take early steps to return it.

Monroe, J.—I agree.

Bhide, J.—I agree.

K.S. *Order accordingly.*

✻✻ A. I. R. 1933 Lahore 577

Special Bench

JAI LAL, DALIP SINGH AND MONROE, JJ.

Emperor

v.

Faridul-Haq—Respondent.

Civil Misc. Petn. No. 32 of 1933, Decided on 19th April 1933.

(a) Letters Patent (Lahore), Cl. 8—Practitioner proceeded against under Cl. 8—He cannot raise plea that High Court should consider merits of his original conviction.

A plea that it is open to the High Court to consider the merits of the original conviction cannot be raised where a pleader is called upon under Cl. 8, Letters Patent, to show cause why his name should not be removed from the list of practitioners or attorneys of the Court. No doubt the High Court has wide powers to intervene in any case brought to its notice in the interests of justice, apart from the fact whether the accused himself has moved the High Court or has appealed from the conviction against him or not: such a power however would only be exercised in very special cases and it is not a right of the accused or any one else but a power inherent in the High Court itself: 1932 *Lah* 364, *Cons.* [P 578 C 1, 2]

✻**(b) Letters Patent (Lahore), Cl. 8—Proceedings started against pleader—Test is that Court should see that suitors are not exposed to improper persons — Legal Practitioners Act (1879), S. 13.**

In considering the proceedings started against a legal practitioner the principle on which the Court should act is to see that the suitors are not exposed to improper officers of the Court. Thus it is necessary for the Court to know what the nature of the act complained was in order to decide whether that act shows that the person in question is an improper person to remain a practitioner: *In re Hill*, (1868) 3 *Q B D* 543, *Foll*; *AIR* 1924 *Lah* 123, *Ref.* [P 578 C 2]

Quaere.—Whether this test does or does not imply any moral baseness or depravity of character is an open question. [P 578 C 2]

✻✻**(c) Letters Patent (Lahore), Cl. 8—Pleader committing isolated act which assists operations of unlawful association is not necessarily improper person—Legal Practitioners Act (1879), S. 13.**

Every conviction of a legal practitioner under S. 17 (1), Criminal Law Amendment Act, does not necessarily attract the disciplinary jurisdiction of the High Court. There seems to be a great distinction between being a member of an unlawful association and in assisting the operations of an unlawful association. Being a member of an association which interferes with the maintenance of law and order, or is a danger to the public peace may well be considered to render a man an improper person to be practitioner in a Court of justice but it by no means follows that a man, who has committed an isolated act which assists the operations of an unlawful association, is necessarily such an improper person. Much would depend upon the nature of the act done and the particular operation assisted. In the absence of anything to show what particular act was done, the High Court cannot be called upon to take any action in the matter at all : *AIR* 1922 *P C* 351; *AIR* 1920 *Bom* 168 and *AIR* 1923 *Pat* 185, *Dist.* [P 578 C 2; P 579 C 1]

Carden Noad—for the Crown.

J. N. Aggarwal, B. R. Puri, J. L. Kapur and *Asa Ram*—for Respondent.

Dalip Singh, J.—These two cases under para. 8 of the Letters Patent raise somewhat similar points and may conveniently be disposed of in one judgment. The facts of the first case, namely, that of Mr. Farid-ul-Haq Ansari, Advocate of Delhi, are as follows:

The respondent was charged under S. 17 (1), Criminal Law Amendment Act. The record of the proceedings shows that he was asked whether he had taken part in a celebration of Independence Day under the orders of the Delhi District Congress Committee which had been declared an unlawful association by the Chief Commissioner in his Notification No. 40, dated 4th January 1932, and had thereby assisted the operations of an unlawful association. The respondent pleaded guilty to the charge and the Court, on his plea of guilty, convicted him under S. 17 (1), Criminal Law Amendment Act, and sentenced him to six months' simple imprisonment and a fine of Rs. 200, or in default one and a half months' further simple imprisonment. There is nothing on the record to show us what was Independence Day or how it was ordered to be celebrated by the unlaw-

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ful association known as the Delhi District Congress Committee nor what part the respondent took in the celebration. The learned Government Advocate, who appeared on behalf of the Crown in the case, stated that he did not wish and did not consider it proper to lead any evidence to elucidate the above matters.

The facts of the second case, namely, that of Lala Jugal Kishore Khanna, Pleader of Delhi, are that, on 21st January 1932, he addressed a meeting, held by the Delhi Congress Committee, in which he told the people assembled that the purpose of the meeting was to congratulate Mr. Sen Gupta, a member of the All India Congress Working Committeee, which had also been declared an unlawful association by the Governor-General in Council on his arrest. He further stated that, in arresting Mr. Sen Gupta, the Government had given proof of their embarrassment and nervousness and that, since the Government had declared the Congress unlawful, he would like to know under what law the Government itself existed. When questioned by the Court the said respondent stated that he did not mean any disrespect to the Court but he did not wish to take part in the proceedings. In other words, he refused to plead to the charge. He was convicted of an offence under S. 17 (1), Criminal Law Amendment Act, either for taking part in a meeting of an unlawful association or for assisting the operations of any such association. The judgment does not make it clear which of these two clauses was applied. He was sentenced to six months' simple imprisonment and to Rs. 200 fine, or, in default, to 1½ months' further simple imprisonment.

Before dealing with the arguments advanced by the learned Government Advocate, I think it is convenient here to dispose of an argument raised by Mr. Bhagat Ram Puri, who appeared for Mr. Farid-ul-Haq Ansari. The learned counsel endeavoured to argue, relying in *Lilawati* v. *Emperor* (1), that it was open to the High Court in such a case to consider the merits of the original conviction. I do not think it is open to the respondent to raise such a plea at all when called upon under Cl. 8, Letters Patent, to show cause why his name should not be removed from the list of practitioners or attorneys of the Court. No doubt the High Court, as held in that ruling, has wide powers to intervene in any case brought to its notice in the interests of justice, apart from the fact whether the accused himself has moved the High Court or has appealed from the conviction against him or not; such a power however, would only be exercised in very special cases and, as pointed out in that ruling, it is not a right of the accused or anyone else but a power inherent in the High Court itself. I would, therefore, repel this argument of the learned counsel. I now proceed to deal with the arguments advanced by the learned Government Advocate. He relied on *Abdul Rashid, In re* (2). This was a decision by three Judges of this Court in a case where certain persons had been held guilty under S. 17 (1), Criminal Law Amendment Act, for being members of an unlawful association. The ruling refers to the judgment of Lord Blackburn in the case of *In re Hill* (3), with approval. That ruling says:

> "We are to see that the officers of the Court are proper persons to be trusted by the Court with regard to the interests of the suitors, and we are to look to the character and position of the persons and Judge of the acts committed by them upon the same principle as if we were considering whether or not a person is fit to become an attorney . . . . . the principle on which the Court acts being to see that the suitors are not exposed to improper officers of the Court."

With the test laid down, with all deference, I humbly agree. Whether this test does or does not imply any moral baseness or depravity of character is not a question which to my mind arises in this case and I, therefore, do not feel called upon to decide that point. It is clear, however, that it is necessary for the Court to know what the nature of the act complained of was in order to decide whether that act shows that the person in question is an improper person to remain a practitioner, or, to put it in the words of the ruling, to whom suitors in the Court should not be exposed. In the first case before us we do not know the nature of the act complained of. There seems to me to be a great distinction between being a member of an unlawful association and in assisting the operations of an unlawful association. An unlawful association is defined as one (a) which encourages or aids persons to commit acts of violence or intimidation or of which the members

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1. AIR 1932 Lah 364=1932 Cr C 482=136 I C 717=33 Cr L J 339.
2. AIR 1924 Lah 123=76 I C 385=25 Cr L J 161: 4 Lah 271 (SB).
3. (1868) 3 Q B D 543=9 B & S 461=37 L J Q B 295=18 L T 564=16 W R 1061.

habitually commit such acts, or (b) which has been declared to be unlawful by the Governor-General-in-Council under the powers conferred by the Act. In S. 16, the Governor-General is given power to declare an association unlawful, if, in his opinion, it interferes or has for its object interference with the administration or the law or with the maintenance of law and order, or constitutes a danger to the public peace. Now, being a member of an association which interferes with the maintenance of law and order, or is a danger to the public peace may well be considered to render a man an improper person to be a practitioner in a Court of justice but, in my opinion, it by no means follows that a man, who has committed an isolated act which assists the operations of an unlawful association, is necessarily such an improper person. Much would depend upon the nature of the act done and the particular operation assisted. I do not say, and I clearly must not be taken to say, that there may not be acts assisting a particular operation of an unlawful association which might be as bad or even worse than being a member of that unlawful association, but I repeat that all depends on the nature of the act and the particular operation assisted. In this case we only have it that celebration of a day was ordered and the practitioner assisted in that celebration. A very wide range of acts might be covered by the facts disclosed. It might range from the most venial or trivial acts to an act involving grave danger to the public peace and the maintenance of law and order. In the absence of anything to show what particular act was done, I do not think that this Court is called upon to take any action in the matter at all.

The learned Government Advocate relied upon *Shankar Ganesh* v. *Secy. of State* (4), but the facts of that case are quite different. There it was proved that the practitioner had organized resistance to a tax of which he disapproved and it was held as a fact that the procedure adopted was reasonably calculated to lead to a breach of public tranquillity, or as held by the the Privy Council, that the practitioner had attempted to establish a system of resistance to payment which might have defeated the recovery of the tax with grave danger to the public peace. Similarly, in *Jiwan Lal Varajray Desai, In re* (5), the practitioner in question had taken a pledge to break particular laws known as the Rowlatt Acts and had further undertaken to break any laws which a committee to be appointed hereafter might think fit to declare liable to be broken. Such a case might well be held to make the practitioner an improper person to act as a practitioner in a Court of justice, since obviously there was no limit to the laws which the committee might consider fit to be broken. In *re*: *Madhava Singh* (6), the conviction was under S. 17 (2), Criminal Law Amendment Act. That is a much more serious offence, the punishment of which may extend to three years' imprisonment or with fine or with both and a conviction under that section might similarly well be held to show unfitness to be a legal practitioner. The facts, therefore, of the case relied upon by the learned Government Advocate are clearly distinguishable from the facts of this case, and I would therefore, hold that this Court should not take any action in the case of Mr. Farid-ul-Haq Ansari especially as he has served his punishment imposed under the section itself.

The above arguments also apply, though in modified form, to the case of Mr. Jugal Kishore Khanna. There is no doubt in this case as to what the respondent did. He made a speech in which he condemned the action of the Government in arresting Mr. Sen Gupta. This fact by itself would not have been a criminal offence but for the manner in which it was performed, namely, a speech at a meeting organized by an unlawful association. I do not think, in the circumstances, that this fact would by itself show that Mr. Jugal Kishore Khanna was an improper person to remain a legal practitioner of this Court and I would, therefore hold that this Court need take no further action against Mr. Jugal Kishore Khanna either.

Jai Lal, J.—I have read the judgment of Dalip Singh, J., and agree with his conclusion that no reasonable cause, within the meaning of Cl. 8, Letters Patent of this Court, has been shown to exist to justify the removal or suspension from practice of Mr. Farid-ul-Haq Ansari and Mr. Jugal Kishore Khanna, Advocates of this Court. The respondents were convicted by a Magistrate of Delhi under S. 17 (1),

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4. AIR 1922 P C 351=69 I C 367=49 I A 319=49 Cal 845 (PC).
5. AIR 1920 Bom 168=54 I C 679=44 Bom 418 (FB).
6. AIR 1923 Pat 185=72 I C 875 (SB).

Criminal Law Amendment Act, and after they had served out their respective terms of imprisonment applications were made by the learned Government Advocate, praying that the names of the respondents be removed from the rolls of the Advocates of this Court. The cases cited by the Government Advocate, i. e., *Abdul Rashid In re* (2), *Shankar Ganesh* v. *Secy of State* (4), *Jiwan Lal, In re* (5) and *Madhava Singh, In re* (6), are all distinguishable from the present case.

Every conviction of a legal practitioner under S. 17 (1), Criminal Law Amendment Act, does not necessarily attract the disciplinary jurisdiction of this Court. This must depend on nature of the acts for which the practitioner was convicted. It is true that in such proceedingst it is not open to the Court to go behind the conviction, i. e., to examine the legality of the conviction, but it is open to the Court and indeed the Court is bound to do so, to ascertain from the criminal proceedings the facts on which the conviction is based in order to decide whether by virtue of his conduct complained against the legal practitioner concerned is or is not a proper person to be retained as a member of the legal profession. Now, in the case of Mr. Farid-ul-Haq Ansari, neither the record nor the learned Government Advocate can give us any information as to the facts on which he was convicted. In the case of Mr. Jugal Kishore Khanna all that appears from the judgment of the Magistrate is that he made a speech at a meeting which was convened by the Congress Committee. It has, however, been found that he was not one of the conveners of the meeting and the speech made by him is not of such an objectionable character as to bring his case within the ambit of para. 8, of the Letters Patent. I, therefore, concur in dismissing the petitions.

Monroe, J.—I have read the judgments of Jai Lal and Dalip Singh, JJ. I fully agree with the views expressed by my learned brethren, but nevertheless, I think it proper that I should actually state my views also. The respondents, having committed criminal offences, the commission of which, they, the one expressly, and the other by implication admit, have been convicted and sentenced by a Court of competent jurisdiction. We have to decide in each case whether the conviction and the in formation which we have obtained from a perusal of the record show that the respondent has proved himself to be unfit to act as a legal practitioner in the Courts of this Province. It cannot be contended that conviction for any criminal offence is a sufficient ground for our taking action; nor do I think that from the nature of the offences for which the respondents have been sentenced their want of fitness is apparent. We cannot proceed to condemn either of them without considering his conduct. The acts of Mr. Farid-ul-Haq Ansari do not appear from the record of his case and have not been shown to us, and we are asked to pronounce on his conduct without having before us any material from which we may form an opinion. We are, therefore, in my opinion, constrained to hold that it has not been shown that Mr. Farid-ul-Haq is unfit to carry on his profession.

In Mr. Jugal Kishore Khanna's case we know what he did. At a meeting organized by an unlawful association he made a speech protesting against the arrest of Mr. Sen Gupta. Who Mr. Sen Gupta is or for what he was arrested does not appear? As a legal practitioner Mr. Jugal Kishore Khanna would have acted more in accordance with the etiquette of his profession if he had refrained from interfering in Mr. Sen Gupta's case until he had been retained to defend him, but the complaint against him is not that he has committed a professional impropriety; and in any event I do not think that there is anything to show that Mr. Jugal Kishore Khanna's speech was prompted by a desire to get himself employed in Mr. Sen Gupta's case. So far as a conclusion on the nature of the speech can be found, it seems to me that Mr. Jugal Kishore Khanna was expressing the view that the policy of the Government in having Mr. Sen Gupta arrested was wrong. It has not been suggested by the Government Advocate that Mr. Jugal Kishore Khanna was not entitled to hold and give expression to such a view—the offence arises from the circumstances in which the view was expressed. It does not appear that Mr. Jugal Kishore Khanna pressed his views in a provocative manner, nor that, though he broke the law, he said anything to indicate his own determination or to encourage others to break the law. The fact, too, that he disclaimed any disrespect to the Court in refusing to plead indicates an absence of an intention to defy lawfully constituted authority. I am, unable therefore, to infer from Mr.

Jugal Kishore Khanna's single act of disobedience to the law that he ought to be barred from practising his profession.

V.S. *Petition dismissed.*

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* A. I. R. 1933 Lahore 581

ADDISON AND AGHA HAIDER, JJ.

Kilkha Singh—Plaintiff — Appellant.

v.

Fazal Din and *others* — Defendants—Respondents.

First Appeal No. 2817 of 1927, Decided on 24th November 1932, against decree of Sub-Judge, First Class, Amritsar, D/- 28th June 1927.

*** (a) Limitation Act (1908), Arts. 62, 97 and 116—Advance of money for mortgage by plaintiff—Repudiation of mortgage by plaintiff—Suit for money paid is governed by Art. 62 or Art. 97 and not by Art. 116.**

Where a plaintiff who has advanced money on a mortgage, repudiates it himself and files a suit for the money paid, such a suit is not a suit for compensation for breach of contract and is governed either by Art. 62 or by Art. 97, Lim. Act, according as to whether the contract is void or voidable and not Art. 116. If breach had been committed by defendant, Art. 116 would have been applicable: 40 *Bom* 614, *Rel on*; *AIR* 1925 *Nag* 130, *Ref.* [P 582 C 1]

(b) Limitation Act (1908), Art. 120—Article 120 is only residuary article.

Article 120 is a residuary article and cannot be applied when there is a specific article applicable: *AIR* 1922 *Cal* 157, *Ref.* [P 582 C 2]

Badri Das, *Fakir Chand* and *Chandar Gupta*—for Appellant.

Shamair Chand, *Nihal Singh* and *Labh Singh*—for Respondents.

Addison, J.—One Milkha Singh sued Fazal Din, Ghulam Mohammad, Rahim Bakhsh and Diwan Chand for possession of 151 kanals 4 marlas of land on the basis of four mortgage-deeds: see *Fazal Din* v. *Milkha Singh* (1). Diwan Chand was an alienee from the other defendants of a small portion of the mortgaged land. The first three mortgages were in favour of the plaintiff's father while the fourth, dated 21st December 1919, was entered into after plaintiff's father had died and while the plaintiff was a minor. It was arranged by the plaintiff's mother in conjunction with one of his father's relatives Wadhawa Singh. It was pleaded in that suit that the fourth mortgage-deed mentioned above had been cancelled by the plaintiff himself on 7th November 1922, some time after he became a major. That suit was instituted on 14th August 1923. It was held in it that Milkha Singh was entitled to possession on the basis of the first three mortgages, but not on the fourth mortgage, as plaintiff himself had cancelled it by the notice above mentioned. Milkha Singh accepted that decision and did not appeal against it. On 19th December 1925 he brought another suit against the same mortgagors, Fazal Din, Ghulam Mohammad and Rahim Bakhsh, while he also joined Wadhawa Singh, his father's relative. He stated in this plaint that Wadhawa Singh during his minority had entered into the fourth mortgage of 21st December 1919, in order to defraud him and to get his money unlawfully, that he had sued for cancellation of this fourth mortgage-deed and that it was held in that suit that it was not for the benefit of the plaintiff. Accordingly the plaintiff was entitled to recover from the defendants certain sums which he said had been advanced out of his estate when the mortgage-deed was written. His cause of action was in fact stated to be that he had suffered loss from the collusion of the defendants who misappropriated some part of his estate. It may be at once mentioned that the plaint is wrong where it states that he sued for cancellation of this mortgage-deed and that the Court held that it was not for his benefit. I have already described what happened. He sued for possession on the basis of all four mortgages, and on the mortgagor's plea that he himself had repudiated and cancelled this mortgage the Court held that this was the case and that therefore he could not sue upon a document which he had repudiated and cancelled. The decree for possession was therefore granted on the basis of the first three mortgages entered into in his father's lifetime.

In this second case, which is now on appeal before us, Wadhawa Singh denied any conspiracy as well as the allegation that this mortgage-deed had been cancelled as the result of a suit. He also denied that he benefited in any way. The mortgagor defendants denied that they received anything under the deed in question. They also denied that there was a suit for cancellation and pleaded that the transaction was for the benefit of the plaintiff and was not collusive. The question of limitation was also raised. The trial Judge without going into the merits has dismissed the suit on the ground that it is barred by limitation and against this decision the plaintiff Milkha Singh has preferred this First Appeal No. 2817 of 1927.

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1. AIR 1933 Lah 193.

The contention before the Judge who tried the case and before us was that Art. 116, Limitation Act, applied as it was a suit for compensation for the breach of a contract in writing registered. That would give six years' limitation from 21st December 1919, and as the suit was instituted on 19th December 1925 it would just be within time under that article. The trial Judge however held that the suit was governed either by Art. 62 or by Art. 97, Limitation Act, according as to whether the contract was void or voidable and that Art. 116 was inapplicable as the case of the plaintiff was not that the defendants had broken the contract and that he was asking for compensation for its breach, but his case was that he had been defrauded and was entitled to recover what had been paid out of his estate as a result of that fraud. In my judgment this decision is correct. By no stretch of the imagination can this be said to be a suit for compensation for breach of a contract. In fact, as I have already shown, the plaintiff himself repudiated this contract and gave notice that he cancelled it though he did say that he would sue for what he had lost under it. It was he therefore that repudiated this contract and this was not denied before us. It was argued however on his behalf that what he repudiated was merely the mortgage part of the transaction and not the personal liability to repay any sum which may have been advanced. I am unable to accept this argument, as the whole transaction was repudiated and the document cancelled by him. He therefore cannot now fall back upon the document and claim that Art. 116 applies. Besides it cannot be said to be a suit for compensation for breach of a contract in which case only Art. 116 would apply, for as already stated in no sense can it be said that any breach was committed by the mortgagors; on the other hand it was cancelled by the plaintiff.

This being the case it is quite clear from the authorities that either Art. 62 or Art. 97, Limitation Act, applies according as the contract be treated as a void or voidable one. In either case the period of limitation is three years and the suit is barred. An authority nearly on all fours with the present case is *Diwali Bai* v. *Umed Bhai* (2). In that case the suit was brought within six years of the cause of action accruing under the registered mortgage-deed. The consideration or part of it was however held to be unlawful and for this reason the mortgage-deed was held to be void and from this it followed that the agreement contained in the mortgage to pay the mortgage debt was also void. That being the case it was held that Art. 62, Limitation Act, applied. Another case of a registered mortgage-deed is *A. I. R.* 1925 *Nag.* 130. Of course if the breach of contract had been committed by the defendants, a suit for compensation for the breach would have fallen under Art. 116, Limitation Act; but that is not the case here. As a last resort it was contended that Art. 120 should be applied. This is a residuary article and obviously cannot be applied when there is a specific article applicable as there is in the present case: see in this connexion *Biman Chandra Datt* v. *Promotha Nath Ghose* (3). For the reasons given I would hold that the suit has been properly dismissed and I would dismiss the appeal with costs.

K.S. *Appeal dismissed.*

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2. (1916) 40 Bom 614=36 I C 564.

3. AIR 1922 Cal 157=68 I C 94=49 Cal 886.

A. I. R. 1933 Lahore 582

BROADWAY, J.

Muni Lal and *others*—Petitioners.

v.

Hira Lal—Debtor—Opposite Party.

Civil Revn. Petn. No. 588 of 1932, Decided on 27th February 1933, from order of Dist. Judge, Hoshiarpur and Kangra, D/- 10th June 1932.

(a) **Provincial Insolvency Act (1920), S. 9—Onus.**

A Court commits an error in placing the onus on the creditors in an insolvency proceeding of proving that certain occupancy holdings are not capable of being sold and that therefore, they should not be included in the insolvent's assets. [P 583 C 1]

(b) **Provincial Insolvency Act (1920), S. 9—Condition precedent for adjudicating person insolvent stated.**

There can be no doubt that a man can only be declared an insolvent if he is not in a position to pay his debts and if a debtor owed Rs. 50,000 and his property were valued at Rs. 51,000, it cannot be held that he was insolvent. [P 583 C 2]

(c) **Provincial Insolvency Act (1920), S. 9—Alienation of property how far act of insolvency.**

Where even after the alienation of his certain properties the remaining assets of a debtor still exceed the total value of the debts, the debtor cannot be declared an insolvent on the ground that he is unable to pay his debts and the alienations effected by him cannot amount to acts of insolvency. [P 583 C 2]

M. L. Sethi—for Petitioners.

Vishnu Datta for *Achchru Ram*—for Opposite Party.

***Judgment*.**—Muni Lal and certain other members of his family instituted a suit against one Hira Lal and, on 6th March 1930, obtained a decree for Rupees 22,237-1-6. Instead of proceeding to execute that decree Muni Lal, etc., on 1st April 1930, filed a petition in the Insolvency Court asking that Hira Lal should be adjudicated an insolvent on ground that he had, within three months of the 1st April, made certain alienations which amounted to acts of insolvency and that he was not in a position to pay his debts. Hira Lal denied his inability to pay his debts and also asserted that the alienations effected by him did not amount to acts of insolvency. The Insolvency Court settled two issues: (1) Are the alienations effected by the debtor, second party, tantamount to an act of insolvency ? (2) Is the debtor, second party, able to pay off the debt ?

After a careful and elaborate consideration of all the evidence on the record the trial Court came to the conclusion that the alienations clearly were tantamount to acts of insolvency, but that Hira Lal was in a position to pay off his debts, Muni Lal's petition was therefore dismissed. Dissatisfied with this decision Muni Lal preferred an appeal to the District Court where the whole position was again thrashed out with the result that the learned District Judge came to the conclusion that the Insolvency Court had rightly decided that Hira Lal was in a position to pay his debts.

Dissatisfied still with this decision Muni Lal has come up to this Court under S. 75 of Act 5 of 1920, through Mr. Jai Gopal Sethi and, in support of this petition, I have heard Mr. Madan Lal Sethi at length. Mr. Sethi is perfectly right in saying that the learned District Judge was in error when he placed the onus on the creditors of proving that certain occupancy holdings were not capable of being sold and that therefore they should not be included in Hira Lal's assets. Mr. Vishnu Datta for Hira Lal has frankly and properly admitted that Mr. Sethi's contention on this point is correct and that the learned District Judge has erred, but it has been contended that, even if the occupancy holdings be eliminated from consideration, the total value of the remaining assets still exceeds the total value of the debts (which have been proved so far) by at least Rs. 9,000. Mr. Sethi however urged that it is not for the Courts to approach a matter of insolvency with meticulous accuracy and that a broad view should be taken and further that, if a broad view of the present situation were taken, the result would be that it would be held that Hira Lal could not, as a matter of fact, pay his debts inasmuch as the margin over of the remaining assets was really too small to be considered. Now, there can be no doubt that a man can only be declared an insolvent if he is not in a position to pay his debts and if *A* owed Rs. 50,000, and his property were valued at Rs. 51,000, I do not see how it could be held that he was insolvent.

In these circumstances, although Mr. Sethi is right in attacking the learned District Judge's methods of arriving at his conclusion, I consider that the learned District Judge was right in the conclusion he came to, and in my judgment the alienations effected by Hira Lal cannot amount to acts of insolvency because on the facts it must be found that Hira Lal has not been shown to be insolvent. This petition is therefore dismissed, but I leave the parties to bear their own costs in this Court.

V.S. *Petition dismissed.*

A. I. R. 1933 Lahore 583

ADDISON, J.

Mt. Basant Kaur—Defendant—Appellant.

v.

Mt. Gulab Devi and *another*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1716 of 1932, Decided on 28th April 1933, from decree of Dist. Judge, Rawalpindi, D/- 1st August 1932.

Will—Construction—Bequest to two sisters—Prohibition against partition — Provision for benefit of their sons after death of both—Forfeiture of one's interest on alienation—Other sister would get it—Sons to come in after both sisters are dead or excluded.

Where property is bequeathed to a female, a power to alienate is an essential incident of absolute interest in property. If no such power is conferred upon the donees, but there is a prohibition against partition and a provision for the benefit of their sons, the whole scheme of the will is that the property should remain intact after the death of the donees for the benefit of their sons as the heirs of the testator. If one of the donees forfeited her interest the other would get the whole. The sons should not come in until both sisters are dead or excluded from the property. [P 584 C 2]

Jagan Nath Aggarwal—for Appellant.

Achhru Ram and *N. C. Mehra*—for Respondents.

***Judgment*.**—Mt. Gulab Devi sued her sister, Mt. Kartar Devi and her sister's alienee, Mt. Basant Kaur, for possession of the land sold by Mt. Kartar Devi to Mt. Basant Kaur, or in the alternative, for possession by pre-emption. The case for the plaintiff was that the brother of the two sisters, Jagat Singh, by means of a will dated 14th December 1906, bequeathed the land to them. It was stipulated in the will that they would hold the land jointly as long as they lived that they could not partition, mortgage or sell the land, that neither if once married, would be allowed to marry a second time, etc., the penalty being forfeiture of her share. It was also laid down that the land would subsequently go to the sons of the two sisters. It was alleged by the plaintiff that Mt. Kartar Devi not only had forfeited her rights under the will by means of the alienation in question to Mt. Basant Kaur, but also by her previous unchastity. The trial Court granted a decree for possession to the plaintiff and also recorded a finding that the plaintiff would have been entitled to a decree for possession by pre-emption on payment of Rs. 5,000, had she not succeeded in getting the first relief claimed. There was then an appeal to the District Judge who upheld the order of the trial Court. Against this decision this second appeal has been preferred. The District Judge held that the will had been proved to have been executed by Jagat Singh when he was in his senses. This is a finding of fact and is not challenged before me. He also found that the sisters took a limited estate in the property in question, there being a gift over to their sons upon their death. By reason of the terms of the will he held that one sister was entitled to succeed to the other when one died, or there was a forfeiture, as there was by virtue of the forbidden alienation.

The principal argument before me was that there had been a demise of a full estate to the two sisters, and counsel relied upon *Mt. Suraj Mani* v. *Rabi Nath Ojha* (1), *Bhai Das Shivdas* v. *Bai Gulabi* (2) and *Ramachandra Rao* v. *Ramachandra Rao* (3). In the first of these it was held that where there was a bequest to a widow and the word "malik" was used, that word implied full ownership unless there was something in the context or surrounding circumstances to qualify such meaning. In the other two authorities this proposition was amplified and discussed. In the will before me there is much in the context and surrounding circumstances to qualify the meaning of malik. The sisters were deprived of the power of mortgaging or selling the property or having it partitioned between themselves. As long as they lived, the property was to be joint; if any sister left her husband, or married after his death, or was unchaste, she was to be excluded from the property. If the one who was a minor at the time, namely, Mt. Gulab Devi, was to die before marriage, the other sister, Mt. Kartar Devi was, under the terms of the will, to be the owner. The sons of the two sisters were to be the owners thereafter. Not only was there a gift over in the present case, but no power was given to mortgage or sell the property or to partition, it also being stipulated that it had to remain joint as long as the sisters lived. In these circumstances the authority nearest to the present case is in my judgment *A. I. R.* 1929 *P. C.* 214. It was held by their Lordships in that case

> "that a power to alienate was an essential incident of an absolute interest in property. And not only was no such power in terms conferred upon the daughters, but the prohibition against partition by them and the provision for the benefit of their sons indicated clearly that the whole scheme of the will was that the property should remain intact after the death of both daughters for the benefit of their sons as the heirs of the testator."

In my judgment this was what was intended by Jagat Singh in the case before me. The next point argued was that it was not expressly provided by the will what was to happen if one sister forfeited her interest. I agree however with the Courts below that the intention is clear, namely, that the land should remain joint of the two sisters and that if one were to die the other would succeed her, the same happening in the case of forfeiture incurred by the act of one sister. It was not meant that the sons should come in until both sisters were dead or excluded from the property. It follows that the plaintiff could maintain the suit. No other point was argued. For the reasons given I dismiss the appeal with costs.

R.K. *Appeal dismissed.*

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1. (1908) 30 All 84=35 I A 17 (P C).
2. AIR 1922 P C 193=65 I C 974=49 I A 1=46 Bom 153 (P C).
3. AIR 1922 P C 80=67 I C 408=49 I A 129=45 Mad 320 (P C).

A. I. R. 1933 Lahore 585

HARRISON AND DALIP SINGH, JJ.

Sri Krishen and *others*—Plaintiffs—Appellants.

v.

Sham Sunder — Defendant— Respondent.

First Appeal No. 1376 of 1926, Decided on 24th January 1933.

(a) Hindu Law—Gotra—Meaning as applied to Brahmans, Kshatriyas and Waishas indicated.

The gotras of the Brahmins are defined as being the various branches descended from the different Rishis. There is therefore in theory at any rate, a blood connexion between such descendants. The gotra of the Kshatriyas and the Waishas was the gotra of the family purohit, and nothing more. There was therefore no link of blood between such disciples and the idea of the gotra amongst these two latter cases was that of congregations as opposed to families. [P 585 C 2]

(b) Custom (Punjab) — Marriage—Sagotra marriages among Waish Aggarwal is valid—Hindu Law—Marriage.

The custom of sagotra marriages amongst the Waish Aggarwals is a well established and recognized custom and that although it may not be approved by a certain section of the community, it carries with it no sort of stigma or evil consequences. The issue of such marriages is perfectly legitimate and the bond is recognized on all sides. [P 587 C 2]

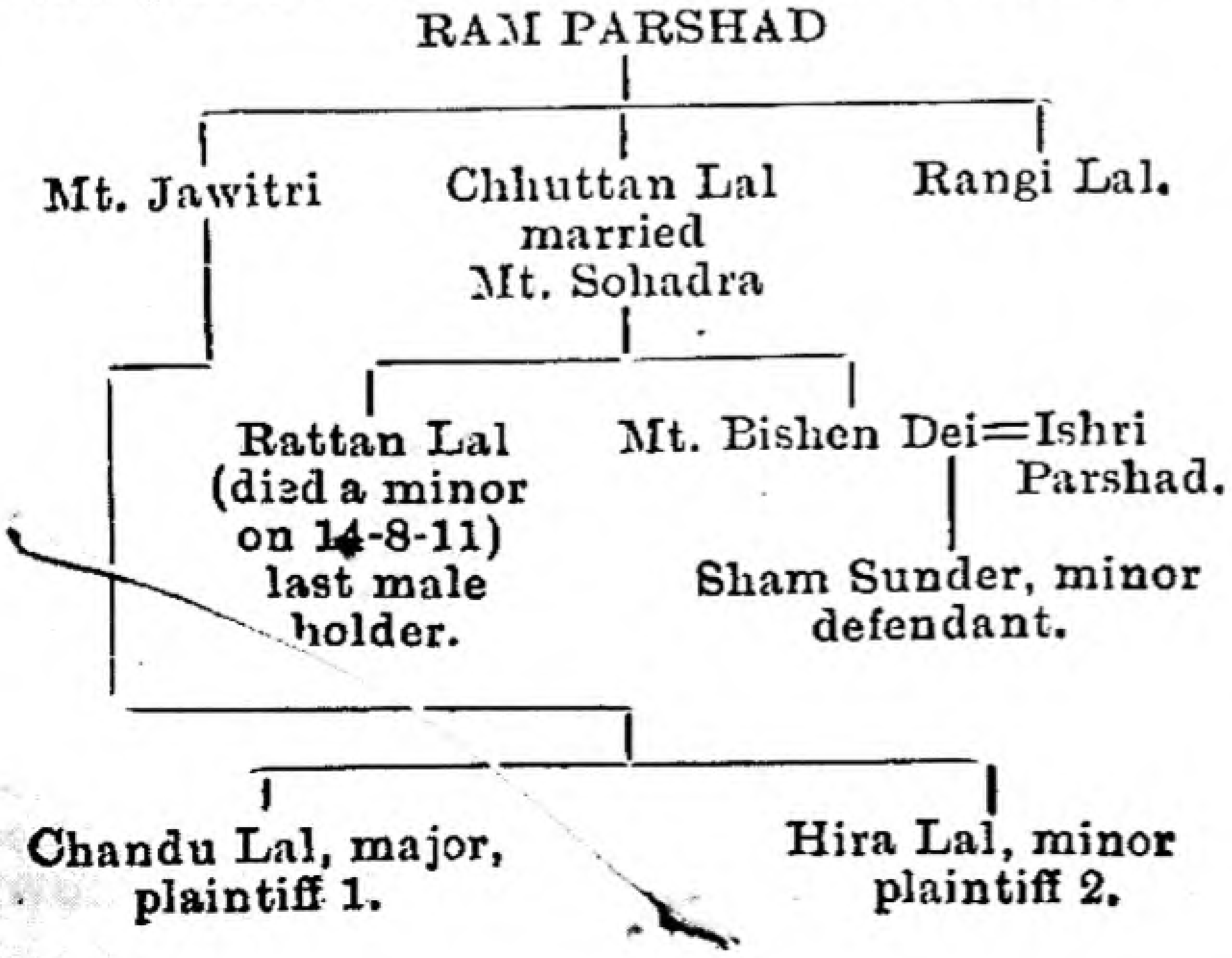
(c) Civil P. C. (1908), S. 35—Awarding or disallowing costs is in discretion of Court.

The matter of awarding or disallowing costs is in the discretion of the Judge. When the Judge gives reason for his order dismissing costs and those reasons are sufficient and sound, the appellate Court will not interfere with his order. [P 587 C 2]

Jagan Nath Aggarwal, Mehr Chand Mahajan, Gullu Ram, S. M. Sikri, Ajit Parshad and *V. N. Sethi*—for Appellants.

Kishen Dayal, Bhagwat Dayal and *Bishen Narain*—for Respondent.

Judgment.—The pedigree table of the parties in this suit is as follows:


RAM PARSHAD
Mt. Jawitri
Chhuttan Lal married Mt. Sohadra
Rangi Lal.
Rattan Lal (died a minor on 14-8-11) last male holder.
Mt. Bishen Dei=Ishri Parshad.
Sham Sunder, minor defendant.
Chandu Lal, major, plaintiff 1.
Hira Lal, minor plaintiff 2.

Rattan Lal died on 14th August 1911. The property went to his mother for her lifetime and on her death to Sham Sundar the minor son of Chhuttan Lal's daughter, Mt. Bishen Dei. The two plaintiffs are the sons of the daughter of Ram Parshad and bring this suit for a declaration and for possession of the property owned by the late Rattan Lal and base their suit on the contention that the marriage of Mt. Bishen Dei and Ishri Prashad, the parents of Sham Sundar, was no marriage inasmuch as it was celebrated between the two persons of the same *got* within the caste of Waish Aggarwal. The suit has been dismissed, the finding being that the marriage is valid, both under Hindu law and under custom or rather under the Hindu law as varied by custom. The learned Senior Subordinate Judge has discussed the different meanings of the word gotra as applied to: (1) the Brahmins; and (2) the Kshatriyas and Waishas. The gotras of the Brahmins are defined as being the various branches descended from the different Rishis. There is therefore in theory at any rate, a blood connexion between such descendants. Among Kshatriyas and Waishas this is not the case. Whatever the reason may have been, whether it was impossible to apply the same rule to the Brahmins who could trace their descent accurately and to the other two branches, who could not, or whether because it was that the law-giver thought it unreasonable to demand the same degree of strictness from the Kshatriyas and the Waishas as was required from the Brahmins, the fact is clear that the gotra of the Kshatriyas and the Waishas was the gotra of the family purohit, and nothing more. There was therefore no link of blood between such disciples and the idea of the gotra amongst these two latter casts was that of congregations as opposed to families.

The first thing to be seen is, whether the gotras of the Aggarwals as existing in recent times can be reconciled with the conception of the gotra laid down in the Hindu law. Of the various witnesses produced on both sides practically all have repeated the accepted tradition that 17 of the 17½ gotras of the Aggarwals represent the descendants of the 17 sons of a certain Raja. The explanation of the half gotra is different and singularly illuminating as giving a precedent for a common practice of the present day. It was discovered at the actual celebration of a marriage that both bride and bridegroom were Goylas.

To get over the difficulty the bridegroom invented a new *got* and called himself a Goin. No body believed him, but the irregularity was avoided by this transparent device. Not only do the witnesses attribute and explain their *gots* as named after the sons of that Raja, as pointed out by the learned Senior Subordinate Judge, but it is only in the case of four that by the exercise of the greatest ingenuity is it possible to discover even a resemblance to any Brahmanical name. Now if the gotras of the Aggarwals were, as is contended, their gotras under Hindu law, all the names must be Brahmanical, for they must be derived from the purohits of the various families. The names therefore and the assertion of a blood link and common ancestor establish beyond doubt that whether or no the legendary story of the 17 sons of the Raja be true, the gotras are not in the true sense of the word gotras under original definition given by the Hindu law. It follows that they are the creation of custom in modification of that law.

It is conclusively proved, and the general idea certainly exists, if only amongst the more orthodox and the more strict of the Aggarwals, that the prohibition of a marriage within the got still prevails. This is apparently due to the same idea of blood relation, though the gotra of the Waishas was not originally based on consanguinity as explained in the Hindu law. Marriage within seven degrees in the case of the father's family and five degrees in the case of the mother's family is prohibited amongst all Hindus. Apart from this according to the plaintiff's case, a marriage within the gotra of the father is absolutely prohibited in spite of the radical change that has taken place in the Hindu law as applied to these people. If unmodified Hindu law were applicable, the marriage regarding which the case was launched could be no marriage and the plaintiff's case must succeed. The gotras which exist however on the creation of custom in modification of that law, and that custom in its turn has the force of law or rather becomes the law. It has to be seen whether this more recently created and developed gotra has been modified by a further custom in such a way that marriage within gotra is prohibited under Hindu law. That is to say it is not a question of custom modifying the original law, but custom in the first instance creating the modified law and subsequent custom in its turn modifying the original modification. The number of instances required to prove such a variation or modification is naturally less than what would be required where it is desired to prove the original departure from the strict Hindu law. Fifty-two so-called instances were put before the trial Court supported by various witnesses.

Out of these the learned Senior Subordinate Judge accepted 39 as established after analysing and considering the evidence very carefully. It is urged by counsel, and we think correctly, that one of these 39 must be rejected. This leaves 38 coming from the following districts: Bareilly, 16; Delhi, 7; Muradabad, 7; Budaon, 2; Lucknow, 1; Meerut, 3 and Muzaffarnagar, 2. These instances are spread over a period of 50 years and they roughly fall into two halves, those before the marriage of the defendant's parents in 1912 and those which took place later. These are all well established instances of marriages, many of them having been contracted between members of influential and important families of the Waish Aggarwal community. It is urged that amongst a population, as shown by the census, of 7,00,000 in the provinces of the Punjab the U. P. and Delhi this number is small and insignificant, and various rulings have been cited to show that a great number of such instances is required before a custom can be established. This is obviously so when it is a question of establishing such a matter as succession, and it has to be shown that an invariable rule has been accepted and there have been no departures from it. It is clear that even to day, other things being equal, a marriage outside *got* would be more acceptable to the vast majority if not to all members of the caste, but what has to be seen is whether marriage within the *got* are sufficiently common to prove that the new custom varying the old has been established, and to discover whether this is so we have to see what consequences follow on such marriages taking place. The correct procedure when the negotiations have been successfully carried through is for the horoscopes of the prospective bride and bridegroom to be compared by the priests of the two families. These horoscopes invariably disclose the *got* of the child for whom they have been drawn up, if it is suspected that they will not agree another course is adopted and they are placed before Thakurjee and any trouble that there may be is thus overcome. But it is clear from the evidence which has been led that now a days this comparison or avoidance of comparison of the horoscopes is not invariably carried out and it is possible, though highly improbable, that the arrangements for marriage could go through up to the actual time of the celebration of the ceremony without it being discovered whether there was or not any identity of *got*.

At the time of the marriage such identity must be disclosed as the *gots* are recited by the officiating priests. In order to avoid the appearance, though not the reality, of any sort of irregularity the device is adopted of reciting a different *got* for one of the parties. This may be the *got* of the maternal uncle of the bridegroom that is to say the *got* of his mother before marriage, or similarly it may be an incorrect *got* of the bride. Another device, which is adopted is to go through a meaningless adoption which changes the bridegroom's *got*. The position, as disclosed, therefore is that there are a certain number of persons who consider that any restriction imposed by the identity of *gots* is old fashioned and may be disregarded completely, a very much larger section, while disregarding it in effect, wishes to camouflage any irregularity there may still be thought to be and therefore adopts the device, which deceives nobody, of reciting an incorrect *got* and a body of old fashioned orthodox opinion which considers such marriages highly improper and objectionable and contrary to their religion, but would not go so far as to take any action with a view to ostracizing or penalizing in any way those of their community who perform them. No single instance has been cited of any attempt by the brotherhood either to stop such a contemplated marriage before it could be celebrated or to attach any sort of social stigma upon the person who had celebrated it. It is urged on the strength of *Abdul Hussain Khan* v. *Mt. Bibi Sona Dero* (1), that no custom which is opposed to the general consensus of the people, whom it affects can or should be recognized. This was a case regarding a totally different sort of custom. It was proved that the head of the family professed complete ignorance of the alleged custom and the finding of their Lordships of the Privy Council was that there being the two alternatives, that he was telling the truth or the contrary, and it being found that there was no reason or no ground for believing the latter, it was clear that he must know of the custom if it existed. His word was accepted and the mere instances were held not to be sufficient. Here however there is no question of any consensus of opinion, because so far from the most prominent and important witnesses from the Aggarwals denying the existence of the custom, Lala Madan Mohan Lal and Mr. Sukhbir Sinha who are admittedly the most distinguished of the witnesses, both testify to its existence and to the fact that no evil consequences follow from such a marriage.

It follows therefore that the conclusion drawn by the learned Senior Subordinate Judge from the evidence is quite correct that it is established that the custom of sagotra marriages amongst the Waish Aggarwals is a well established and recognized custom and that although it may not be approved by a certain section of that community, it carries with it no sort of stigma or evil consequences. The issue of such marriages is perfectly legitimate and the bond is recognized on all sides. The appeal must therefore be dismissed with costs. Cross-objections have been put in by the respondent contending that costs should have been allowed in the trial Court. This matter was within the discretion of the Senior Subordinate Judge. He has given reasons for his order dimissing such costs and these reasons are, in our opinion, sufficient and sound. The cross-objections will be dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 587

DALIP SINGH, J.

Chhota—Plaintiff—Appellant.

v.

Mt. Fiazi and *another* — Defendants and Plaintiffs—Respondents.

Second Appeal No. 1635 of 1932, Decided on 14th February 1933, from decree of Dist. Judge, Hissar, D/- 16th July 1932.

Civil P. C. (1908), Sch. 2, Para. 4—Umpire, powers of.

There is nothing in law which prevents an umpire when there is a difference of opinion between the arbitrators from deciding the case entirely on his own opinion. [P 588 C 1, 2]

Sardar Partap Singh—for Appellant.

Nanwan Mal—for Respondents.

Judgment.—The plaintiffs in this case sued for possession of a house alleging that they were the heirs of

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1. AIR 1917 P C 181=43 I C 306=45 I A 10=45 Cal 450 (PC).

one Yusaf Ali, the husband of Mt. Faizi defendant. They stated that Mt. Faizi had remmaired and had, therefore, forfeited her rights to retain the property. Various defences were raised which do not now concern us, but the main defence was that the matter in dispute between the parties had been referred to arbitration and an award had been given and, therefore, the plaintiffs' suit did not lie. The trial Court held that it was not proved that there was any valid reference to arbitration, that there was no valid award and it partially decreed the plaintiffs' suit. On appeal the learned District Judge agreed with all the findings of the trial Court, except on this question of the validity of the reference and of the award. He held that it was proved that the parties had finally agreed to refer the dispute to four arbitrators, two appointed by each side, and an umpire. It is not clear on the record how the umpire was appointed but it is proved from the evidence of two arbitrators that Mt. Fiazi and the plaintiffs nominated the four arbitrators and that they agreed to the umpire either selected by the executive committee of a local Anjuman or possibly by the parties themselves. Whichever way it was, the factum of the agreement is proved on the record by the oral evidence, which has been accepted by the learned District Judge. The learned counsel for the appellant contended, first, that it was not proved that Mt. Fiazi had ever agreed to the particular arbitrators and umpire. He next contended that it was not proved that the thumb mark of Mt. Fiazi was her thumb mark or in what capacity she had affixed her thumb mark to the document. As rightly pointed out by the learned District Judge these questions do not arise once it is held on the oral evidence that there was an oral agreement between the parties to refer the matter to four arbitrators and an umpire.

The next point raised by the learned counsel for the appellant was that the arbitrators did not sit together. This is a question of fact and the learned District Judge has specifically stated that he disbelieves the evidence on the point. The learned counsel next contended that it was clear from the award that what had happened was that when the four arbitrators disagreed with each other the umpire proceeded to give his own decision without considering the decisions of either group of arbitrators. I know nothing in law which prevents an umpire when there is a difference of opinion between the arbitrators from deciding the case entirely on his own opinion. I, therefore, do not see any force in the appeal, which is dismissed. No order as to costs as there was no argument addressed to me by learned counsel for the respondent which I have used in this decision.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 588

BHIDE, J.

Phangan Singh—Plaintiff—Appellant.

v.

Hukam Singh — Defendant —Respondent.

Second Appeal No. 105 of 1929, Decided on 27th October 1932, from decree of Dist. Judge, Gurdaspur, D/- 2nd October 1928.

(a) Hindu Law—Partition—Mere notice is not sufficient—Intention to separate is test and it is question of fact—Civil P. C. (1908), S. 100.

A mere notice of an intention to separate is not sufficient to effect severance, if there was no such real intention. The true test is the intention of the parties, and whether there was any intention to separate or not is clearly a question of fact: *AIR* 1925 *P C* 49: *AIR* 1929 *All* 170 and *AIR* 1931 *P C* 154, *Ref.* [P 589 C 1]

(b) Hindu Law—Partition—Partial.

A suit for a partition of a portion only of the family property is not maintainable. [P 589 C 1]

Achhru Ram—for Appellant.

Mehr Chand Mahajan — for Respondent.

Judgment.—This was a suit for rendition of accounts by one Phangan Singh against his brother Hukam Singh. They had two other brothers, namely, Natha Singh and Daswandha Singh, who are now dead. Daswandha Singh was employed in Sindh and left some property there. On 1st April 1926, the plaintiff executed a power of attorney in favour of the defendant authorising him to dispose of the property and to do certain other things. The property was accordingly sold and the plaintiff sued for a rendition of accounts in connection with those transactions. The suit was resisted on the ground that the brothers were members of a joint Hindu family and no suit for accounts with respect to the sale of a part of the family property was maintainable. The trial Court held that the brothers were not members of a joint Hindu family and granted a preliminary decree. This decree was reversed on appeal by the learned District Judge, who held that the brothers were members of a joint Hindu family. The plaintiff has now preferred a second appeal. The finding of the learned District Judge that the family was joint is one of fact but the learned counsel for the appellant has sought to attack it on the ground that the learned District Judge has not drawn correct legal inferences from the proved facts. It was urged that on 7th March 1911, Hukam Singh had served his brothers with a notce that he intended to separate from them and wanted his share and that this notice was sufficient to effect a severance of the joint family. The learned District Judge has however found in view of the other evidence on the record that the notice was only in the nature of a threat and that the brothers continued to be joint inspite of the notice. A mere notice of an intention to separate is not sufficient to effect severance, if there was no such real intention, or if the intention is abandoned soon afterwards, (cf. *Palani Ammal* v. *Muthuvenkatacharla* (1), *Bankey Behari Lal* v. *Brij Behari Lal* (2) and *Bal Krishna* v. *Ram Krishna* (3). The true test, it would appear, is the intention of the parties, and whether there was any intention to separate or not is clearly a question of fact.

The next point urged was that even if the family was joint, the defendant having been authorised as an agent by the plaintiff to dispose of certain property, the plaintiff was entitled to claim an account from him. It will appear, however, from the power of attorney, that the defendant was authorised to sell the joint family property and not plaintiff's share. The power of attorney authorised the defendant to do various other acts and as pointed out by the learned District Judge this appears to have been done merely for convenience. The proceeds of the sale belonged to the joint family. The plaintiff's object in instituting the present suit is obviously to get his share ascertained and separated. But it is well-established that a suit for a partition of a portion only of the family property is not maintainable. I see no good ground for interfering with the decision of the learned District Judge in second appeal and must, therefore, dismiss this appeal with costs.

R.K. *Appeal dismissed.*

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1. AIR 1925 P C 49=87 I C 383=52 I A 83=48 Mad 254 (PC).
2. AIR 1929 All 170=116 I C 285=51 All 519.
3. AIR 1931 P C 154=132 I C 733=58 I A 220=53 All 300 (PC).

A. I. R. 1933 Lahore 589

TAPP, J.

Deputy Commissioner, Jhang — Petitioner.

v.

Firm Shankar Das-Lachhman Das and *others*—Opposite Parties.

Civil Ref. No. 15 of 1932, Decided on 7th November 1932, from order of Junior Sub-Judge, Jhang, D/- 16th January 1932.

Punjab Alienation of Land Act (1900), Ss. 2 (3) and 16 — Prohibition in S. 16 does not apply to date trees attached in execution.

Trees are not land within the meaning of S. 2 (3) and hence the statutory prohibition in S. 16 (1) of the Act, does not apply in the case of the date trees attached in execution of a decree: *AIR* 1925 *Lah* 29, *Rel on.* [P 589 C 2]

Ganesh Datta—for Opposite Parties.

Order.—This is an application by the Deputy Commissioner, Jhang, under Sub-S. (2), S. 21-A, Punjab Alienation of Land Act for revision of the order of the Sub-Judge, Second Class, Jhang, directing the attachment and sale of certain date trees in execution of a decree obtained by the firm Shankar Das Lachhman Das against Mt. Aishan and Satto on 30th July 1931. An application was made to the District Judge, Jhang, on 28th March 1932 but was returned by that Court on the ground that as the decree was passed by a Small Cause Court no appeal lay to the District Court.

The present application not having been made within the prescribed period of two months the Deputy Commissioner claims the benefit of S. 14, Limitation Act, on the ground of a bona fide mistake of law. The extensions of the provisions of S. 14 to the application is opposed by the learned counsel on behalf of the decree-holders who further contends that trees are not land within the meaning of S. 2 (3) of the Act. I do not think that the meaning of the application in the first instance to the District Judge can be regarded as a bona fide mistake, but it is unnecessary to decide the point as on the merits the application must fail.

The question whether trees are land within the meaning of S. 2 (3), Punjab Alienation of Land Act, has been concluded by authority it having been held in *Achhru Mal* v. *Maula Baksh* (1), by a Division Bench of this Court that they are not. In accordance with this decision I hold that the statutory

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1. AIR 1925 Lah 29=84 I C 89=5 Lah 385.

prohibition in S. 16 (1) of the Act does not apply in the case of the date trees in question and I therefore reject the application leaving parties to bear their own costs.

R.K. *Application rejected.*

A. I. R. 1933 Lahore 590

ADDISON, J.

Abdul Karim—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1641 of 1932, Decided on 24th February 1933, from order of Addl. Sess. Judge, Ferozepore, D/- 5th December 1932.

Cantonments Act (2 of 1924), S. 236—In order to get conviction prosecution should be started in accordance with S. 236 (2).

In order that a person can be legally convicted under S. 236, it is necessary that the prosecution should be instituted strictly in accordance with the provisions laid down in sub-S. (2), S. 236.

An Executive Officer of a Cantonment launched a prosecution under S. 236 against the accused and the accused was convicted under that section. The Executive Officer was not the person importuned, nor did the prosecution allege that the offence, was committed in his presence or that he had been authorized in this behalf by the Officer Commanding the station :

Held : that the prosecution being illegally instituted, the conviction of the accused must be set aside. [P 590 C 2; P 591 C 2]

Report.—This revision petition has arisen out of a complaint brought by the Executive Officer, Ferozepore Cantonment, through the Cantonment Superintendent, Mohammad Ibrahim, under S. 236, Cantonment Act, 1924, against the petitioner for loitering in the Cantonment for the purpose of prostitution. The prosecution alleged that on 6th February 1932, between the hours of 11 and 12 of the day, the petitioner approached Fus: Eachus and Fus: Roden in the garden of the officers' mess of their Regiment, which is situate on the Mall and within the limits of the Cantonment, and requested them for a match box. He then asked them whether they would like to be supplied with some women for sexual intercourse, an offer which they declined. It was also alleged that he had made a similar proposal to Fus: Clarkson on the same day. The case was tried by the Additional District Magistrate. Though the petitioner pleaded not guilty, the learned District Magistrate held that the offence against him had been established beyond doubt and therefore convicted him under S. 236, Cantonment Act. The petitioner has urged two grounds in support of his petition: (1) that the Executive Officer or his Superintendent had no locus standi to lodge the complaint and hence there was no proper complaint before the Court; and (2) that even if the facts alleged by the prosecution be assumed to be correct they do not constitute an offence under S. 236, Cantonment Act. After hearing the learned counsel for the petitioner and the Prosecution Deputy Superintendent of Police who appeared for the District Magistrate I am of opinion that both the above contentions urged on behalf of the petitioner are correct. I therefore beg to submit the record of the case to the High Court with the recommendation that the conviction of the petitioner be quashed.

Sub-Section (2), S. 236 lays down that no prosecution for an offence under the section shall be instituted except on the complaint of the person importuned or of a Military Officer in whose presence the offence was committed or of a member of the Military or Air Force Police being employed in the Cantonment, and authorised in this behalf by the officer commanding the station in whose presence the offence was committed, or of a Police Officer not below the rank of a Sub-Inspector who is employed in the Cantonment and authorised on his behalf by the Officer Commanding the station. The complaint in this case was made by Muhammad Ibrahim, the Cantonment Superintendent, whe is said to have done so on behalf of the Executive Officer. Criminal Law does not recognize any delegation of authority except when it is specially provided for by the statute. Consequently the complaint should be taken as lodged by Mohammad Ibrahim in his own right. But even if it be taken as a complaint by the Executive Officer, it is still bad in law. There is no doubt that he is not the person importuned, nor does the prosecution allege that the offence, even if one was committed, was done so in his presence or that he had been authorised in this behalf by the officer commanding the station. For these reasons the complaint was not made by a person competent to do so and is bad in law. The offence that the petitioner is said to have committed and for which he is convicted is that he loitered for the purpose of prostitation. Now the word "prostitute" is confined to women and can by no stretch of imagination be applied to men. For this reason only a woman can be said to be loitering for purposes of prostitution, and not a man. Consequently even if it be considered that the petitioner did approach the three persons with the proposals that he is said to have made to them, his action does not amount to loitering for the purposes of prostitution, and his conviction as it is cannot be upheld.

Order.—For the reasons given by the Additional Sessions Judge as to the prosecution being illegally instituted, I accept this petition, and set aside the conviction of Abdul Karim. The fine, if paid, will be refunded.

V.S. *Conviction set aside.*

* A. I. R. 1933 Lahore 591

BHIDE, J.

Nanna Mal-Banarsi Das — Decree-holders—Appellants.

v.

Bal Mokand and *others* — Judgment-debtors—Respondents.

Misc. Second Appeal No. 1172 of 1932, Decided on 25th April 1933, from order of Dist. Judge, Gurdaspur, D/- 31st March 1932.

* **(a) Civil P. C. (1908), O. 21, R. 50—Notice not issued individually to partners—Their liability as partners must be proved—Presumption arising under Contract Act, S. 264, does not avail creditor if he is customer after dissolution—Contract Act (1872), S. 264.**

If in a suit against a partnership the creditor decree-holder wants to proceed against the individual partners in executing his decree, but admits that notice was given only to one of such partners, it is incumbent on the decree-holder to establish the liability of the objectors under O. 21, R. 50. The presumption arising under S. 264, Contract Act, that the objectors were partners of the firm as no public notice of the dissolution had been given does not avail the creditor if he is a customer of the firm after its dissolution. For the expression "persons dealing with a firm" occurring in this section does not cover persons dealing with a firm for the first time after dissolution: 78 *P R* 1903 and *AIR* 1922 *Lah* 466, *Foll*; *AIR* 1930 *Bom* 449; *AIR* 1928 *Mad* 125 and *AIR* 1926 *Cal* 271, *not Foll.* [P 591 C 2]

(b) Contract Act (1872), S. 264—S. 264 is particular form of estoppel.

Section 264 is a particular form of estoppel by conduct and a person is not entitled to take advantage of it unless the facts raise a presumption that the absence of public notice excited in him a belief which caused him to do something that he would not otherwise have done. [P 592 C 1]

Chiranjiva Lal Aggarwal—for Appellants.

Nawal Kishore—for Respondents.

Judgment.—The material facts of the case are briefly as follows: A decree was obtained by a firm named Nanna Mal-Banarsi Das of Karachi against other firm named Labhu Mal-Basanta Mal of Batala on 14th March 1927. In execution proceedings the plaintiffs sought to make seven persons liable under the decree on the ground that they were partners of the firm. These men with the exception of Labhu Mal denied their liability on the ground that they had ceased to be partners long before the decree was passed. During the pendency of the suit notice was admittedly given only to Labhu Mal and it was therefore incumbent on the decree-holders to establish the liability of the objectors under O. 21, R. 50, Civil P. C. Evidence was led by the parties. The trial Court found the issue against the decree-holders and the decision was upheld in appeal by the learned District Judge. From this decision the decree-holders have preferred a second appeal. The learned counsel for the appellants contended that Bal Mukund, one of the objectors, has admitted in the witness box that the objectors continued to be partners of the firm for about six months after the death of Basant Mal which resulted in the dissolution of the firm some 12 years ago and that in view of this admission there was a presumption under S. 264, Contract Act, that the objectors were partners of the firm as no public notice of the dissolution had been given. It was admitted that a public notice of the dissolution had not been given and the sole point which requires consideration therefore is whether the objectors should be held liable on the basis of the provisions of S. 264, Contract Act.

According to S. 264 persons dealing with a firm are not affected by a dissolution of which no public notice is given unless they themselves had notice of such a dissolution. There is a divergence of judicial authority on the question whether the expression "persons dealing with a firm" occurring in this section applies only to persons dealing with a firm before its dissolution or also to persons who start their dealings after dissolution. It was held in *Chanmal* v. *Ganga Ram* (1), that the expression does not cover persons dealing with a firm for the first time after dissolution and this view was accepted by a Division Bench of this Court in *A. I. R.* 1922 *Lah.* 466. The appellants alleged that they were dealing with the respondent firm, even

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1. (1903) 78 P R 1903.

before its dissolution by the death of Basanta Mal and also during the period of about six months thereafter, when the objectors were still working as partners according to the statement of Bal Mukund. But this allegation has not been proved. The learned counsel for the appellants referred to the statement of Bal Mukund in this connexion but he has made conflicting statements and his evidence cannot help the appellants. The learned counsel next tried to rely on certain accounts which he sought to produce in the lower Appellate Court. But this evidence does not appear to have been admitted. If the appellants were new customers of the firm after its dissolution, they cannot take advantage of the provisions of S. 264, in view of the Division Bench judgment of this Court referred to above. It was urged that the judgment does not lay down correct law and that the Calcutta, Madras and Bombay High Courts have taken a different view. (cf. *A. I. R.* 1930, *Bom.* 449; *A. I. R.* 1928 *Mad.* 125 and *A. I. R.* 1926 *Cal.* 271). But I do not think there is sufficient justification for reference to a larger Bench as suggested in the circumstances of this case. For, even if it be held that S. 264 applies to new customers, the appellants had still to prove that they knew that the objectors were partners in the firm when they started their dealings. The statement of Bal Mukund on which the learned counsel relied shows that the objectors ceased to be partners about six months after the death of Basanta Mal which took place some 13 years ago and it appears that since then it was Labhu Ram alone who was conducting the business of the firm. As pointed out in *A. I. R.* 1922 *Lah.* 466, S. 264, Contract Act, is a particular form of estoppel by conduct and a person is not entitled to take advantage of it unless the facts raise a presumption that the absence of public notice excited in him a belief which caused him to do something that he would not otherwise have done. According to the evidence of Bal Mukund on which the learned counsel for appellant sought to rely, the objectors ceased to have connexion with the respondent firm long ago and there is nothing to show that the appellants believed that they were still partners in the firm and were induced to deal with the firm in the belief. I dismiss the appeal with costs.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 592

BHIDE, J.

Tulsi Ram Rup Chand — Plaintiff—Petitioner.

v.

Rattan Chand Hukam Chand—Defendant—Opposite Party.

Civil Misc. Petn. No. 29 of 1933, Decided on 3rd March 1933.

Civil P. C. (1908), O. 39, R. 2 and S. 151—Temporary injunction refused.

The issue of a temporary injunction staying further proceedings in another Court in the exercise of equitable jurisdiction was refused as the petitioner could easily raise his plea of want of jurisdiction in the other Court. [P 592 C 2]

Fakir Chand—for Petitioner.

Achchru Ram—for Opposite Party.

Facts.—Petition under O. 39, R. 2, coupled with S. 151, Civil P. C., for stay of all further proceedings in the High Court of Bombay in the suit filed by defendants and entered as No. 1814 of 1931 in the Commercial Cause List of that High Court, pending decision of the revision case noted above, by this Court.

Order.—The learned counsel for the respondent had referred to S. 56 (b), Specific Relief Act, and has also cited *Cohen* v. *Rothfield* (1), in support of his contention that an injunction could be only granted in the exercise of equitable jurisdiction and on grounds of great hardship, while no such hardship is involved in this case. The learned counsel for the appellant has referred to *Rash Behari* v. *Bhowani Churn* (2). After reconsidering the matter, I am of opinion that the circumstances of the case do not justify the issue of an injunction in the exercise of equitable jurisdiction. The petitioner can easily raise his plea of want of jurisdiction in the Bombay Court. Besides this petition will be shortly heard and disposed of on merits. I discharge the order granting temporary injunction. No order as to costs.

R.K. *Order discharged.*

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1. (1919) 1 K B 410=88 L J K B 468=120 L T 434.
2. (1907) 34 Cal 97.

A. I. R. 1933 Lahore 593

DALIP SINGH AND AGHA HAIDER, JJ.

Ram Chandar and *another*—Decree-holders—Appellants.

v.

Daryaoo Singh and *others*—Judgment-debtors—Respondents.

Misc. Second Appeal No. 1338 of 1929, Decided on 25th November 1932, from order of Dist. Judge, Karnal, D/- 15th February 1929.

(a) Custom (Punjab)—Jat of Mauza Kawali, Sonepat Tahsil, Rohtak, District—Ancestral property in minor son's hand is liable to attachment and sale in execution of decree against father — Question is one of custom and not of procedure.

The question whether ancestral house property in the hands of the minor sons of a deceased judgment-debtor, a Jat of Mauza Kawali in Sonepat Tahsil, now included in Rohtak District, but formerly part of the old Delhi District, is or is not liable for attachment and sale in execution of a decree against the deceased judgment-debtor is one of the custom and not of procedure and the custom in this case is that it is so liable: 4 *P R* 1913(*FB*) and *AIR* 1919 *Lah* 145 (*FB*), *Foll*; *AIR* 1929 *Lah* 150 *AIR* 1931 *Lah* 225; *AIR* 1930 *Lah* 1058 and *AIR* 1931 *Lah* 7, *Ref.* [P 594 C 1]

(b) Civil P. C. (1908), S. 11 — Particular custom not proved in a previous case—Finding is not res judicata.

A mere decision that a certain custom is not proved in a previous case is not of any particular force in a subsequent case for obviously one man may have proved much more than another man proved and a mere negative finding would not constitute any res judicata. [P 593 C 2]

Shamair Chand—for Appellants.

Kishan Dayal—for Respondents.

Dalip Singh, J.—The point for determination in this appeal is whether ancestral house property in the hands of the minor sons of a deceased judgment-debtor, a Jat of Mauza Kawali in Sonepat Tahsil, now included in Rohtak district but formerly part of the old Delhi District, is or is not liable to attachment and sale in execution of a decree against the deceased judgment-debtor. The trial Court held that it was so liable following an unpublished ruling of this Court: *Jot Ram Hans Ram* v. *Ibrahim* (1). That ruling turned on the interpretation of an answer in the Riwajiam. The ruling itself referred to Muhammadan Gujars of the same Tahsil, but the answer of all tribes to question 39 of the Riwajiam, namely:

> "Is a minor, whose father is dead and who has inherited the father's estates, liable for his father's debts?"

was

> "If the son receives by way of inheritance some property from his father, then he is liable for the debt of his father."

I have given a translation of the actual entry in Urdu. It is slightly different from the English translation which is given at p. 18 of the printed paper book, but there is no substantial difference. The ruling pointed out that the question turned on the meaning of the words "bap ki jaidad" whether these words referred to the self-acquired property of the father only or also included the ancestral property and came to the conclusion that it also included the ancestral property. On appeal the learned District Judge, who had this ruling before him, refused to follow it on the ground that in a Division Bench ruling, *Ram Mehr* v. *Fali Ram* (2), referring to Nahra village of Sonepat Tahsil, the special custom urged was not proved. I point out here to the learned District Judge that a mere decision that a certain custom is not proved is not of any particular force in a subsequent case for obviously one man may have proved much more than another man proved and a mere negative finding would not constitute any res judicata. The learned District Judge is in error in saying that 13 instances were considered insufficient by the Division Bench. As a matter of fact the Division Bench stated that there were alleged to be 13 instances, but they were not proved. No reference was made to the Riwajiam. The position therefore before the learned District Judge was that there was a direct ruling of this Court with reference to the interpretation of the Riwajiam and in the light of the recent rulings this shifted the onus on to the objectors and it is not possible to contend that if the onus lay on them, they have discharged it. The learned District Judge should therefore have followed the High Court ruling and if he thought that it was mistaken, he could have pointed that out in suitable language.

On second appeal being taken the case has been referred by the Single Judge to a Division Bench and we have heard counsel at length on the points involved in the case. I find that the Single Bench ruling referred to was taken in Letters Patent Appeal No. 127 of 1928 and the Letters Patent appeal was dismissed in preliminary hearing on 21st December 1928. Further the said ruling was referred to with approval by Jai Lal, J., in *A. I. R.* 1931 *Lah.* 225 and *A. I. R.* 1930 *Lah.* 1058. These rulings are with reference to the Jhang

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1. Since reported in AIR 1929 Lah 150=112 I C 668.

2. AIR 1924 Lah 455=78 I C 404=5 Lah 268.

District, but the words in the Riwajiam are almost exactly the same. The ruling was also approved in *A. I. R.* 1931 *Lah.* 7 by Tek Chand, J. The learned counsel for the respondents has contended that the position of the clause in the chapter on the rights of guardianship shows that no custom at all was being laid down by it and it contained only an endeavour to direct the guardian of a minor as to his rights and powers of obligation. In the alternative he contended that the question related primarily to the extent of the minor's liability, made no discrimination between ancestral and acquired property and that in view of the general custom to the contrary, the words "bap ki jaidad" should be held to relate to the father's self-acquired property. Lastly, he contended that the question whether property which has come into the hands of minors is attachable in execution of a decree obtained against the father is not a question of custom at all, but a question of procedure. None of these arguments appear to me to have much force. The last point is settled law in the province and whatever might be the merits of the argument, it is not possible to go back on the two Full Benches *Jagdip Singh* v. *Narayan Singh* (3) and *Mt. Mikor* v. *Chhaju Ram* (4) which have held that this is a question of custom. So far as the second argument is concerned, nothing new has been shown to me to make me alter the view which I expressed in my previous judgment in *Jot Ram Hans Ram* v. *Ibrahim* (1). So far as the first point is concerned, the position of the clause might have lent great force to the argument of the learned counsel, but the words used are unfortunately too clear to bear the construction that he puts upon it. There is no reference to the guardian in the question at all and the question is a direct question as to the liability of the minor. The second portion of the question clearly shows that the question was with reference to the liability of the property in the hands of the minor. I would therefore accept this appeal and dismiss the objection with costs throughout and direct the Court to proceed with the execution according to law.

Agha Haider, J.—I agree.

K.S. *Appeal accepted.*

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3. (1913) 4 P R 1913=15 I C 866 (FB).
4. AIR 1919 Lah 145=49 I C 281=17 P R 1919 (FB).

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* A. I. R. 1933 Lahore 594

BHIDE, J.

Bibi Ved Kaur—Decree-holder—Appellant.

v.

Balkishan Das Mehra—Judgment-debtor—Respondent.

Misc. Second Appeal No. 545 of 1932, Decided on 5th December 1932, from order of Addl. Dist. Judge, Amritsar, D/- 4th February 1932.

* **(a) Civil P. C. (1908), S. 11—Point decided by implication operates as res judicata.**

M obtained a declaratory decree for maintenance against her husband and executed it through Court several times. Subsequently in another execution of the same decree the husband contended that the decree being declaratory cannot be executed:

Held: that as the husband allowed the decree to be executed against him on previous occasions without any objection, the matter was impliedly decided against him in those proceedings, that that operated as res judicata, that the principle of res judicata applied to execution proceedings and that the objection cannot be raised in this execution proceeding: 8 *Cal* 51 (*P C*); 6 *All* 269 (*P C*); *AIR* 1921 *P C* 23 and *AIR* 1926 *All* 71, *Rel on*; *AIR* 1924 *Bom* 495, *Ref*; *AIR* 1915 *All* 344 and *AIR* 1922 *Pat* 289, *Dist.* [P 595 C 2; P 596 C 1]

(b) Civil P. C. (1908), S. 11—Applicability of principle of res judicata—Question as to executability of decree is one of construction.

The point whether a decree is or is not capable of execution is not a pure question of law but really one of construction of the decree; hence the principle of res judicata applies: 6 *All* 269 (*P C*); *AIR* 1925 *Lah* 640 and *AIR* 1914 *Mad* 365, *Rel on.* [P 595 C 2]

Jagan Nath Aggarwal—for Appellant.

Jai Gopal Sethi and *Gobind Ram Khanna*—for Respondent.

Judgment.—The material facts of the case giving rise to this second appeal are briefly these: Mt. Ved Kaur, appellant, obtained a decree for maintenance against her husband Balkishen Das on the basis of a compromise on 13th May 1915. The decree was as follows:

> "I hereby pass a declaratory decree to the effect that the plaintiff is entitled to Rs. 45 per mensem by way of maintenance from the defendant and that this sum will be a charge on the movable and immovable property of the appellant."

This decree was executed several times through Court by the appellant, but when in 1929 she claimed arrears for about 2½ years, the respondent raised objections: (1) that the decree had been satisfied out of Court; and (ii) further that the decree, being declaratory, was not executable. The latter objection was raised in execution proceedings in 1929 for the first time. The trial Court dismissed the objections, but the learned

District Judge having upheld the latter objection on appeal, Mt. Ved Kaur has come up to this Court in second appeal. The learned counsel for the appellant has contended that the respondent not having raised the question of the executablity of the decree till 1929 and having allowed the decree to be executed against him on previous occasions without any objection the matter was impliedly decided against him in the previous proceedings and could not be raised again. The learned counsel has relied upon *Mungal Pershad Dichit* v. *Girja Kant Lahiri* (1), *Ram Kirpal* v. *Rup Kuari* (2) and *Raja of Ramnand* v. *Velusami Tevar* (3), in this respect.

The learned counsel for the respondent conceded that the principle of res judicata applied to execution proceedings, but he urged that no decision on any matter could be held to operate as res judicata for the purposes of execution proceedings unless it was actually heard and decided. He contended that the principle of Expl. 4 to S. 11, Civil P. C., did not apply to execution proceedings. But the decision of their Lordships of the Privy Council in *Raja of Ramnand* v. *Velusami Tevar* (3) seems to go against this contention. In that case the question of limitation had only been decided impliedly and yet the decision was held to operate as res judicata. It has been held in *Dip Prakash* v. *Dwarka Prashad* (4) that even if a point is decided by necessary implication, it operates as res judicata in the subsequent proceedings. A similar view was taken in *Gadigappa Chandbasappa* v. *Shidappa Gurushidappa* (5). The learned counsel for the respondent relied on *Kalayan Singh* v. *Jagan Prasad* (6) and *Prithi Mahton* v. *Jamshed Khan* (7), but the facts of the former case are distinguishable. In the former case there was only an error in the decretal amount claimed in a previous application and there had been no occasion yet for giving a definite decision on that point in the previous proceedings. In the latter case it was held that the point raised before the learned Judge had not been taken up before the District Judge and could not be registered. The further remarks on the question of res judicata appear therefore to be in the nature of obiter dicta. Besides the view taken therein seems to be opposed to the view expressed by their Lordships of the Privy Council in *Raja of Ramnand* v. *Velusami Tevar* (3). In the present instance the previous application for execution could not have been granted unless it was held that the decree was capable of execution. The respondent not having raised the latter objection, it must be held to have been decided against him by necessary implication in view of the authorites cited for the appellant.

The learned counsel for the respondent urged that the present claim for maintenance was for a different period and hence the principle of res judicata is not applicable. But this argument has, I think, no force as the claim arises under the same decree. The learned counsel referred in this connexion to *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (8), but that case is clearly distinguishable. All that was held therein was that a decision with respect to an assessment for one year does not operate as res judicata for the purposes of an assessment for a subsequent year. But the asssessment for each year was distinct, while here the maintenance is being claimed under the same decree. It was argued next that the point whether the decree is or is not capable of execution is a pure question of law and hence the principle of res judicata cannot apply. But I do not think the point can be treated as a pure question of law. The question is really one of construction of the decree. In *Ram Kirpal* v. *Rup Kuari* (2) when it was once held that mesne profits were claimable under a certain decree, the decision was held to operate as res judicata in subsequent proceedings. The present case is analogous. It must also be remembered that the decree in this case was based upon a compromise and the question whether it was to be executed by recourse to Court depended mainly on the intention of the parties. The fact that the respondent never raised any objection to execution through Court till 1929 is very significant in this connexion.

The facts of the present case seem to be very similar to those in *Banu Mal* v. *Paras Ram* (9) a Division Bench ruling of this Court. In that case a preliminary decree in a mortgage suit had been erroneously allowed to be

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1. (1881) 8 Cal 51=8 I A 123=4 Sar 248 (P C).
2. (1884) 6 All 269=11 I A 37 (P C).
3. AIR 1921 P C 23=59 I C 880=48 I A 45 (P C).
4. AIR 1926 All 71=90 I C 83=48 All 201.
5. AIR 1924 Bom 495=83 I C 155=48 Bom 638.
6. AIR 1915 All 344=30 I C 523=37 All 589.
7. AIR 1922 Pat 289=67 I C 656=1 Pat 593.
8. (1926) A C 94=95 L J P C 83=134 L T 335.
9. A I R 1925 Lah 640=92 I C 254.

executed without objection in previous proceedings, though such a decree is incapable of execution. It was held following, *Epoor Ramasamy Reddy* v. *Kandadai Rangamannar Iyengar* (10) that the objection that the decree was incapable of execution could not be raised in subsequent proceedings. In my opinion, the trial Court's decision was correct. I accept the appeal and setting aside the order of the learned District Judge direct the execution to proceed according to law. The appellant will get her costs throughout.

K.S. *Appeal accepted.*

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10. AIR 1914 Mad 365=23 I C 390.

A. I. R. 1933 Lahore 596 (1)

JAI LAL, J.

Chaudhri Ram—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1598 of 1932, Decided on 24th February 1933, from order of First Class Magistrate, Lahore, D/- 29th November 1932.

Penal Code (1860), S. 489-B — No guilty knowledge or intention proved—Nor was possibility of innocence excluded—No conviction can lie under S. 489-B for being found in possession of counterfeit currency note.

The accused tendered among others a note of the value of Rs. 5 which was obviously a counterfeit note. He was sent up for trial. No other counterfeit currency notes had been found in his possession, nor was it shown by any independent evidence that he had knowledge that the currency note tendered by him was counterfeit :

Held : that as the requisite guilty knowledge or intention had not been established by the circumstances proved by the prosecution, nor had the possibility of the innocence of the appellant been excluded it was not safe to maintain the conviction under S. 489-B. [P 596 C 2]

B. R. Puri—Appellant.

Abdul Rashi—for the Crown.

Judgment.—The appellant Chaudhri Ram has been convicted under S. 489-B, Penal Code, for being found in criminal possession of a counterfeit Government Currency Note. The facts are that on 1st October 1932, the appellant went to the Post Office in order to remit some money by money-order and tendered four Currency Notes to the money-order clerk. One of these Currency Notes of the value of Rs. 5 was obviously a counterfeit note and the postal clerk having invited the attention of the Post Master to this fact the police was called in and the appellant sent up for trial. No other counterfeit Currency Notes have been found in his possession, nor has it been shown by any independent evidence that he had knowledge that the Currency Note tendered by him was counterfeit. He is described to be a simpleton and has stated that he had borrowed Rs. 20 from two persons which included the Currency Note in question.

The appellant has produced two witnesses to prove that from one of these two men he borrowed Rs. 6 which included a folded Currency Note. The circumstances, in my opinion, are so doubtful that it is not safe to maintain the conviction of the appellant. The requisite guilty knowledge or intention has not been established by the circumstances proved by the prosecution, nor has the possibility of the innocence of the appellant been excluded. I accept the appeal and setting aside the conviction of the appellant acquit him and direct that he be released from jail forthwith.

V.S. *Appeal allowed.*

A. I. R. 1933 Lahore 596 (2)

ADDISON, J.

Guranditta—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1675 of 1932, Decided on 17th February 1933.

Penal Code (1860), S. 411—Failure to disclose names of thieves is not sufficient ground for conviction under S. 411.

Failure to disclose at once the names of thieves from whom the accused purchased "toria" is not in itself sufficient ground for his conviction under S. 411. It must also be proved that he purchased the article dishonestly, knowing it to be stolen property. [P 596 C 2]

Anant Ram Khosla—for Petitioner.

Madan Lal—for the Crown.

Judgment.—Trackers followed the tracks of certain thieves, who had taken "toria" from a village, to the shop of the petitioner, who at once stated that he had purchased it from certain persons, whose names he would disclose to the Police or Lambardar. I think that he was foolish in not at once disclosing the names. He did disclose them however whenever the Police arrived. There is no other evidence against the petitioner. I do not think that it can be said that it has been proved that he purchased that "toria" dishonestly, knowing it to be stolen property.

I accetpt the petition, set aside the conviction under S. 411, Penal Code, and direct that the fine, if paid, be refunded.

V.S. *Conviction set aside.*

A. I. R. 1933 Lahore 597 (1)

JAI LAL, J.

Sharfu Phulla—Convict — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1638 of 1932, Decided on 17th February 1933, from order of Addl. Sess. Judge, Karnal, D/- 7th December 1932.

Punjab Municipal Act (3 of 1911), Ss. 221 and 228—Complaint by Sanitary Inspector—Authority should be in his name.

In the case of a Sanitary Inspector the authority to file a complaint should be in writing and by name and not office. Where this procedure is not followed there is no proper complaint and the conviction and sentence based on an invalid complaint cannot be maintained: 8 *P R* 1916 *Cr* and *AIR* 1924 *Lah* 80, *Rel on.* [P 597 C 1, 2]

Report.—Mr. A. N. Bhandari, District Magistrate, Karnal, summarily tried the petitioner Sharfu under S. 221, Punjab Municipal Act, for having resisted on 22nd December 1931 the municipal mistri and the labourers under his order in allowing a wall to be demolished, which according to the complaint was constructed by the petitioner's brother on the public street without permission and which had not been demolished by his brother in compliance with the notices under Ss. 172 and 192, Municipal Act, nor after the notice under S. 220 of the Act. The evidence in support of the complaint lodged by Bishan Das, Sanitary Inspector, consisted of the statement of Lala Bishan Das, Sanitary Inspector, and Lachhmi Chandar Mistri and Malik Mohammad, conservancy patrol. The petitioner set up an alibi. Disbelieving the alibi and relying on the prosecution evidence, the Magistrate convicted the petitioner and sentenced him to a fine of Rs. 20 or 7 days' simple imprisonment. The petitioner prays that the conviction and sentence may be set aside.

The complaint nowhere mentions the fact that Lala Bishan Das, Sanitary Inspector, Karnal, was ever authorised by name by the Municipal Committee. He did not mention this fact in his statement. The learned District Magistrate never even makes a reference to this fact in his judgment. *Emperor* v. *Dharma Singh* (1), *A. I. R.* 1924 *Lah.* 80, and S. 228, Punjab Municipal Act, are authorities for the proposition that in the case of a Sanitary Inspector the authority to bring the suit should be in writing and by name and not office. The learned public Prosecutor could not say anything to the contrary and conceded that there was no proper complaint before the District Magistrate and that the conviction and sentence based on an invalid complaint could not be maintained. There are no notices issued in the case on the file from which the particulars may be gathered as to what the brother of the petitioner was required to do and whether as a matter of fact the Committee had legally laid the foundation for issuing the notice under S. 220, Punjab Municipal Act. For these reasons I send the records of the case to the Hon'ble High Court for the purpose of setting aside the conviction and sentence and acquitting the petitioner. The fine imposed by the Magistrate was paid, and may be ordered to be refunded.

Order.—For reasons recorded by the Additional Sessions Judge I set aside the conviction of the petitioner and direct that the fine, if paid, be refunded to him.

V.S. *Conviction set aside.*

A. I. R. 1933 Lahore 597 (2)

JAI LAL AND AGHA HAIDAR, JJ.

Muhammad Rafiq—Plaintiff—Appellant.

v.

Faiz Ahmad and *another*—Defendants—Respondents.

Second Appeal No. 2486 of 1928, Decided on 11th April 1933, from decree of Dist. Judge, Shahpur, D/- 18th July 1928.

Practice — Subsequent events —Declaratory suit by reversioners that sale did not affect their rights decreed—Sale cancelled by vendor and purchaser by mutual consent —Decree becomes useless.

On a sale by a proprietor in favour of his son-in-law the reversioners filed a suit for a declaration that the sale did not affect their reversionary rights. The suit was decreed. Subsequently the land was allowed to be mutated in favour of the vendor, the sale being cancelled by mutual consent:

Held: that it was open to the parties to do so and that the decree in favour of the reversioners became useless. [P 598 C 1]

Mohsin Shah—for Appellant.

Akbar Ali—for Respondents.

Jai Lal, J.—The facts of this case are brief and simple. Faiz Ahmad sold the property in suit in 1918 to his son-in-law and the reversioners instituted

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1. (1916) 8 P R 1916 Cr=17 Cr L J 199=34 I C 811.

a suit for a declaration that the sale shall not affect their reversionary rights. The suit was decreed in May 1919. Subsequent to this the property was mutated back by the son-in-law in favour of Faiz Ahmad which means that the sale was cancelled by the parties by mutual consent, and in 1922, Faiz Ahmad made a gift of the property in favour of his daughter. The reversioner Mohammad Rafiq has instituted the suit out of which this second appeal has arisen to set aside the gift on the ground of incompetency of Faiz Ahmad to make the same. The Courts below have found that among the Awans of Shahpur District, and the parties are Awans of the Shahpur District, there is an unrestricted power of alienation of ancestral property. They have consequently dismissed the plaintiff's suit, thus upholding the gift.

On the second appeal the only point raised by Mr. Mohsin Shah on behalf of the appellant, the reversioner, is that the decrees of the Courts below really have the effect of nullifying the declaratory decree obtained by the reversioners in the previous suit. But it is clear that the decrees of the Courts below have not led to that effect. On the other hand, the parties having cancelled the previous sale and placed them selves in the same position in which they were before it was effected, the decree in favour of the reversioners practically became usless. No law has been quoted to show that it was not open to the parties by mutual agreement to cancel the sale under the circumstances and obviously there is no law to that effect. In my opinion the decree of the trial Court is not open to any valid objection, and I would dismiss this appeal with costs.

Agha Haidar, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 598

BHIDE, J.

Har Lal and *others*—Defendants—Appellants.

v.

Sri Ram—Plaintiff—Respondent.

Second Appeal No. 4 of 1931, Decided on 24th October 1932, from decree of Dist. Judge, Hissar, D/- 2nd August 1930.

Civil P. C. (1908), S. 149—Proper court-fee not affixed in appeal filed in time—Court giving time for making up court-fee—Subsequent dismissal by Court of appeal as being time barred for not having affixed proper court-fee at time of presentation is wrong.

Where a Court allows time for payment of deficient court-fee, and if the deficiency is made up within the time allowed the court-fee must be held to be effective from the date of the institution of the appeal. And the Court cannot dismiss the appeal on the ground that the proper court-fee had not been affixed on the appeal when presented and as such the appeal is time barred : *AIR* 1929 *P C* 147 and *AIR* 1932 *Lah* 21, *Rel on.*

[P 599 C 1]

Shamair Chand and *Qabul Chand*—for Appellants.

N. C. Pandit and *Chiranjiv Lal*—for Respondent.

Judgment.—Civil Appeals Nos. 4, 5 and 1672 of 1931, are connected and will be disposed of together. I shall first take up Civil Appeal No. 4 of 1931. This appeal arises out of a redemption suit instituted by one Siri Ram, son of Tulsa. A preliminary decree was granted and the mortgagor was ordered to pay Rs. 575-13-0, on or before 13th May 1927. The payment was not made by the date fixed and thereafter the defendant mortgagee applied for a final decree to the effect that the right of the mortgagor to redeem the property was extinguished. This application was dismissed by the trial Court. An appeal was preferred to the District Judge who found that the proper court-fee had not been paid on the memorandum of appeal. He thereupon made the following order:

> "The court-fee must be made upon the value of the original suit. It must be done by tomorrow morning as it is already 4-45 p.m. today. I make no promises as to whether I will extend the time for presentation of appeal."

The court-fee was accordingly made up but the learned District Judge eventually dismissed the appeal on the ground that the proper court-fee had not been affixed on the appeal when presented, and the appeal was, therefore, time barred. From this decision a second appeal has been preferred to this Court and it is urged on behalf of the appellant that the learned District Judge's order was illegal inasmuch as the Court having ordered the court-fee to be made up within a certain time the memorandum of appeal must be held to have been properly stamped and presented on the date of the original institution. S. 149 of the Civil Procedure Code, *Faizullah Khan* v. *Mauladad Khan* (1) and *Jowala Singh* v. *Mt. Dhano* (2), were relied upon as authorities in support of the contention.

The contention appears to me to be well founded. It is true that the learned

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1. AIR 1929 P C 147=117 I C 493=56 I A 232 =10 Lah 737 (P C).
2. AIR 1932 Lah 21=133 I C 122.

District Judge said in his order that he did not make any promise, as to whether he will extend the time for presentation of the appeal, but he ordered the court-fee to be paid up by the next day. He had evidently made up his mind on the question of court-fee and given time for payment till the next day. He left the question of limitation open. But the point for decision is whether he could do so. In my opinion, time for payment of court-fees could only have been allowed under S. 149, Civil Procedure Code, and by virtue of the provisions of that section the court-fee must be held to be effective from the date of the institution of the appeal. Consequently limitation was automatically saved. This view is supported by the authorities relied upon by the learned counsel for the appellants which have been referred to above. I accordingly accept the appeal and, setting aside the order of the learned District Judge, remand the case to him for redecision. Stamp on appeal will be refunded. Costs will follow final decision. (The rest of the judgment is not material).

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 599

BROADWAY, J.

Sundar Das-Prem Singh—Plaintiffs—Petitioners.

v.

Puran Chand — Defendant—Opposite Party.

Civil Revn. Petn. No. 1 of 1933, Decided on 28th March 1933, from order of Sm. C. C. Judge, Amritsar, D/- 5th December 1932.

Jurisdiction—Suit for money based on contract entered into at *H* — Delivery to be made at *A* and margin money to be paid at *A* —Contract governed by rules and regulations of Merchants Association at *A*—Court at *A* has jurisdiction—Civil P. C. (1908), S. 20.

A contract was entered into at *H*, but the delivery was to be made at *A* and the margin money also was to be paid at *A*. Further it was provided that the contract was to be governed by the rules and regulations adopted by the Sugar and Grain Merchant Association at *A*:

Held: that in a suit for money based on the contract that the Court at *A* had jurisdiction. [P 599 C 2]

Dev Raj Sawhney—for Petitioners.

Achhru Ram—for Opposite Party.

Judgment.—The firm of Sundar Das-Prem Singh instituted through its managing partner two suits, one against Puran Chand for Rs. 419-9-6 and the other against Dhani Ram for Rupees 423-13-6. In each case the defendant concerned raised an objection that the Court at Amritsar had no jurisdiction as the contract in question had been entered into at Hoshiapur, was to be carried out in Hoshiarpur and that no part of it was to be performed in Amritsar. At the present moment I am not concerned with the other pleas raised. The learned Judge, Small Cause Court at Amritsar, after recording the evidence of the parties on four issues, returned the plaints in both suits holding that the Amritsar Small Cause Court had no jurisdiction to deal with them on the ground that the defendants had substantiated their plea on the question of jurisdiction.

The plaints having been returned in both the suits the plaintiffs have come up to this Court under S. 25 of Act 9 of 1887 through Mr. Dev Raj Sawhney, and it has been contended that the decision arrived at by the Judge, Small Cause Court, Amritsar, on the question of jurisdiction is entirely erroneous. For the respondents it was urged that the decision had been arrived at after a consideration of the evidence on the record and after certain definite findings of fact.

Now, it appears to me that the view taken by the Judge, Small Cause Court, Amritsar, is entirely erroneous, for an examination of the contracts on which the two suits are based, clearly shows that so far as the written contracts are concerned, there can be no doubt whatever that the Amritsar Court had jurisdiction. The heading, which has been referred to by the Court below, clearly shows that "delivery" was to be at Amritsar. The margin money referred to in the 4th clause of the contract was distinctly to be "paid" in Amritsar. The rules and regulations adopted by the Sugar and Grain Merchants' Association, Amritsar, were to govern the contract from day to day. Para. 13 of the contract also lays down that the contracts were to be treated as having been made wholly and completly in Amritsar and to be fulfilled there. To this paragraph the learned Judge of the Small Cause Court has referred and he has pointed out that the parties cannot by contract deprive a Court of jurisdiction that it inherently possesses nor confer on a Court by consent a jurisdiction that it does not possess. While this proposition has not been controverted by the learned counsel for the petitioner, para. 13 has been referred to, and I consider rightly, as showing that the intention of the parties was from the very outset that these contracts were to be regarded as having been, and were actually, made in Amritsar and to be carried out at Amritsar. The very next para. 14 makes it still more clear and it is a matter of surprise that the Court below apparently overlooked its provisions. It clearly provides for arbitration in the the matter of all disputes arising under this contract and the arbitrators nominated were to be under the Amritsar Sugar and Grain Merchants' Association. The importance of this lies in the fact that one of the pleas raised by the defendant in each case was that the matter had been referred to arbitration between the plaintiffs and the defendant and that an award had been made and owing to that fact the present suit was incompetent.

I, therefore, accept both petitions with costs and setting aside the order of the Judge, Small Cause Court, remand the case to him for disposal on the merits.

K.S. *Petitions accepted.*

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* A. I. R. 1933 Lahore 600

BHIDE, J.

Raghbir Das and *others*—Appellants.

v.

Madsudan Das and *another*—Respondents.

Second Appeal No. 1915 of 1931, Decided on 26th January 1933, from decree of Addl. Dist. Judge, Lahore, D/- 23rd May 1931.

*** Majority Act (9 of 1875), S. 3—Guardian of person and property of minor appointed by Court — Court removing such guardian under Guardians and Wards Act (1890), S. 39—Still age of majority for that minor is 21 years—Guardians and Wards Act (1890), S. 39.**

Where a certain person has been appointed guardian of person and property of a minor under the Guardians and Wards Act and the appointment itself is not set aside on appeal or otherwise, but if at a later period the guardian is removed by the Court in exercise of powers under S. 39 of the Act, then once a guardian having been appointed for a minor the age of majority in the case of that minor is to be taken as 21 years howsoever the appointment terminates afterwards: *AIR* 1924 *Lah* 157, *Rel on.* [P 601 C 1]

Mohammad Hussain—for Appellants.

J. G. Sethi and *Mohsin Shah* — for Respondents.

Judgment.—This appeal arises out of a suit by Raghbir Das and certain other persons for removal of the defendant Madsudan Das, Mahant of Dera Bawa Hari Har, from his office and certain other reliefs. The suit has been dismissed by the Courts below and plaintiffs have preferred a second appeal. Defendant Madsudan Das, while he was still a minor was appointed a Mahant on the death of his father Gopi Nath, some 12 or 13 years ago. The Dera has considerable property attached to it, yielding an annual income of between Rs. 10,000, to Rs. 20,000. Mt. Bhagwan Devi, mother of Madsudan Das, was appointed guardian to his person and property under the Guardians and Wards Act. It appears that a committee of management had also been appointed with her consent to manage the affairs of the Dera, but she did not allow the committee to do so properly and it was eventually dissolved. In 1925, a petition was filed by Raghbir Das and Bansi Das under S. 3 of Act 14 of 1920, (Charitable and Religious Trusts Act), praying that the Mahant be directed to file particulars of the objects and income of the trust and its accounts. Mt. Bhagwan Devi disputed that the property was a trust, but a suit filed by her to establish this claim failed. She was then directed to file accounts but she failed to furnish the same and the Court then directed the plaintiffs to seek their remedy by a suit as provided in S. 6, of the Act. Thereupon the present suit was instituted.

It may be stated at the outset that before the institution of the present suit Mt. Bhagwan Devi was removed from the guardianship of the person and property of the defendant. The learned Senior Subordinate Judge who tried the suit held that the mismanagement of the property or denial of the trust by Mt. Bhagwan Devi were no good grounds for removal of the defendant from his office, that it was not proved that the defendant was a man of bad character as alleged by the plaintiffs and as he had only lately taken over charge of the property and there was nothing to show that he was not managing it properly, there was no justification for any interference. The plaintiffs' suit was therefore dismissed on these grounds. On appeal, it was urged before the learned District Judge that the defendant was still a minor according to the Indian Majority Act, as he was under 21 and was therefore incapable of managing the property. The learned District Judge held that the order appointing Mt. Bhagwan Devi as guardian of the trust property was illegal and hence the age of majority was 18 and not 21. He further held that as the defendant had only recently assumed charge of the property on attaining majority and nothing had been proved against him, the plaintiffs were not entitled to any relief. The appeal was accordingly dismissed. Plaintiffs have preferred a second appeal.

The learned counsel for plaintiffs-appellants has pressed only two points before me, viz., (1) the learned District Judge has erred in law in holding that the age of majority was 18 and not 21 in the case of the defendant; (2) that the defendant being still a minor, the Court should have sanctioned a scheme for the proper management of the property.

The first contention appears to me to be correct. There is no doubt that Mt. Bhagwan Devi had been appointed guardian of the person and property of the defendant under the Guardians and Wards Act. The appointment itself was not set aside on appeal or otherwise. All that the Senior Subordinate Judge did later was to remove the guardian in exercise of his powers under S. 39 of the Act. There is ample authority for the proposition that when once a guardian is appointed for a minor the age of majority in the case of that minor is to be taken as 21, howsoever the appointment terminates afterwards: see *A. I. R.* 1924 *Lah.* 157. It was urged that the appointment itself was illegal as the property had been dedicated in trust for religious purposes. *Kilbi* v. *Bahurla Sheo Ratan* (1), was cited as an authority in support of this contention. But as already pointed out the appointment, whether legal or illegal, was never set aside. Besides there was certainly nothing illegal in the appointment of the guardian of the person and that, by itself, would serve to extend the age of majority to 21. The learned counsel for the respondent referred to Cl. (b) of S. 2 of the Indian Majority Act and urged that the Indian Majority Act does not apply as the defendant is the Mahant of a Dera. But I am unable to see that the clause has any bearing on the present question. There is no question here as regards the capacity of the defendant to perform his religious duties. The contention of the learned counsel for the appellants is that the defendant cannot legally enter into valid contracts etc., for the purposes of managing the property and hence the Court should sanction a suitable scheme of management. For such purposes it seems to me that defendant cannot attain majority unless and until he completes 21 years.

The next point for consideration is whether the minority of the defendant can by itself be considered to be a fit ground for sanctioning a scheme for management of the property of the Dera. As regards this point it is sufficient to point out that the plaintiffs never based their case on this ground. The only allegations made by them in respect of the defendant were that he was a man of bad character and denied the "wakfi" character of the property. The Courts below have found against the plaintiffs on these points and these points are not pressed now. The learned counsel for the appellants urged that the ground of minority was involved in his pleas. But I am unable to accept this contention. If the plaintiffs wanted to rely merely on the ground of the minority of the defendant, it would have been unnecessary for them to raise the issue as to his character. The defendant is now over 18. Although technically he is still a minor, owing to a guardian having been once appointed for him, the fact cannot be ignored that the usual age of majority now recognised in this country is 18. The learned counsel for the respondent rightly contended that, if the plaintiffs had taken up this plea, an issue would have been framed and the defendant would then have been in a position to say that he was in fact managing the property in a proper manner and was fit to be entrusted with the management.

In my opinion the plaintiffs are not entitled to any relief in the circumstances of this case merely on the ground that the defendant though over 18, is still technically a minor. I accordingly dismiss the appeal with costs.

V.S. *Appeal dismissed.*

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1. AIR 1922 Pat 527=70 I C 872=1 Pat 432.

A. I. R. 1933 Lahore 601

ADDISON AND AGHA HAIDAR, JJ.

Mohammad Hassan — Plaintiff—Appellant.

v.

Safdar Mirza and *others*—Defendants—Respondents.

First Appeal No. 2772 of 1928, Decided on 30th November 1932, from decree of Sub-Judge, First Class, Delhi, D/- 29th October 1928.

(a) Evidence — Evidence as to age in birth register cannot be rebutted by entry in records of educational institutions.

It is very common to make out a person entering a school to be younger in age than he is, in order not to be too old for Government employment when his education is completed and for other reasons. Therefore the mere entry of the date in the records of educational institutions does not seem to be sufficient to rebut the very strong evidence afforded by a birth register. [P 603 C 1]

(b) Practice—Secondary evidence admitted by trial Court without objection—Appellate Court cannot reject such evidence—Evidence Act (1872), S. 65.

Where secondary evidence has been admitted by the trial Court without objection, the appellate Court cannot reject such evidence on the ground that no reason has been given for such admission: 19 *Cal* 438 (*P C*), *Expl*; *AIR* 1915 *P C* 111, *Foll.* [P 603 C 2]

(c) Mahomedan Law—Hiba-bil-iwaz—Provisions of law of gifts are not applicable.

The provisions of the Mahomedan Law applicable to gifts do not apply to a so called gift made in lieu of a dower debt, i.e., hiba-bil-iwaz which is really of the nature of a sale. Hence it is not necessary in the case of a hiba-bil-iwaz for possession to be transferred: 42 *Cal* 361; *AIR* 1927 *Cal* 808; *AIR* 1928 *Lah* 516 and 8 *All* 178, *Ref*; *AIR* 1916 *P C* 27, *Dist.* [P 604 C 2]

(d) Mahomedan Law—Gift—Gift by father to minor son—Transfer of possession is not necessary.

In the case of a gift by a father to his minor son, delivery of possession to the son is not necessary as the father can remain in possession on behalf of his son as his guardian: *AIR* 1928 *P C* 108, *Rel on.* [P 605 C 1]

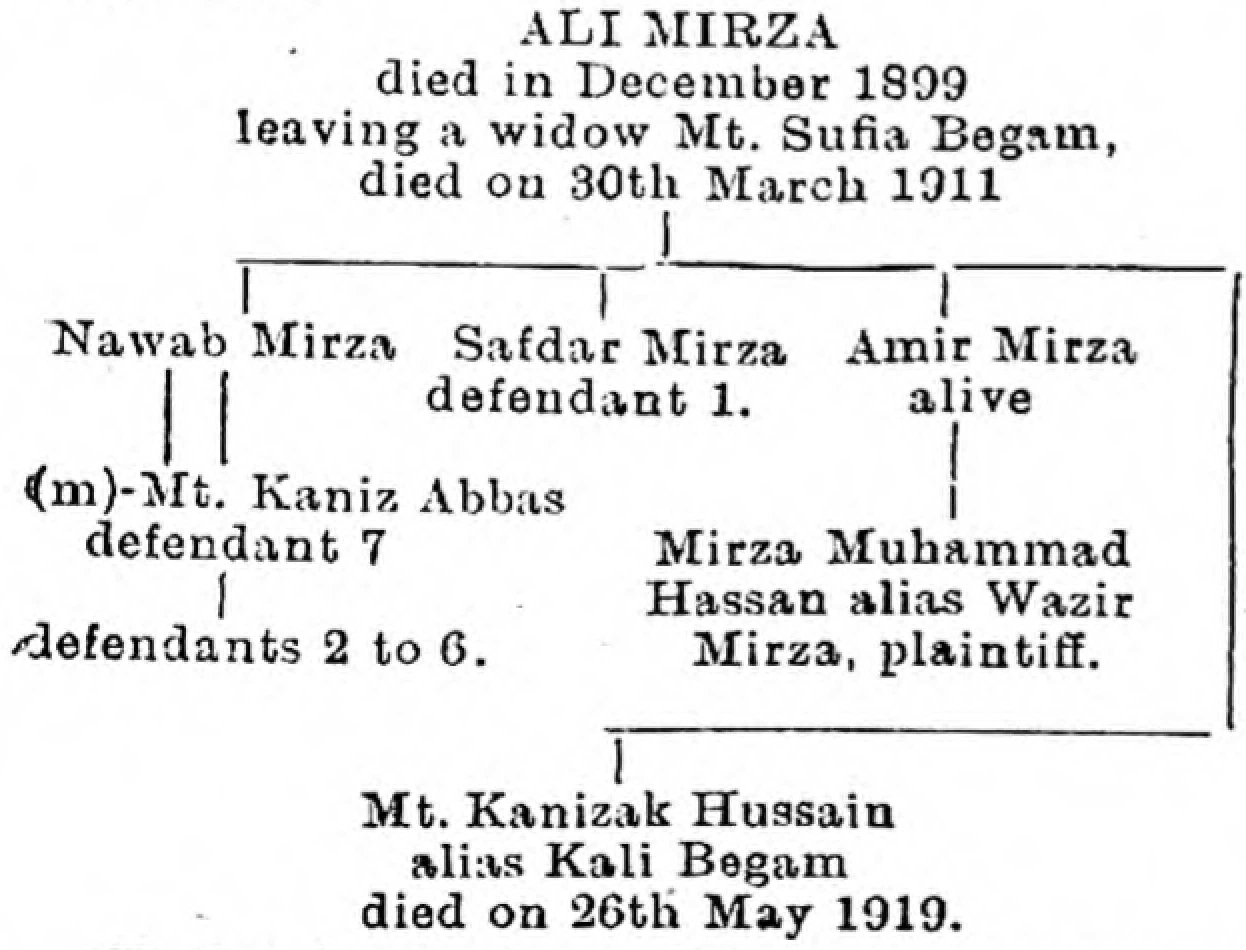
(e) Practice — Appeal — Question both of law and of fact.

A point involving both a question of law and fact cannot be raised for the first time in appeal. [P 605 C 2]

Kishen Dayal, Mehr Chand Mahajan, Bhagwat Dayal—for Appellant.

Nawal Kishore, Hem Chand Mahajan and *Ajit Prashad*—for Respondents.

Addison, J.—The following pedigree table is necessary in order to understand this case:



Defendants 8 to 10, are mortgagees from Amir Mirza, Safdar Mirza and Nawab Mirza. They obtained a decree for the sale of the mortgaged property in 1927. Thereupon the plaintiffs instituted the present suit for possession by partition of one-third of the six houses mortgaged on the ground that his father had made a hiba-bil-iwaz of his share in his favour on 13th January 1905. Defendants 1 to 7 admitted the plaintiff's claim, but the other defendants denied it and alleged that Amir Mirza, Safdar Mirza and Nawab Mirza were the owners who had validly mortgaged the six houses to them. It was further pleaded that Amir Mirza, the father of the plaintiff, had been dealing with the property prior to the mortgages in their favour. Amir Mirza married Mt. Anwar Sultan on 11th July 1901 and executed a deed of dower for Rs. 25,000, in her favour. A son was born to Amir Mirza and Mt. Anwar Sultan, on 29th January 1903. It is the plaintiff's case that he is this son. On 6th December 1904, Mt. Anwar Sultan died and on 13th January 1905, the hiba-bil-iwaz in question was executed and registered by Amir Mirza in favour of Muhammad Hussain alias Wazir Mirza, his son, by Mt. Anwar Sultan, the consideration being the son's share of the dower of his deceased mother. At that time Amir Mirza's share was 2/7th as his sister Mt. Kanizak Hussain was alive and it was this 2/7th share in nine houses that was transferred by Amir Mirza to his son, the value of this share being stated in the deed to be Rs. 2,000. Three of the houses have been sold to another person and are not now in suit. The Subordinate Judge, First Class, has held that it is not proved that plaintiff is the son to whom the gift was made, that the alleged deed of gift was being withheld improperly and that the father's subsequent conduct in dealing with the property showed that there was no bona fide intention to make a gift in favour of his son. He therefore dismissed the suit and the plaintiff has appealed. It may be mentioned here that most of the evidence was recorded by the predecessors of the Subordinate Judge who delivered judgment.

Both parties have produced copies of entries from the birth and death registers. No entry has been found regarding the birth of another son to Amir Mirza and no entry has been found of the death of the son born to Amir Mirza on 29th January 1903. It should follow from this that plaintiff is the son whose birth was registered on 29th January 1903 and this is supported by various members of the family including the father of the plaintiff. Further, the evidence regarding subsequent marriages of the father is to the effect that he did not marry again after the death of Mt. Anwar Sultan till 1917. His second wife died in 1918, no child being born from her. His third marriage was in 1919 and there is a daughter by that marriage. This evidence however has been brushed aside by the Subordinate Judge on the ground that the relatives would support a false case and also on the ground that the date of birth given by the plaintiff in two applications for entry to two colleges is 5th May 1906. His certificate of Matriculation dated 23rd May 1923, gives the same date of birth, namely, 5th May 1906. Two days later, namely, on 25th May 1923, the plaintiff applied for entry to St. Stephen's College, Delhi, and entered the date of his birth in that application as 5th May 1906. He did the same when he applied to enter the Hindu College on 10th June 1926. It is in evidence that the date given in the certificate that he had passed the Matriculation Examination is always taken from the school register and this certificate was obviously obtained in order to be enrolled in the St. Stephen's College and had to be given along with the application. It was therefore necessary for the plaintiff to give the same date of birth, namely, 5th May 1906, as had been first given when he entered the school. The date of birth 5th May 1906, was thus first given when he entered school and at that time the plaintiff was a minor and was not responsible for it.

It is very common to make out a person entering a school to be younger in age than he is, in order not to be too old for Government employment when his education is completed and for other reasons. The mere entry therefore of the date, 5th May 1906, in the records of these educational institutions does not seem to me to be sufficient to rebut the very strong evidence that he was born on 29th January 1903. Had Amir Mirza married again and had children shortly after the death of the first wife and if his son by his first wife had died, there would have been ample evidence available to the contesting defendants to prove these facts. I have therefore no hesitation in holding that the plaintiff was born of Mt. Anwar Sultan on 29th January 1903, that she died on 6th December 1904, and that his father Amir Mirza on 13th January 1905, a little more than a month after his wife's death, executed and registered the hiba-bil-iwaz, which is the basis of the plaintiff's claim. By this deed Amir Mirza set out the fact that he possessed nine houses along with his two brothers and one sister, that his share which was 2/7th was worth Rs. 2,000, that he owed his wife a dower of Rs. 25,000 and that he in consideration of his son's share of this dower transferred his 2/7th share in the property of his son Mirza Muhammad Hussain alias Wazir Mirza, the son of the wife who had just died. He further stated that he did so in order that, if he married again, his issue by the subsequent marriage would have no interest in the property transferred. He stated that he had put his son in proprietary possession of the property and made it his permanent property and he contracted to spend the income on the maintenance and education of the son. These terms are taken from a copy of the document supplied by the Registration Department, the original not having been produced. The original dower deed dated 11th July 1901, has however been produced.

It seems to me that the Subordinate Judge could not, when delivering judgment, reject the copy of the registered deed as it was admitted without objection. It is true that it was said by their Lordships of the Privy Council in *Hari Priya Debi* v. *Rukmini Debi* (1) that whether or not sufficient proof of search for, or loss of, an original document to lay a ground for the admission, of secondary evidence, has been given, is a point proper to be decided by the Judge of first instance and it must be treated as dependent very much on his discretion and that his conclusion should not be overruled except in a clear case of miscarriage. But in the present case the Subordinate Judge, who rejected the copy of the document was not the presiding Judge of the Court when it was admitted in evidence without objection. To such a state of affairs *Padman* v. *Hanwanta* (2) is applicable where it was said that the first appellate Court should not have treated the copy of the will taken from the Registrar's Office, which was filed and admitted in evidence in the first Court without objection, as inadmissible, on the ground that no sufficient foundation was laid for the admission in the first Court of secondary evidence; for if such objection had been taken in the first Court, that Court would probably had seen that the deficiency was supplied. It follows that the document must be treated as properly admitted.

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1. (1892) 19 Cal 433=19 I A 79=6 Sar 177 (P C).
2. AIR 1915 P C 111=29 I C 807=93 P R 1915 (P C).

In any case Amir Mirza, the father of the plaintiff, has stated in evidence that it was burnt by his brother Nawab Mirza when Amir Mirza sold his share in five houses to his brother Nawab Mirza in 1912. That is a reasonable explanation, for Nawab Mirza might not have cared to buy his brother's share with the original of such a document in existence.

There is no doubt that subsequent to the deed of the gift the father of the plaintiff, Amir Mirza, did act as if he was still the owner of the 2/7th share transferred, in that on various occasions commencing with the year 1906 he mortgaged or sold this share of some of the property to various persons. The last of these transactions appears to have taken place in 1912, except that the four mortgage-deeds in favour of the contesting defendants were executed in 1919 and 1920 by Amir Mirza and his two brothers. On the other hand, the plaintiff has been able to produce certain deeds of rent executed before this dispute arose in which Nawab Mirza, Safdar Mirza and the plaintiff and not his father were acknowledged to be the landlords. One of these rent deeds was executed on 16th March 1914, by Abdul Ghafur another on 18th September 1912, by Parwarish Ali, and a third by Sharif Hussain on 20th July 1922. There are also receipts in the plaintiff's favour. but they start subsequent to the institution of the mortgagees' suits and need not be further considered. It has also been proved that in the municipal-tax registers the recorded owner of the property is Nawab Mirza. That however cannot go against the plaintiff's case, as obviously Nawab Mirza was not the sole owner of the property.

It is clear therefore that immediately after his wife's death this hiba-bil-iwaz was executed by the plaintiff's father in plaintiff's favour, and it is not asserted that at that time there was any necessity to enter into a sham transaction. On the other hand, it was natural that the father should wish to make a gift for consideration in favour of the young son of his first wife who had just died. It has been established that to this wife was due a large sum of dower and the son had a considerable share in this. By the deed in question the father protected his son by granting him his share in the property. He was the de jure guardian of his son and it seems to me that he could act on his son's behalf in accepting the bargain which was undoubtedly for the benefit of the son. I therefore hold that the transaction was not a pure gift but a hiba-bil-iwaz and that it was a bona fide transaction intended to benefit the son of his first wife. It does not matter therefore that subsequently the father mortgaged or sold parts of the property in conjunction with his relatives. It is not necessary in the case of a hiba-bil-iwaz of this description for possession to be transferred as it partakes of the nature of a sale and not of a gift. In *Esahq Chowdhury* v. *Abadenniss* (3) it was said that the provisions of the Mahomedan law applicable to gifts do not apply to a so-called gift made in lieu of a dower debt which is really of the nature of a sale; while in *Sharifuddin Mahomed* v. *Mohiuddin Mahomed* (4) it was held that the transaction falsely termed in India hiba-bil-iwaz is not governed by Mahomedan law of hiba, but is amenable to the general law in India relating to contracts and the transfer of property. Similarly in *Fateh Ali Sah* v. *Mahomed Bakhsh* (5) it was held that a transaction of this kind was tantamount to a sale and by it an absolute title in the property in dispute was conferred at once. In *Suba Bibi* v. *Balgobind* (6) it was held that if there was a subsisting debt for dower from the husband to the wife and he transferred and she accepted his share in satisfaction of it, the transaction was legitimate and no Court had any power to disturb it, while it was for the defendant to establish that the transaction was merely colourable or fictitious.

Reliance however was placed by the learned counsel for the respondents on the Privy Council decision in *Sadik Husain Khan* v. *Hashim Ali Khan* (7). In that case there was a settlement by a Mahomedan the parties to which were himself, his wife and trustees. In it it was said that it had been agreed between the parties that the settlement should be in full satisfaction of the dower debt. The deed however was never executed by the wife and there was no evidence independent of the deed to show that the agreement was ever entered into between the settlor and his wife and that she would accept the provision made for her in the settlement in satisfaction and discharge of the unpaid balance of her dower and she

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3. (1915) 42 Cal 361=28 I C 692.
4. AIR 1927 Cal 808=105 I C 67=54 Cal 754.
5. AIR 1928 Lah 516=119 I C 258=9 Lah 428.
6. (1886) 8 All 178=(1886) A W N 51.
7. AIR 1916 P C 27=36 I C 104=43 I A 212=19 O C 192=38 All 627 (P C).

never elected in his lifetime to take the benefits conferred on her by the deed in lieu of it. It was held that the conveyance was a purely voluntary gift, as subsequent election could not be held to be a substitute for the original consideration. It does not seem to me however that this case applies to the facts before us. Here the father was the de jure guardian of his minor son and as the transaction was undoubtedly for the benefit of his son, he could transfer the property to his son in lieu of Rs. 2,000, part of the dower debt which the son was entitled to on the death of his mother. It seems to me therefore that the transaction vested the property absolutely in the minor from the very beginning and that the subsequent conduct of the father could not derogate from the plaintiff's title.

Even if it were held in the present case that this was an ordinary gift and not a hiba-bil-iwaz, it seems to me that no transfer of possession to the son was necessary. This follows from *Musa Miya* v. *Kadar Bax* (8). The father recited in the deed that he would use the income for the maintenance and the upbringing of the son. It seems to me that it was not necessary to get all the tenants to attorn to the son. The property was joint property and was managed by various members of the family from time to time. All the tenants did not give leases, but whatever leases have been proved are leases in favour of the plaintiff and of the plaintiff's two uncles. Even in such a case it does not seem to me that the father's subsequent acts of alienation establish that he had no intention of transferring the property to his son. The father would properly remain in possession on behalf of the son and his subsequent conduct alone would not show that the transaction in its inception was meant to be sham. Whatever view therefore is taken of the case, it seems to me that the plaintiff must succeed.

The parties are Shias and as Mt. Sufia Begam was a childless widow she would only be entitled to a ¼th share in the value of trees and buildings standing on her husband's land as well as of his movable property. She was entitled to no share in the site of the buildings. At the time of the gift therefore Amir Mirza had certainly 2/7th share in the site of the buildings. The plaintiff's case is that he is entitled to one-third, but this is obviously wrong. When Mt. Kanizak Hussain alias Kali Begam died in 1919, her share did not go to the plaintiff, but to his father Amir Mirza who is still alive. The plaintiff's share therefore cannot be more than 2/7th. It was contended on behalf of the repsondents that he was not entitled to that share of the value of the building materials as at the time of the hiba-bil-iwaz to him Mt. Sufia Begam was alive. This question was not raised in the trial Court and I am of opinion that it cannot be allowed to be raised here. It involves a question both of law and fact. Had the question been raised it might have been pleaded that Mt. Sufia Begam's share in the material had been satisfied out of the moveable property or that she had been paid in some other way, while in order to determine her share, the value of the material in 1899 when Ali Mirza died would have to be arrived at. I agree therefore that this question cannot be raised now. For the reasons given, I would accept the appeal and would grant the plaintiff a decree for possession by partition of a 2/7th share in the six houses in suit. In the circumstances of this case however I would direct that parties bear their own costs throughout.

Agha Haidar, J.—I agree.

R.K. *Appeal accepted.*

A. I. R. 1933 Lahore 605

DALIP SINGH, J.

Behari Lal and *others* — Petitioners.

v.

Sardari Lal and *others*—Defendants—Opposite Parties.

Civil Revn. Petn. No. 59 of 1932, Decided on 17th October 1932.

Government of India Act (1915), S. 107—Order of stay can be revised—Civil P. C. (1908), S. 10.

An order staying a suit pending the decision of another suit or appeal can be revised under S. 107, Government of India Act. [P 906 C 2]

J. G. Sethi and *Daulat Ram* — for Petitioners.

M. C. Mahajan and *D. R. Sawhney*—for Opposite Parties.

Judgment.—The plaintiffs in the present suit brought a previous suit against all the present defendants except one in which they prayed: (a) for a declaration and injunction regarding two bungalows Nos. 47 and 49. The Court found that the suit did not lie as the plaintiffs were not in possession of the said bungalows. The plaintiffs accepted this finding and have brought the present suit for possession of the same.

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8. AIR 1928 P C 108=109 I C 31=55 I A 171=52 Bom 816 (P C).

(b) The suit was for account of rents collected in Khairati Ram's lifetime and after, both by Khairati Ram and by some of the present defendants. The Court found that this suit was time-barred and this point is being agitated in an appeal pending in the High Court. In the present suit this point has not been raised and the suit is being brought for the rents collected by some of the present defendants after the death of Khairati Ram. Qua this portion, the Court had held that the suit was tenchnically within time and might be proceeded with but permission was given to withdraw; (c) A suit for compensation received by Khairati Ram for certain land situated in Ichhra. The compensation was originally awarded in 1923. On appeal to the High Court the compensation was enhanced in 1925. The Court held that the suit was time barred qua the 1923 compensation. Qua the 1925 compensation it was held that the suit was within time but that the plaintiffs were estopped from challenging Khairati Ram's title qua his own share received by him but that the plaintiffs were entitled to proceed with the share received by one Mulkh Raj who died in 1925 and in whose inheritance Khairati Ram had, according to the plaintiffs, wrongfully taken a share and thereby received compensation. As to this the Court held that the suit might proceed but the suit was allowed to be withdrawn.

In the present suit the plaintiffs sue for possession of bungalows Nos. 47 and 49, for an account of rents received by all the defendants after Khairati Ram's death, for a declaration of title regarding the Ichhra land, which it appears was not disputed in the previous suit, and for Mulkh Raj's share of the compensation. The learned trial Court held that the present suit should be stayed, holding that though it might not fall within S. 10, Civil Procedure Code, yet that section was not exhaustive and the Court had inherent jurisdiction in appropriate circumstances to stay the second suit if there was a danger of conflicting findings.

The statement of facts given above seems to my mind clearly to show that there is no danger of conflicting findings at all. The learned counsel for the respondents, however, contends that this is an interlocutory order and that therefore no revision lies: *Lal Chand Mangal Sain* v. *Behari Lal Mehar Chand* (1). He also relies on S. 10, Civil Procedure Code, *Ram Chand Dewan Chand* v. *Prithuri Chand & Co.* (2), a Single Bench ruling and *Swan Lane Spining Co. Ltd.* v. *Paras Ram Harnand Rai* (3), also a Single Bench ruling. He further contends that the decision that Khairati Ram was an heir of Bulli Mal, which is involved in (c) in question-compensation received by him, will also make the point res judicata qua the rest of the estate of Bulli Mal. In other words, he argues that the High Court may give a finding not only that the plaintiffs' right to that compensation cannot now be raised by estoppel, but also will further extend it, though the trial Court did not so extend it, to the geneal claim to Bulli Mal's estate. I do not consider that any of these grounds apply and this is a fit case for the the application of S. 107, Civil Procedure.

I direct the Court below, therefore, to proceed with the suit and accept the revision with costs.

R.K. *Revision accepted.*

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1. AIR 1924 Lah 425=84 I C 259=5 Lah 288 (FB).
2. AIR 1923 Lah 615=73 I C 247.
3. AIR 1929 Lah 662=123 I C 116.

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* A. I. R. 1933 Lahore 606

BHIDE, J.

Mohammad Umar Daraz Ali Khan—Plaintiff—Appellant.

v.

Pirji Abdul Rashid—Defendant—Respondent.

Second Appeal No. 547 of 1930, Decided on 15th December 1932, from decree of Addl. Dist. Judge, Karnal, D/- 17th December 1929.

(a) Punjab Courts Act (1918), S. 41 — Decision of Court on question of custom—Appeal challenging jurisdiction of lower Court to consider question — Certificate under S. 41 is not necessary.

Where the lower Court gives a decision on question of custom and an appeal is filed in which the jurisdiction of the lower Court to consider the question itself and not the finding regarding custom is challenged, no certificate under S. 41 is necessary for the appeal: *AIR* 1931 *Lah* 495, *Ref.* [P 608 C 1]

(b) Provincial Small Causes Courts Act (1887), Sch. 1, Art. 13—Claim for share of income of religious shrine is excluded from cognizance of Small Causes Court.

A claim for a certain amount though less than Rs. 500, on account of share as Khadim's out of income of a religious shrine falls under Art. 13, Sch. 1, and is excluded from the cognizance of a Court of Small Causes: *AIR* 1922 *Lah* 451; *AIR* 1926 *Lah* 276, *Dist*; *AIR* 1918 *Mad* 366; 41 *P R* 1872, *Rel on.* [P 608 C 1, 2]

S. N. DAR. B. A. LL.B., Vakil High Court. SRINAGAR (Kashmir).

*** (c) Civil P. C. (1908), S. 11—Question as to whether certain custom is opposed to public policy is not an abstract question of law.**

The question whether a custom as regards the alienability of Khadims' right is or is not opposed to public policy cannot be treated as a mere abstract question of law which can be reopened in subsequent suits: *AIR* 1928 *Cal* 777 (*FB*); 37 *I C* 857 and (1909) *A C* 615, *Ref.* [P 608 C 2]

(d) Civil P. C. (1908), S. 11, Expl. 4—Ex parte decision is no bar to operation of res judicata.

The mere fact that the previous decisions were ex parte does not exclude the operation of the doctrine of res judicata if the defendant could have put in appearance and raised the same plea which he raises in the subsequent suit: *AIR* 1914 *Lah* 390 and *AIR* 1923 *Lah* 560, *Rel on.* [P 609 C 1]

*** (e) Civil P. C. (1908), Ss. 11 and 100—Question whether requisites for res judicata are proved is one of law and can be raised in second appeal.**

The question whether all the necessary requisites for the application of the rule of res judicata are established by the evidence on the record is purely a question of law and party can be permitted to raise it in second appeal even if it was not raised in the Courts below when it is patent on the facts appearing on the record. [P 609 C 2]

Barkat Ali and *Asad Ullah Khan*—for Appellant.

Muharram Ali Chishti — for Respondent.

Judgment.—Civil Appeals Nos. 547 and 708 of 1930, arise out of two suits the facts in which were similar and it will be convenient to dispose of them together. There is a Mohammadan shrine known as the Dargah of Hazrat Qalandar Sahib at Panipat in the Karnal District. The defendant Pirji Abdul Rashid is the Sajjada Nashin of that shrine. There is a muafi attached to the shrine and the khadims or servitors of the shrine are said to be entitled to certain shares in the income from the maufi. The plaintiffs, claiming to have purchased some of these shares, instituted the present suits for recovery of certain amounts on account of these shares. One of the suits was for recovery of Rs. 1,194, while the other was for recovery of Rs. 346-15-0. The defendant Abdul Rashid raised various pleas but most of them were held to be barred by the rule of res judicata. It is alleged that these very plaintiffs had previously instituted three similar suits—one jointly and two separately—against the defendant on the basis of purchases of the shares of the khadims. These suits had not been defended with the result that ex parte decrees had been passed against the defendant. The Courts below have held that although these previous decrees were ex parte, the pleas which the defendant might and ought to have raised in those suits were not now available to him owing to the provisions of Explanation 4 of S. 11 of the Civil Procedure Code.

In the present suits, the defendant did not admit the alleged sales of the khadims' shares in plaintiffs' favour and secondly pleaded that the sales were invalid in law. The plaintiffs contended that the sales were sanctioned by custom. The defendant in reply denied the existence of the custom and urged further that the custom being opposed to public policy, was invalid. These are the only pleas material for the purposes of these second appeals. The trial Court held that the defendants could not challenge the factum of sales in plaintiffs favour owing to the rule of res judicata, but that the question of the validity of the alienations of khadims' shares was a question of law and could be reopened. It held further that the khadims' rights were inalienable and dismissed the plaintiffs' suits. The plaintiffs appealed from this decision to the Additional District Judge who held the question whether the alienations of khadims are allowed by the custom of a religious institution, being a "mixed question of law and fact" could not be reopened owing to the rule of res judicata, but that the question whether the custom was opposed to public policy was a pure question of law and could be reopened. He found further that the custom relied on by the plaintiffs was, in fact, opposed to public policy. The learned Additional District Judge has also recorded a finding that "there is no sufficient proof on the file of the custom," in case the question of custom is held to be not barred by the rule of res judicata and open to reconsideration in the present cases. He did not discuss the evidence as to custom in detail as he agreed with the trial Court's view and the point was not much pressed before him. In the result, he affirmed the decision of the trial Court and dismissed the appeals. From this decision, the plaintiffs have preferred second appeals.

Two preliminary objections have been raised on behalf of the respondent, viz:—(1) that the appeals are incompetent for want of a certificate on the question of custom under S. 41 of the Punjab Courts Act; and (2) that one of the suits in which the amount claimed was less than Rs. 500, being of a small cause nature, no second appeal is competent in that suit at any rate.

As regards the first point, the learned counsel for the appellant has urged that he is not challenging the lower Courts' findings as regards the existence or validity of custom but is merely contending that it was not open to the Courts below to go into these questions at all owing to the rule of res judicata. There was a number of grounds in the memoranda of the present appeals but the learned counsel for both the appellants made it clear that they intended to rely on one point only, viz., that the lower appellate Court was not right in holding, as it did, that the question whether the custom as to alienability of khadims' rights was opposed to public policy was a pure question of law and was not barred by the rule res judicata. The learned cousel conceded that if it were held that the lower appellate Court had jurisdiction to reopen this question he cannot contest the findings of that Court either as regards the existence or the validity of the custom relied upon by the appellants, owing to want of a certificate under S. 41 of the Punjab Courts Act.

In support of the above argument he cited *Roshan Donee* v. *Wadhawa* (1). In my opinion the argument is sound. The appellants are now challenging the decision of the lower appellate Court solely on the ground that it is "contrary to law" inasmuch as it was not open to that Court to go into the question of custom and in the circumstances no certificate under S. 41 of the Punjab Courts Act appears to be necessary. The second preliminary objection also appears to have no force. The plaintiffs claimed in the present suits certain amounts on account of their shares as khadims, out of the income of a religious shrine and on these allegations their suits would appear to fall under Art. 13 of the first schedule to the Provincial Small Cause Courts Act and would thus be excluded from the cognizance of a Court of Small Causes. The learned counsel for the respondent has relied upon *Shire Gir* v. *Khazan Gir* (2), and *Taz Mahomed* v. *Farid Khan* (3), but these cases appear to be distinguishable as the claims therein were against persons who had improperly realized the plaintiffs' dues. The learned counsel for the appellants has cited *Bhardwaja Mudaliar* v. *Arunachala* (4), *Brijballab Singh* v. *Kartar Singh* (5) and *Azmat Ali Khan* v. *Lalli Begam* (6), which support his contention that the suits are excluded from the cognizance of a Small Cause Court. I overrule this objection also.

Coming to the merits of the appeals the main contention of the learned counsel for the appellants is that the question whether the alleged custom as regards the alienability of khadims' rights was or was not opposed to public policy cannot be treaded as a mere abstract question of law, which can be reopened in these suits, inasmuch as the rights of the plaintiffs had been settled on the basis of the implied decision thereon in the previous suits. In support of this contention a number of authorities were cited. The learned counsel for the appellants particularly relied upon *Tarani Charan* v. *Kedar Nath* (7), a Full Bench decision of the Calcutta High Court and *Bommadevara Venkata* v. *Venkata Ratnam* (8), a Division Bench judgment of the Madras High Court in which the conclusion was based on a review of a number of authorities, including a decision of their Lordships of the Privy Council, reported as *Badar Bi* v. *Habib Merican Noordin* (9). After considering the authorities cited, I am inclined to think there is force in this contention. The main point for consideration is whether the matter now in issue was directly and substantially in issue between the same parties and whether that very matter has been decided in a previous suit between the same parties. If it was, that matter cannot be reopened merely because the reasoning of the Court in the previous suit on a point of law was erroneous. The decision (implied) in the previous suits on the question whether the alleged custom was opposed to public policy cannot. I think, be treated as a decision on a abstract question of law because on the basis of that decision, the rights of the parties were settled and it was decided that the plaintiffs were entitled to base their claims to the khadims' shares on the sales in their favour. It is true that the present claims are for a different period, but that would not be material; for once it is held to be established that the transfers of khadims' shares were valid, the plain-

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1. AIR 1931 Lah 495=134 I C 197=13 Lah 180.
2. AIR 1922 Lah 451=77 I C 561=3 Lah 369.
3. AIR 1926 Lah 276=92 I C 779.
4. AIR 1918 Mad 366=45 I C 414=41 Mad 528.
5. (1872) 41 P R 1872.
6. (1876) 1 P R 1876.
7. AIR 1928 Cal 777=115 I C 593=56 Cal 723 (FB).
8. (1917) 37 I C 857.
9. (1909) A C 615=78 L J C P 161=101 L T 161.

tiffs would be entitled to succeed, provided of course that the other conditions for the applicability of the rule of res judicata are present.

However, I do not consider it necessary to discuss the above point further because it seems to me that the other requisite conditions for the application of the rule of res judicata are not established in the present cases. The learned counsel for the respondent raised two objections in this respect viz. (1) that the previous suits were decided ex parte and there being thus no decision on merits in the previous suits on the points now raised, the rule of res judicata does not apply: (2) secondly, it was urged that it has not been proved that the parties and the causes of actions are the same. The first objection does not seem to have force in view of Explanation 4 to S. 11, of the Civil Procedure Code. It is true that the defendant did not put in an appearance in the previous suits. But it was open to him to do so and it is not suggested that the defences which he has now raised were not available to him then. In these circumstances the mere fact that the previous decisions were ex parte would not be sufficient to exclude these defences from the rule of res judicata as laid down in S. 11 of the Civil Procedure Code. It was so held by the Punjab Chief Court in *Gobind Lal* v. *Baldeo Singh* (10), and this decision has been followed by a learned Judge of this Court in *Mahomed Hussain* v. *Gulam Bi* (11). The second objection appears, however, to be sound. The previous suits were based upon the sales of khadims' shares by certain persons. Fifteen such sales appear to have been relied upon in the previous suits. In the present suit no details of sales have been given and there is nothing on the record to show that the sales on the basis of which the present suits are lodged are identical with those, which formed the basis of the previous suits.

The learned counsel for the appellants argued that this position was not taken in the Courts below. But I find from the written statements filed by the defendant, that he denied any knowledge of the alleged sales in plaintiffs' favour and also disputed their validity. It was incumbent on the plaintiffs in these circumstances to specify and prove those sales by proper evidence. There was in fact a clear issue on the point, viz., No. 3, which was to the effect whether the plaintiffs had purchased the rights of the khadims and if so, when, The burden of proof of this issue was on the plaintiffs but they did not apparently trouble to produce any evidence as regards the sales. Reference was made in the course of arguments only to one sale mentioned by one of the plaintiffs' witnesses, viz., a sale by Nizam Din, but the claims in the previous suits were not based on any sale by Nizam Din. The previous suits were based, as stated already, on 15 different sales. In the present suits we do not know on what sales the suits are really based. The learned counsel for the appellants were unable to point out any such evidence on this record. The Courts below seem to have overlooked this point. It may be that this argument was not advanced in the Courts below, but that would not, I think, debar the defendant from raising it, when there was a clear plea and an issue covering it. The record does not show that the plea was ever given up.

The question whether all the necessary requisites for the application of the rule of res judicata are established by the evidence on the record is purely a question of law and I see no reason why the defendant should not be permitted to raise it now, even if it was not raised in the Courts below when it is patent on the facts appearing on the record. The rule of res judicata is a technical rule and is rather a hard one especially in the circumstances of the present cases as the previous decisions were ex parte. It was, therefore, incumbent on the plaintiff to prove strictly all the necessary conditions for its application before he could take advantage of that rule. I hold that it is not established on the record that the subject-matter of the present suits is identical with those of the previous suits. I dismiss the appeals, but in view of all the circumstances I leave the parties to bear their costs in this Court.

K.S. *Appeal dismissed.*

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10. AIR 1914 Lah 390=24 I C 931=12 P R 1915.

11. (1929) 117 I C 805.

✻ A. I. R. 1933 Lahore 609

ADDISON, J.

Rodhal Mal—Plaintiff—Appellant.

v.

Ramji Das and *others*—Defendants—Respondents.

Second Appeal No. 1294 of 1932, Decided on 25th April 1933, from decree of Dist. Judge, Ambala, D/- 30th May 1932.

*** Registration Act (1908), S. 50—Mortgagee under prior unregistered deed giving notice to later mortgagee at time of registration of his prior deed—Later mortgagee cannot claim priority over former—Transfer of Property Act (1882), S. 59.**

A mortgagee under a registered mortgage-deed cannot claim priority if the mortgagee under a prior unregistered mortgage-deed appears before the Sub-Registrar and gives notice of his prior unregistered document at the time when the later mortgage-deed is presented for registration. And if the later mortgage-deed is executed simply consolidating previous deeds with much interest added and no actual money passes, such a notice given by the prior mortgagee is equally valid, and the rule, that notice acquired after payment of money is immaterial, is not vitiated: 30 *All* 238 and *AIR* 1929 *Lah* 500, *Rel on*. [P 610 C 1, 2]

Harbhajan Das—for Appellant.

Balwant Rai—for Respondents.

Judgment.—Ramji Das obtained from Bachna an unregistered mortgage-deed with respect to one house on 21st March 1929. Later, he sued for sale of the house and obtained the usual mortgage decree for sale on 19th May 1930. Rodhal Mal objected to the sale of the property on the ground that it was one of two houses mortgaged to him by Bachna by a registered deed dated 14th February 1930. His objections were dismissed and the property was sold to Munshi. Rodhal Mal then brought a suit against Ramji Das decree-holder, Munshi, the auction- purchaser and Bachna, judgment-debtor and mortgagor, for a declaration that his mortgage should have priority. His suit was decreed by the trial Court, but the lower appellate Court accepted the appeal and dismissed the plaintiff's suit. Against this decision the plaintiff has preferred this second appeal.

The mortgage-deed relied upon by the plaintiff was written and registered on 14th February 1930. When it was presented for registration, Ramji Das appeared also before the Sub-Registrar and gave notice of his prior unregistered document. According to *Khiali Ram* v. *Himmata* (1), this was sufficient notice. The English rule is that notice acquired after payment of the money is immaterial: see *A. I. R.* 1929 *Lah.* 500. In the present case no money was paid. The plaintiff mortgagee had three prior unregistered mortgage-deeds in his favour, but apparently they were obtained from Bahchna when he was a minor though this has not been finally determined. The mortgage-deed in his favour dated 14th February 1930, only consolidates the first three deeds and adds much interest, no money passing. In these circumstances it seems to me that the plaintiff completed the transaction by registering the document with full notice of the prior unregistered mortgage. In my judgment therefore the suit was properly dismissed and I dismiss the appeal with costs.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 610

SHADI LAL, C. J. AND BROADWAY, J.

Mahil and *another*—Appellants.

v.

Narindar Singh—Respondent.

Letters Patent Appeal No. 59 of 1928, Decided on 13th February 1933.

Punjab Tenancy Act (1887), S. 77 (d)—Suit by tenant in possession to establish right as occupancy tenant against landlords is cognizable by Revenue Court.

Where persons are admittedly tenants in possession, and they seek to establish their right to hold the property as occupancy tenants on the ground of inheritance against their landlords, the suit comes within the ambit of Cl. (d), S. 77, and is consequently cognizable by a Revenue Court. [P 610 C 2]

Shamair Chand—for Appellants.

Mehr Chand Mahajan — for Respondents.

Shadi Lal, C. J.—The dispute in this case relates to the occupancy holding of one Hira, and the question for consideration is whether the suit, which was brought by the plaintiffs claiming to be his reversioners against the proprietors of the land, is cognizable by a Civil Court. Now, the plaintiffs in their plaint, which they presented to the Revenue Court, admitted that they had entered into possession of the land as tenants and they cannot now repudiate that admission and claim to be in possession of the property in some other capacity. They are admittedly tenants in possession, and they seek to establish their right to hold the property as occupancy tenants on the ground of inheritance. Their right is contested by the defendants who are admittedly their landlords.

Upon the facts of the present case, I concur with the Single Judge in holding that the suit comes within the ambit of Cl. (d), S. 77, Punjab Tenancy Act, and is consequently cognizable by a Revenue Court. The appeal is accordingly dismissed with costs.

Broadway, J.—I concur.

R.K. *Appeal dismissed.*

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1. (1908) 33 All 238=1908 A W N 99=5 A L J 607.

A. I. R. 1933 Lahore 611 (1)

JAI LAL AND AGHA HAIDAR, JJ.

Muhammad Din — Plaintiff—Appellant.

v.

Gurbakhsh Singh and *another*—Defendants—Respondents.

Second Appeal No. 2295 of 1926, Decided on 11th April 1933, from decree of Addl. Dist. Judge, Lyallpur, D/- 7th June 1926.

Limitation Act (1908), S. 5—Party should not suffer by laches of Court.

No litigant party can suffer on account of the laches or delay of the Court or its officers. [P 611 C 2]

Badri Das—for Appellant.

Agha Haidar, J.—This second appeal arises out of a suit instituted in the Court of a Subordinate Judge at Lahore, on 3rd May 1923, by the plaintiff, who is an ironmonger of Lahore, against the three minor defendants whose father Kapur Singh, carried on business at Toba Tek Singh in the district of Lyallpur, for the recovery of a sum of Rs. 2,295 being the price of goods supplied by him to Kapur Singh.

On 25th March 1924, the Subordinate Judge, Lahore, held that he had no local jurisdiction to try the suit and therefore ordered the plaint to be returned to the plaintiff for presentation to the proper Court. The plaint was not actually returned to the plaintiff by the office of the Subordinate Judge at Lahore until 10th April 1924. On that date the Courts at Lyallpur happened to be closed on account of an epidemic of plague in that district. The plaint was presented therefore on 22nd April 1924. at Lyallpur, on the re-opening of the Courts. It is admitted that, if allowance is made for the period between 25th March 1924, and 10th April 1924 the plaintiff's suit would be within limitation. The learned Judge of the lower appellate Court was of opinion that the plaintiff was remiss in not trying to obtain the plaint from the office of the Subordinate Judge at Lahore, earlier than 10th April 1924, when it was actually returned to him. In this view the Additional District Judge appears to be in error. No date was fixed by the Subordinate Judge when he passed his order on 25th March 1924, on which the plaintiff should ask the office to hand over the plaint to him, in pursuance of the order returning the plaint under O. 7, R. 10, Civil P. C. Under these circumstances, if the office was dilatory in keeping the plaint in its possession during all this interval between 25th March 1924, and 10th April 1924, the appellant cannot be held responsible. A number of cases were cited by the learned counsel for the appellant, but it is not necessary to discuss them here because the general principle is well understood that no litigant party can suffer on account of the laches or delay of the Court or its office. This being my view, in my judgment, the Courts below were not justified in throwing out the plaintiff's suit as barred by limitation.

I would therefore allow this appeal and, setting aside the decrees of the two Courts below, remand the case, under O. 41, R. 23, Civil P. C., to the trial Court for decision on the merits. As that appeal had been disposed of on a preliminary point and the decision of the Court below has been set aside, the appellant is entitled to a refund of the court-fee paid on his memorandum of appeal in this Court, and I would order accordingly. Costs of these proceedings would abide the result.

Jai Lal, J.—I agree.

K S. *Appeal allowed.*

A. I. R. 1933 Lahore 611 (2)

BHIDE, J.

Milawa Ram — Vendee—Petitioner.

v.

Kesar Das and *another* — Auction-purchasers—Opposite Parties.

Civil Revn. Petn. No. 198 of 1932, Decided on 12th October 1932, from order of Dist. Judge, Mianwali, D/- 10th March 1932.

Provincial Insolvency Act (1920), Ss. 4 and 75—Receiver reporting that some alienations by insolvent were fictitious—Court refusing to consider question under S. 4—Saleable interest of insolvent sold — Purchasers applying to consider question of title—Issues on merits framed—Revision is incompetent as appeal with leave was competent.

During the course of insolvency proceedings the Receiver reported that certain properties had been fictitiously alienated by the insolvent and requested the Court to go into the question under S. 4 and restore possession of the properties to him. The Court did not go into the question, but purporting to act under sub-S. (3), S. 4, ordered that the saleable interests of the insolvent in the properties be sold. The properties were accordingly auctioned. Subsequently the auction-purchasers applied to the Court for the question of title being inquired into and possession restored to them. A preliminary objection that the Court had already decided and that it would not inquire into the matter under S. 4 was overruled and issues on merits were framed:

Held: that no petition for revision was competent as an appeal by leave of the Court was competent under S. 75. [P 612 C 1]

M. L. Batra—for Petitioner.

Nand Lal—for Opposite Parties.

Order. — Civil Revisions Nos. 198, 199 and 268 of 1932, are connected and will be disposed of together. During the course of insolvency proceedings the receiver reported that certain properties had been fictitiously alienated by the insolvent and requested the Court to go into the question under S. 4, Provincial Insolvency Act, 1920, and restore possession of the properties to him. The Court did not go into the question, but purporting to act under sub-S. (3), S. 4 of that Act, ordered that the saleable interests of the insolvent in the properties be sold. The properties were accordingly auctioned. Subsequently the auction-purchasers applied to the Court for the question of title being enquired into and possession restored to them. A preliminary objection was raised that the Court had already decided that it would not enquire into the matter under S. 4. This objection was however overruled and issues on merits were framed. Petitions for revision of this order have been now presented to this Court on behalf of the alienees. Dr. Nand Lal appearing for the auction-purchasers has raised two preliminary objections viz.: (1) that the orders in question were of an interlocutory nature and therefore no petition for revision is competent and (2) that an appeal by leave of the Court was competent under S. 75, Provincial Insolvency Act, and for that reason also the present petitions, for revision cannot be entertained.

As regards the first point, it is perhaps possible to look upon the orders in question as being passed in a case within the meaning of S. 115, Civil P. C., as the question of title raised under S. 4 was an independent matter which the Court had to decide apart from the general insolvency proceedings. Leaving that aside however the second objection appears to me to be sound. The learned counsel for the petitioners had also to concede that an appeal with the leave of Court was permissible under S. 75, Provincial Insolvency Act. He admitted that he had overlooked the point and prayed that the present petitions be treated as appeals. I do not see however any adequate ground for adopting this course. The Insolvency Court had undoubtedly jurisdiction to decide the question of title under S. 4. The only point raised in the petition is, whether the Insolvency Court, having first passed an order under S. 4 (3) that the saleable interests of the insolvent in the properties be sold, could subsequently proceed to decide the question of title. The point is only of a technical nature. and I am unable to see that the petitioners will in any way be prejudiced.

I therefore uphold the second preliminary objection referred to above, and dismiss the petitions for revision. In view of all the circumstances I leave the parties to bear their costs.

R.K. *Petition dismissed.*

A. I. R. 1933 Lahore 612

TEK CHAND, J.

Ismail and *others*—Plaintiffs—Appellants.

v.

Mt. Amiran and *others*—Defendants—Respondents.

Second Appeal No. 253 of 1932, Decided on 20th October 1932, from decree of Dist. Judge, Jhelum, D/- 12th November 1931.

Custom (Punjab)—Will—Kahut of Chakwal Tahsil—Will by sonless proprietor to daughter is recognized.

Under custom prevailing among the Kahuts of Tahsil Chakwal, in the Jhelum District a sonless proprietor is competent to will away his ancestral property to his daughters: *AIR* 1921 *Lah* 221 and *AIR* 1929 *Lah* 639, *Rel on*; *AIR* 1924 *Lah* 452; *AIR* 1929 *Lah* 146 and *AIR* 1925 *Lah* 71, *Dist.* [P 614 C1]

M. L. Sethi and *J. G. Sethi*—for Appellants.

Dev Raj Sawhney—for Respondents.

Judgment.—One Amir Khan, a sonless Kahut of Mauza Janga, Tehsil Chakwal in the Jhelum District, executed a will bequeathing his ancestral land to his daughters, defendants 1 to 3. On his death the daughters took possession of the land in accordance with the will and mutation was duly effected in their names. The plaintiffs, who are the nephews of Amir Khan deceased, have brought this suit for possession, alleging that Amir Khan had no power to bequeath his ancestral land to his daughters in the presence of near agnates, like the plaintiffs. The suit has been dismissed by both the Courts below on the ground that it had been established that under custom prevailing among the Kahuts of Tehsil Chakwal, a sonless proprietor is competent to will away his ancestral property to his daughters. The learned District Judge has however granted a certificate under S. 41 (3), Punjab Courts Act, to enable the plaintiffs to prefer a second appeal to this Court, and both counsel have addressed me at length on the evidence bearing on the point and the previous judicial decisions, of the Chief Court and this Court.

The answer to question 78 of Talbot's Customary Law of the Jhelum District is no doubt against the power to make such a will, and there is an initial presumption in favour of its correctness. This entry was however considered at length by a Division Bench of this Court (Leslie Jones and Wilberforce, JJ.), in *Mahomed Khan* v. *Mt. Kesran* (1) where it was definitely found that among Kahuts of Chakwal a sonless proprietor had the power to make a free disposition of his ancestral land to his daughter in the presence of his brothers or other collaterals. Before me Mr. Madan Lal Sethi contended that *Mahomed Khan* v. *Mt. Kesran* (1) was a case of a gift and not a will as described in the headnote, and in support of this contention he referred me to certain observations of Mr. Jaswant Rai, District Judge, in two cases decided by him on 22nd November 1929, and 1st January 1930, copies of which are on the record (Ex. P-3 and Ex. P-4). In order to verify this fact I sent for the paper-book of the case, reported as *Mahomed Khan* v. *Mt. Kesran* (1) and found that this assumption was erroneous. It is clear that the alienation there in dispute was a will made by a sonless Kahut of Mauza Adharwal in the Chakwal Tehsil in favour of his daughters. It also appears that in that case a very full enquiry on the question of custom was made and the matter discussed at great length by the District Judge (Mr. Prenter) and the Judges of the High Court. The case has therefore a very important bearing on the point before us.

The question again came up for consideration in a recent case reported as *Hadayat* v. *Alaf Din* (2) and Jai Lal, J., concurring with *Mahomed Khan* v. *Mt. Kesran* (1), refused to follow the riwajiam and upheld the power of a sonless Kahut of Jhelum District to will away his ancestral property to near relations between whom and the alienor there existed a special tie. The respondents have produced a copy of the judgment of Diwan Sita Ram, Senior Subordinate Judge, Jhelum, dated 5th March 1927, (Ex. D-2), in which a will of ancestral property in favour of the daughter was upheld as agaist near collaterals. Similar instances of the same custom are found in Exs. D-3 and 4 which are decisions of Sheikh Mohammad Hussain, Subordinate Judge, and Mr. Martineau, Divisional Judge, Rawalpindi, dated 15th December 1928 and 11th October 1913, respectively.

It may also be noted that the riwajiam is not in favour of gifts of ancestral property by Mussalman sonless proprietors in favour of their daughters to the exclusion of near collaterals. But there are numerous judicial decisions in which a custom, upholding such gifts has been found: see *Fazl* v. *Mt. Bhagbari* (3), *Sher Jang* v. *Ghulam Mohiuddin* (4), *Hasan* v. *Jahana* (5) and *Hayat* v. *Mt. Gullan* (6). For the appellants, Mr. Madan Lal has strongly relied on *Mt. Rakhi* v. *Baza* (7) and a Single Bench decision of Coldstream, J., in *A. I. R.* 1929 *Lah.* 146. The former however is a case among Awans and the learned Judges, who decided that case, took particular care to restrict the effect of their judgment to Awans only. Judicial decisions relating to Awans are not uniform and as the parties to this litigation do not belong to that tribe I do not think it necessary to discuss them in detail. *A. I. R.* 1929 *Lah.* 146 is also distinguishable on the ground that the will in that case was in favour of a second cousin and not the daughter, and *Mahomed Khan* v. *Mt. Kesran* (1) was not referred to. If the case is therefore to be confined to a will in favour of a second cousin it is not strictly in point. If however it is to be taken as a judicial pronouncement against the power of a sonless Kahut to gift the ancestral property to his daughter I must respectfully decline to follow it in preference to the well-considered earlier decision in *Mahomed Khan* v. *Mt. Kesran* (1).

The appellants' counsel further referred me to *A. I. R.* 1925 *Lah.* 71, but that was a case in which a Kahut proprietor had gifted ancestral property to his daughters in the presence of his own sons. The case has obviously no bearing on the point before me. The whole question of the power of a sonless Mussalman of Jhelum District to bequeath ancestral property and the effect of the entry in Talbot's riwajiam has been recently considered by Addison, J., in *Mt. Nadran* v. *Mahomed*

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1. AIR 1921 Lah 221=62 I C 841=2 Lah 170.
2. AIR 1929 Lah 689=119 I C 758.
3. (1885) 93 P R 1885.
4. (1904) 22 P R 1904=40 P L R 1904.
5. (1904) 71 P R 1904=96 P L R 1904.
6. AIR 1918 Lah 347=47 I C 931=87 P R 1918.
7. AIR 1924 Lah 452=79 I C 748=5 Lah 84.

Husain (8) who has held that notwithstanding the entries in the riwajiam the power to bequeath exists as much as the power to gift inter vivos. The oral evidence on the record is inconclusive and not based on any well-ascertained instances. The plaintiffs' own witness Lal Khan, (P. W. 1), however admitted that "custom of Wills prevailed at one time," but he stated that it had been "abrogated about five years ago." It is hardly necessary to say that the custom, if it existed formerly could not be validly abrogated merely because the witness was not aware of its exercise for a few years. After careful consideration of the evidence on the record and the arguments addressed to me, I see no reason to dissent from the conclusions of the learned Judges of the Courts below and dismiss this appeal with costs.

R.K. *Appeal dismissed.*

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[8] AIR 1931 Lah 450=132 I C 209.

A. I. R. 1933 Lahore 614

JAI LAL, J.

Mohammad Yaqub—Plaintiff—Appellant.

v.

Mohammad Fazal—Defendant — Respondent.

Second Appeal No. 1705 of 1932, Decided on 29th March 1933, from decree of Dist. Judge, Ambala, D/- 4th August 1932.

Civil P. C. (1908), S. 11—General principles cannot override express provisions of S. 11—Court deciding previous suit not having jurisdiction to try later suit—Decision in former suit does not operate as res judicata.

General principles cannot be invoked to override the express provisions of S. 11. Hence where a subsequent suit is not cognizable by the Court which decided the previous suit, the decision in the former suit does not operate as res judicata : *AIR* 1931 *Lah* 207; *AIR* 1932 *Cal* 271; 29 *Cal* 707; *AIR* 1926 *Lah* 603 and 670; 108 *I C* 623 and *AIR* 1930 *Lah* 501, *Ref.* [P 614 C 2]

Achhru Ram—for Appellant.

M. C. Mahajan—for Respondent.

Judgment. — The dispute in this second appeal is between two brothers, The appellant instituted the suit out of which this second appeal has arisen for recovery of arrears of rent and for a declaration that he was the owner of the house in dispute by virtue of a partition effected between the two brothers on 10th November 1919, and that after the partition he had rented a portion of the house to the defendant, but the latter was denying the factum of the partition and consequently the title of the plaintiff to the house and had also refused to pay the rent. The suit was also for possession of that portion of the house which was alleged to have been rented to the defendant and was admitted to be in his possession. The defendant denied the factum of partition and further contended that the suit was barred by res judicata. It appears that previously the plaintiff had instituted a suit for possession of that portion of the house which was in defendant's possession as a tenant according to the plaintiff's allegation and also for recovery of the balance of rent. That suit was dismissed on the ground that the relationship of landlord and tenant had not been established. The District Judge has held that if it was open to him to find whether or not there had been a partition between the two brothers he would have answered the question in the affirmative, but as in the previous case this matter was put in issue and the plaintiff's suit was dismissed he was precluded by rule of res judicata from deciding the question.

It was conceded before me and it appears to have been conceded in the Courts below that the present suit was not cognizable by the Court which decided the previous suit. The learned District Judge however relying upon *Sahibzadi Begam* v. *Mahomed Umar* (1) has applied the rule of res judicata. In that case it was held that S. 11, Civil P. C., was not exhaustive and that the rule of res judicata may be invoked under general principles of law. This case appears to support the view of the District Judge. *Gokul Mandar* v. *Pudmanund Singh* (2) and *Nathu Mal Manohar Lal* v. *Lachmi Narain Gauri Shankar* (3), a judgment of a Division Bench of this Court, *Husain Sah* v. *Ghulam Nabi* (4), by a Judge in Chambers of this Court, and *A. I. R.* 1930 *Lah.* 501, a judgment of a Division Bench of this Court, however seem to lay down that the general principles cannot be invoked to override the express provisions of S. 11. That section clearly provides that the bar by res judicata would not operate unless the Court which decided the previous suit had jurisdiction to try the later case. *A. I. R.* 1932 *Cal.* 271 and *A. I. R.* 1931 *Lah.* 207, do not appear to materially assist the respondent. In my opinion the present suit was not barred by the rule of res judicata, and, in view

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[1] AIR 1926 Lah 603=96 I C 1002=8 Lah 15.

[2] (1902) 29 Cal 707=29 I A 196 (PC).

[3] AIR 1926 Lah 670=96 I C 910.

[4] (1928) 108 I C 623.

of the finding of the District Judge, I accept this appeal and setting aside the decree of the Courts below grant the plaintiff a decree for possession and declaration prayed for, but dismiss the suit for the recovery of rent or compensation for use and occupation. The parties shall bear their own costs throughout.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 615

BHIDE, J.

Basheshar Dass—Plaintiff—Appellant.

v.

Diwan Chand and *others*—Defendants—Respondents.

Second Appeal No. 751 of 1931, Decided on 10th April 1933, from order of Senior Sub-Judge, Lahore, D/- 21st January 1933.

(a) Civil P. C. (1908), O. 43, R. 1 (u)—No distinction is made between partial and total remand.

No distinction seems to be recognized in O. 43, R. 1 (u), between a partial and a total remand of the case. Hence an appeal is competent from an order remanding a case even though the whole of the remand order is not challenged but only certain findings which have gone against the appellant. [P 616 C 1]

(b) Limitation Act (1908), Art. 120—Article 120 is only residuary article.

Article 120 being a residuary article, will not apply if there is any other provision in the Act applicable to the case. [P 616 C 2]

(c) Limitation Act (1908), Art. 109—Suits for mesne profits wrongfully received by defendant—Limitation runs from date of receipt of such profits.

In a suit for recovery of mesne profits wrongfully received by the defendant, limitation runs from date of receipt of such profit by defendant and not from date of decision as to question of title of the plaintiff: 35 *Cal* 209; *AIR* 1916 *P C* 96; *AIR* 1924 *Cal* 600 and 11 *All* 47, *Dist*; *AIR* 1926 *Cal* 65 and *AIR* 1927 *All* 446, *Ref.* [P 617 C 2]

(d) Interpretations of Statutes—Clear and unambiguous language should be given effect to.

When the language of a statute is clear and unambiguous, it must be given effect to apart from considerations of possible inconvenience or hardship. [P 617 C 2]

(e) Limitation — Question must be determined on language of statute.

The question of limitation should be determined primarily on the language of the statute. [P 617 C 2]

(f) Limitation Act (1908), S. 15—Plaintiff purchasing property at auction sale—Objection by defendant—Plaintiff held entitled only to 1/3 property — Declaratory suit by both and plaintiff held to be entitled to whole property—Plaintiff obtaining possession of property but delivery of possession stayed by stay order obtained by defendant—Such stay does not extend time for suit by plaintiff for recovery of mesne profits wrongfully received by defendant.

Plaintiff purchased certain property at auction sale. Objections were raised by defendant and it was held that plaintiff was entitled only to 1/3 of the property. Both parties filed declaratory suit and the plaintiff was held entitled to the whole property and the defendant's suit was dismissed. Plaintiff obtained possession of the property but delivery of possession was twice stayed by stay order obtained by the defendant. In a suit by plaintiff for mesne profits wrongfully received by the defendant:

Held: that the stay order did not extend the time under S. 15 as there was nothing to prevent the plaintiff from filing the suit for mesne profits even though the question was not decided. [P 617 C 2; P 618 C 1]

(g) Limitation—Extension cannot be allowed on equitable consideration.

Plaintiff cannot be allowed any extension of time to save limitation merely on equitable consideration unless the extension is provided for by the statute: *AIR* 1920 *Mad* 1 (*FB*) and *AIR* 1924 *Lah* 40, *Ref.* [P 618 C 1]

(h) Practice—New plea—New point cannot be raised in second appeal.

A point not taken in the trial Court nor even in the memorandum of appeal in the lower appellate Court cannot be allowed to be taken for the first time at the stage of second appeal. [P 618 C 2]

Shamair Chand and *Rama Nand*—for Appellant.

M. C. Mahajan and *Manohar Lal Sachdev*—for Respondents.

Judgment.—The material facts of the case giving rise to this appeal are briefly as follows: In the course of execution of a decree obtained by Messrs. Mul Chand & Co., against Narpat Rai father of the defendants, Nikka Mal, father of the plaintiff, purchased a house at an auction-sale and the sale was confirmed on 27th May 1917. Objections were raised by the defendants and eventually it was held on 30th August 1918, that Nikka Mal was entitled to get 1/3rd share in the house only. Both parties then filed declaratory suits to establish their rights. These resulted in conflicting decrees, which were set aside by the High Court and the cases were remanded for re-decision. Ultimately on 26th May 1926, the plaintiff was declared the sole owner of the house by virtue of the auction-sale and the suit of the defendants failed. On 8th March 1927 the plaintiff obtained possession of the house. In the course of this litigation the defendants obtained stay of delivery of possession twice, once by the Subordinate Judge on 6th November 1919 and later on during the pendency of appeals in the High Court on 3rd January 1920.

After the plaintiff obtained possession on 8th March 1927, he made an application to the executing Court for recovery of mesne profits from 27th May 1917 to 8th March 1927. This claim was allowed for the period subsequent to 3rd January 1920 and the plaintiff was directed to bring a suit for recovery of mesne profits from 27th May 1917 to 3rd January 1920. As a result of this order the plaintiff instituted the present suit on 8th January 1929 which has given rise to this appeal. It may be mentioned here that the order of the executing Court awarding mesne profits for the period subsequent to 3rd January 1920 was eventually set aside by this Court, on certain grounds which have no bearing on the present appeal. The present suit was for recovery of mesne profits from 27th May 1917 to 3rd January 1920 only. It was dismissed by the trial Court as time barred under Art. 109, Limitation Act, but on appeal the learned Senior Subordinate Judge held that the claim was within time with regard to the 1/3rd portion of the house for the period from 6th November 1919 to 3rd January 1920 and remanded the case for re-decision after assessing the mesne profits for the said period. From this decision the plaintiff has appealed. A preliminary objection is raised that the appeal is not competent, as the plaintiff is not challenging the whole of the remand order, but only certain findings which have gone against him. No authority was cited in support of the contention and in view of the wording of O. 43, R. 1 (u), it does not seem to me to have force. It is conceded that an appeal would have been competent if the learned Senior Subordinate Judge had himself passed a decree instead of remanding the case. No distinction seems to be recognized in O. 43, R. 1 (u) between a partial and a total remand of the case. I overrule the preliminary objection.

On merits, the main point for determination is the article of the Limitation Act, applicable to the case. The learned Senior Subordinate Judge's findings in this respect are not very clear, but he appears to have held that the plaintiff was entitled to recover mesne profits for the period from 6th November 1919 to 3rd January 1920, because delivery of possession during this period was stayed by the Court, and that Art. 120 applied to the case as the profits for this period were realized "not under a claim of title which was subsequently discovered as untenable, but on account of the injunction of the Court." The learned counsel for the appellant's contention is that the whole of the claim was within time under Art. 120, Limitation Act, as the cause of action arose only after the final decision as to the question of the title of the plaintiff in 1926 and delivery of possession to him in pursuance thereof. The learned counsel for the respondents on the other hand contended that Art. 109 clearly applied and as time began to run from the date when the profits were received, the whole claim for the period from 27th May 1917 to 3rd January 1920 was time-barred. The respondents had not filed any appeal or cross-objection against the order of the learned Senior Subordinate Judge as they did not think it worthwhile to do so in view of the small period for which mesne profits were decreed. But according to the contention of the learned counsel the trial Court's decision dismissing the suit was perfectly correct. The learned counsel for the appellant disputed the appelicability of Art. 109, but further urged that even according to that article time would begin to run only when the mesne profits were received and that the defendants had not shown that the profits were received more than three years before the suit.

As regards the choice between Arts. 109 and 120, Limitation Act, it is perfectly clear that the latter article being a residuary one, will not apply, if there is any other provision in the Act applicable to the case. Art. 109 governs suits for "profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendants," and seems to be clearly applicable to the circumstances of the present suit. The learned counsel for the respondent contended that it would be inequitable to hold that the cause of action accrues in such a case when the question of title is finally decided between the parties. He relied chiefly on *Lakhan Chandra Sen* v. *Madhu Sudhan Sen* (1) the decision on the question of limitation which was upheld by their Lordships of the Privy Council in *Nrityamoni Dassi* v. *Lakhan Chandra* (2), and certain observations of the learned Judges of the Calcutta High Court in *Dwijendra Narain* v. *Jogesh Chandra* (3) and of their Lordships of the Privy Council in *Bassu Kuar* v. *Dhum Singh*

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1. (1908) 35 Cal 209=7 C L J 59=12 C W N 326.
2. AIR 1916 P C 96=33 I C 452=36 I C 299=43 Cal 660 (PC).
3. AIR 1924 Cal 600=79 I C 520.

(4). The first of these cases was one in which the plaintiffs' cause of action was once satisfied by a decree, which was subsequently held to be erroneous and was set aside. It was held that limitation was suspended during the period when the plaintiffs owing to satisfaction of their cause of action, were not in a position to sue at all. No such situation ever arose in the present case. The facts in *Bassu Kuar* v. *Dhum Singh* (4) also were very different. There an arrangement had been arrived at between the parties and some land was sold in lieu of a book-debt. That sale however was found to be unenforceable and it was held that when it was so declared a new state of things arose and a new obligation was imposed upon the debtor and that the suit for recovery of the debt was within time either under Art. 97, Limitation Act, or by virtue of S. 65, Contract Act.

The observations of their Lordships in this case must be read with reference to its facts and their ultimate decision and do not help the appellant. The third case, viz., *Dwijendra Narain* v. *Jogesh Chandra* (3) was one for recovery of possession of land together with mesne profits, and there are no doubt certain observations in it with respect to the starting point of the period of limitation which go to some extent in favour of the contention of the learned counsel for the appellant. But it must be pointed out that the circumstances of that case also are distinguishable inasmuch as the plaintiffs in that case could not have sued for possession or mesne profits until the question of the registration of certain documents in which their title was based was first decided. In the present case there was no such initial difficulty. The plaintiffs, who were out of possession, could have at once sued for possession and mesne profits upto the date of the suit and also for further profits upto the date of the decree (cf. O. 20, R. 12, Civil P. C.). But for some reason or other this course was not adopted.

The rulings relied upon by the learned counsel for the appellant have been considered in *Sarat Kamini Dasi* v. *Nagendra Nath* (5), in which the case-law on the subject was reviewed and discussed at length by Mukerji, J. It was pointed out in that ruling that under Art. 109, Limitation Act, the starting point of limitation is the time when the profits were received and the observations in *Dwijendra Narain* v. *Jogesh Chandra* (3) with regard to the time of the accrual of the cause of action are therefore not really relevant for the purpose of determining the starting point of limitation under that article. The rulings relied upon by the learned counsel for the appellant have also been discussed by the Allahabad High Court in *Ramcharan Sahu* v. *Mata Prasad* (6), at p. 571 (of 49 *All.*), which was also a suit for recovery of mesne profits, etc., and in which a similar view was taken. The question of limitation must be determined primarily on the language of the statute and the language of Art. 109 in the present instance is perfectly clear and unambiguous. It is a well-recognized principle of interpretation of statutes that when the language is clear and unambiguous it must be given effect to, apart from considerations of possible inconvenience or hardship. It seems therefore clear that limitation must be held to have commenced to run when the mesne profits were received by the respondents.

It was next urged on behalf of the appellant that: (i) the learned Senior Subordinate Judge has given no finding as to when the mesne profits were received and; (ii) that even if the period of limitation began to run when the mesne profits were received, the running of that period was subsequently suspended when execution was stayed first by the order of the Subordinate Judge on 6th November 1919 and later on by the High Court on 3rd January 1920. As regards the latter point the stay order merely related to the delivery of possession and was no bar to the institution of a suit for mesne profits. The cause of action for recovery of those profits was accruing every time these profits were received by the defendants and the only way the plaintiff could keep the claim within limitation was apparently by instituting suits for recovery of the profits within three years of the receipt of the same by the defendants. It is true that the question of title itself was being litigated, but as pointed out already, the plaintiff could have claimed possession and mesne profits also in the previous suit and as he did not do so, the only other course open to him was, I think, to institute separate suits for mesne profits within limitation. These suits would have been probably stayed pending decision of the question of title. This course, though

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4. (1889) 11 All 47=15 I A 211=5 Sar 260 (PC).
5. AIR 1926 Cal 65=89 I C 1000.
6. AIR 1927 All 446=102 I C 96=49 All 565.

inconvenient, was in the circumstances necessary to save limitation. The mere stay of delivery of possession cannot therefore serve to extend time under S. 15, Limitation Act. Lastly, with reference to S. 14 of the Act, it was urged that the plaintiff was pursuing bona fide another remedy by applying to the executing Court to award mesne profits under S. 144/65, Civil P. C., but the period so spent should be deducted. But that application was not made till 23rd July 1927 and long before that date the plaintiff's claim for recovery of mesne profits for the period now in dispute (27th May 1917 to 3rd January 1920) had become barred. It is not suggested that plaintiff is entitled to exemption under any other section. It is well-established that plaintiff cannot be allowed any extension of time to save limitation merely on equitable consideration unless the extension is provided for by the statute: cf. *Muthukorakkai Chetty* v. *Madarammal* (7) and *Hukam Chand* v. *Shahabdin* (8).

In the end, I shall deal with the learned counsel's contention that the learned Subordinate Judge has recorded no finding as to when the mesne profits were received and that the present suit would be within time even under Art. 109 provided the profits were received within three years before the institution of the suit. As to this point it would be sufficient to say that this contention which involves questions of fact does not appear to have been ever raised in the Courts below. The present suit was for recovery of mesne profits for the period 27th May 1917 to 3rd January 1920, and it seems to have been assumed all along that the profits were received during or about that period. It was apparently never suggested that the profits for this period or any portion thereof were received long afterwards within three years before this suit, i. e., between about 1926 and 1929. The trial Court dismissed the suit as barred by time under Art. 109, Limitation Act. But even in the memorandum of appeal presented to the Senior Subordinate Judge no such ground appears to have been put forward. Both the Courts below seem to have decided the case on the assumption that the profits were received during or about the period to which they relate and in the circumstances I see no adequate ground for allowing this point to be raised at this stage.

On the above findings I dismiss the appeal, but in view of all the circumstances I leave the parties to bear their costs in this Court.

K.S. *Appeal dismissed.*

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* A. I. R. 1933 Lahore 618

BHIDE, J.

Ram Niwas Poddar—Plaintiff—Appellant.

v.

Diwan Chand Parma Nand and *others*—Defendants—Respondents.

Misc. First Appeal No. 2091 of 1929, Decided on 4th April 1933, from order of Senior Sub-Judge, Lyallpur, D/- 12th June 1929.

(a) Contract Act (1872), S. 253—Death of one partner—Onus of proving that partnership has not dissolved is on party asserting it.

According to S. 253, partnership is dissolved on the death of a partner in the absence of a contract to the contrary. Hence the burden of proving the existence of such a contract to show that the partnership is not dissolved is on the party who asserts it. [P 619 C 2]

***(b) Contract Act (1872), S. 251—Suit instituted in name of firm — One partner alone has no power to compromise—Civil P. C. (1908), O. 23, R. 3.**

A compromise stands on a footing similar to arbitration, but should be distinguished from a discharge granted in the ordinary course of business. Hence although one of the partners in a firm can give a valid discharge, he cannot compromise a suit instituted in the name of the firm unless all the partners assent to it even if there is no fraud or conclusion in the compromise: *Crown* v. *Lewis*, 36 *W R* 480; *AIR* 1924 *Sind* 41; *AIR* 1925 *Sind* 63; 6 *I C* 63; *AIR* 1932 *Bom* 516 and *AIR* 1932 *Lah* 291, *Ref.* [P 620 C1]

Mehr Chand and *Hem Raj Mahajan*—for Appellant.

Badri Das, *S. L. Puri*, *Jiwan Lal Kapur* and *Kidar Nath* — for Respondents.

Judgment.—Civil Appeals Nos. 2091 and 2092 of 1929 are connected appeals arising out of two suits arising out of business dealing between two firms, viz., Messrs. Kesho Ram Poddar of Karachi and Messrs. Diwan Chand-Parma Nand of Lyallpur. It appears that the latter firm acted as commission agents of the former firm for some-time in the years 1919-20. On the 6th May 1920, the latter firm sued the former for recovery of Rs. 1160-11-3. About a year later, i.e. on the 18th April 1931, the former firm instituted a suit for accounts against the latter. Both the suits were being tried together. A preliminary decree was passed in the

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7. AIR 1920 Mad 1=54 I C 66=43 Mad 185 (FB).
8. AIR 1924 Lah 40=71 I C 495=4 Lah 90.

suit for accounts on 13th May 1922, from which an appeal was preferred to this Court. This appeal was accepted by this Court on 13th February 1926, and the case was remanded with certain directions. A preliminary decree was once more passed and accounts were being examined through a local commissioner when a petition was presented on 21st September 1928, stating that both the suits had been compromised and praying that in accordance with the terms of that compromise, the suits be dismissed. In support of the alleged compromise a receipt Exhibit D/X dated 13th September 1928, signed by Kesho Ram Poddar a partner of the firm Messrs. Kesho Ram Poddar was produced. This petition was opposed by Ram Niwas, who was conducting the suit on behalf of Messrs. Kesho Ram Poddar and who alleged that the compromise was obtained by fraud and collusion and that in any case Kesho Ram, who was alleged to have compromised the suits out of Court had no power to do so according to law, without the concurrence of the other partners of the firm, including Ram Niwas himself who claimed to be a partner. It was further alleged that the firm had been dissolved and hence one partner alone had no authority to act on behalf of others. The defendants denied that Ram Niwas was a partner at all and contended that he had no locus standi to dispute the validity of the compromise. They further pleaded that even if he was a partner, the compromise with Kesho Ram was valid and binding on him. The pleadings of the parties gave rise to the following issues:

(1) Are there any reasons why the receipt exhibited as D/X dated 13th September 1928, signed by Kesho Ram Poddar, a partner of the plaintiff-firm (Kisho Ram Poddar) be not accepted and this case and the connected case dissmissed? (2) Whether the plaintiff-firm was dissolved and whether the said receipt was passed by Kesho Ram after the dissolution? If so, how shall it affect the case?

Evidence of the parties was recorded, but the learned Subordinate Judge found it difficult to come to a conclusion on the question whether Ram Niwas was a partner of the firm and directed Ram Niwas to produce the account books of the firm. Ram Niwas produced only two books subsequent to the year 1921, and stated that the prior books were not in his possession. The learned Subordinate Judge, however, was of opinion that the prior books were in his possession and had been intentionally withheld by him. He therefore drew a presumption against Ram Niwas in this respect and rejecting his objections, dismissed both the suits on the basis of the alleged compromise. From this decision the present appeals have been preferred.

There are three main points which call for decision in these appeals, viz. (1) Whether Ram Niwas was a partner in the firm Kesho Ram Poddar. (2) Whether that firm was dissolved before the alleged compromise; and (3) Whether, in any event, the compromise effected by Kesho Ram is binding on all the partners of the firm, whether it has been dissolved or not.

As regards the first point, the learned Subordinate Judge has shown that the oral evidence is unsatisfactory. (After discussing the evidence, his Lordship came to the conclusion that Ram Niwas has failed to prove that he is a partner in the firm Kesho Ram Poddar. and proceeded.) On the above finding it is unnecessary to give a decision on the other two points; for if Ram Niwas is not a partner he has obviously no locus standi to object to the compromise by Kesho Ram, who was admittedly a partner in the firm. But I may briefly deal with these points also. As regards the question whether the firm has been dissolved, Kesho Ram has himself admitted that one Gobind Prasad was a partner in the firm and there is evidence on the record to show that this partner died about 1922. According to S. 253 of the Indian Contract Act, a partnership is dissolved by the death of a partner in the absence of any contract to the contrary. The latter provision being in the nature of an exception, the burden of proof, would, I think, be on the respondents to prove the existence of such a contract. No evidence of such contract having been adduced by the respondents it must, therefore, be held that the firm has become dissolved according to law, owing to the death of Gobind Prasad.

As regards the last point, the learned counsel for the respondents mainly relied on the proposition of law that in the absence of fraud or collusion one partner of a firm is competent to give a valid discharge in respect of a debt to the partnership (cf. *Diwan Chand Parma Nand* v. *Ramdas Uttamchand* (1).) It was further urged that the dissolution of the firm would not

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1. AIR 1931 Lah 186=186 I C 260=12 Lah 270.

make any difference in this respect in view of the provisions of S. 263 of the Indian Contract Act. It was contended that if a partner could give a valid discharge there was no reason why he should not be able to compromise a suit as well. In support of this contention reliance was placed on *A. I. R.* 1924 *Sind* 41 and *A. I. R.* 1925 *Sind* 63. The learned counsel for the appellant on the other hand relied chiefly on certain authorities like *Mahomed Akbar* v. *Dwarka Nath* (2), *A. I. R.* 1932 *Bom.* 516, *A. I. R.* 1932 *Lah.* 291, in which it has been held that a partner has no power to refer a dispute to arbitration without the concurrence of the other partners. He contended that the power to compromise stands on a similar footing and that it should be distinguished from the power to grant a discharge in the ordinary course of business. He also referred to Lindley on Partnership (9th edition) at p. 195 and Halsbury's Laws of England, Vol. 22 at p. 28, where the law on the point is thus summed up:

> "In the absence of fraud one partner may release a cause of action in which he and his partners are plaintiffs, but he must have express authority to consent to judgment, or to submit to arbitration or to compromise an action."

In my opinion the contention of the learned counsel that a compromise stands on a footing similar to arbitration and that it should be distinghished from a discharge granted in the ordinary course of business is sound. The power of a partner to grant a discharge is derived from S. 251 of the Indian Contract Act; but a compromise which involves "give and take" and re-adjustment of the claim cannot, I think, be said to fall properly within the scope of S. 251. The learned Senior Subordinate Judge has held that there was no fraud or collusion but this, by itself, would not, I think, be sufficient to render the compromise binding on all the partners. Although the suit was instituted in the name of a firm for the the sake of convenience all the partners are in reality plaintiffs and if the suit is to be adjusted by a lawful compromise according to the provisions of O. 23, R. 3, Civil Procedure Code, the agreement must, I think, be assented to by all the parties concerned. In this aspect of the question, if Ram Niwas were a partner, the compromise by Kesho Ram would, in my opinion, not be binding on him. The only authorities in point, which the learned counsel for the respondents has been able to cite are *A. I. R.* 1924, *Sind* 41 and *A. I. R.* 1925 *Sind* 63. In these cases stress appears to have been laid on the fact that the compromise therein was made by the managing partner. In the present instance, Kesho Ram who has been at Calcutta for some years was evidently not a managing partner. Moreover it appears that in *A. I. R.* 1925 *Sind* 63, there was a difference of opinion between the learned Judges of the Bench and the matter had been referred to a third Judge. The latter seems to have decided the point chiefly on the basis of a quotation from Lindley on Partnership, but that quotation seems to deal with cases in which a "release" was granted by one of the plaintiffs and it is not clear whether there was any "adjustment" or "compromise" of the suit in the sense of O. 23, R. 3, Civil Procedure Code. According to the English Law as summarized in Halsbury's laws of England (Vol. 22 at p. 28), it would appear that one partner alone has no power to compromise an action. This view seems to be based on *Crown* v. *Lewis* (3).

However, as I have held that Ram Niwas has not been proved to be a partner in the firm, these appeals must fail. I accordingly dismiss them with costs.

K.S. *Appeals dismissed.*

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2. (1910) 6 I C 63.

3. (1888) 36 W R 480.

A. I. R. 1933 Lahore 620

TEK CHAND, J.

Bodhe Shah—Appellant.

v.

Sarmukh Singh—Respondent.

Misc. First Appeal No. 1320 of 1932, Decided on 30th March 1933, from order of Dist. Judge, Gujranwala, D/- 16th July 1932.

Provincial Insolvency Act (1920), S. 54—Voluntary payment to near relation without demand three days before application for adjudication — Held transaction not being in good faith showed fraudulent preference over other creditors and should be annulled.

A debtor who was unable to pay his debts, voluntarily gave over to a near relation of his who was one of the creditors, practically the only movable assets he had, viz., a promissory note duly assigned and some piecegoods. There was no allegation or proof that the latter had made any demand on the debtor or that any pressure had been applied by him on the date of the transaction:

Held: that the transaction was not entered into in good faith, that the dominant intention of the debtor was to give to his relation fraudulent preference over other creditors and that the transaction should be annulled under S. 54. [P 621 C 1, 2

Shamair Chand—for Appellant.

Fakir Chand—for Respondent.

Judgment.—Two brothers Munshi Lal and Chuni Lal, carried on business at Gujranwala. On 2nd July 1928 one of their creditors, named Ladha Ram, applied that Munshi Lal and Chuni Lal be adjudicated insolvent. The application was granted and the adjudication order was passed on 16th November 1928. Three days before the finding of the application, i. e., on 30th June 1928, the debtors had assigned to Bodhe Shah who is a maternal cousin of theirs, a promissory note for Rs. 1,767-3-6 and given him piece goods worth Rs. 230 in liquidation of a debt alleged to be due by the debtors to Bodhe Shah. The Official Receiver has applied under S. 54, Provincial Insolvency Act, for the annulment of the transaction on the ground that the debtors had given fraudulent preference to Bodhe Shah. The learned District Judge has granted the application and annulled the transaction. Bodhe Shah appeals.

It has been found by the learned District Judge that on the date of the transaction the debtors were unable to pay their debts. This finding has not been challenged by counsel for the appellant, as indeed it could not be, in view of the fact that an application for their adjudication as insolvents was made only three days later. It is also established that payment to the appellant was made voluntarily. There is no allegation, much less proof, that Bodhe Shah had made any demands on the debtors or that pressure of any kind had been applied by him, or anyone else on his behalf, on or about the date of the assignment of the promissory note and the delivery of the piece goods to him. There is no reason why the debtors should have paid him in preference to Ladha Ram (P. W. 1), Kanshi Ram, (P. W. 2), Mangal Singh, (P. W. 3), and other creditors some of whom were executing their decrees against him at the time, while others were making pressing demands by means of telegrams and letters. It also appears from the evidence that the promissory note for Rs. 1,767-3-6, and the piece goods in question were practically the only valuable moveable assets of the insolvents, as the appellant was able to sell the promissory note for Rs. 1,400 shortly after the assignment.

It is clear from these facts that the transaction was not entered into in good faith and that the dominant intention of the debtors was to give to the appellant fraudulent preference over the other creditors. As stated already, Bodhe Shah is a cousin of the insolvents and it cannot be pretended that he was ignorant of the real state of their affairs. In my opinion the Official Receiver has fully discharged the onus which lay on him and the learned District Judge was right in annulling the transaction under S. 54, Provincial Insolvency Act. The appeal is without force and is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 621

BHIDE, J.

Board of Trustees of Ayurvedic and *Unani Tibbi College* and *another*—Appellants.

v.

Ahmad Nabi and *others*—Respondents.

Misc. First Appeal No. 342 of 1933, Decided on 10th April 1933, from order of First Class, Addl. Sub-Judge, Delhi, D/- 24th February 1933.

Civil P. C. (1908), O. 39, R. 1—Conditions for granting of temporary injunction pendente lite stated.

A temporary injunction pendente lite will not be granted unless the plaintiffs have a good prima facie case and unless there is a risk of irreparable injury being caused if the injunction is not granted. [P 623 C 1]

A suit was brought on behalf of minors. It was found that the minors had no strong prima facie case and that it was a collusive one. Further it was found that the defendants were maintaining proper and accurate accounts:

Held: that under such circumstances plaintiffs were not entitled to a temporary interim injunction as the plaintiffs could have been compensated for loss of income even if they succeeded in the suit. [P 623 C 2]

Kishan Dayal and *S. K. Ahmad*—for Appellants.

Manohar Lal, *Nawal Kishore* and *Abdul Aziz*—for Respondents.

Judgment.—Civil Appeals Nos. 342 and 528 of 1933 are connected appeals arising out of an order by Sheikh Laiq Ali, Additional Subordinate Judge, First Class, granting a temporary injunction. The facts relevant for the purposes of these appels are briefly these: Hakim Ajmal Khan, a renowned physician of Delhi, died in the year 1927. During his lifetime he was conducting a dispensary known as "Hindustani Dawakhana" which fetched considerable income. This income is said to have been utilised for the purpose of the Ayurvedic Unani Tibbi College, Delhi, founded by him which was under the management of a Board of Trustees.

According to the rules of the trust a member of the family of Hakim Ajmal Khan was to be the Secretary of the Board and in accordance therewith Muhammad Jamil Khan, son of Hakim Ajmal Khan, was appointed secretary after the death of Hakim Ajmal Khan. He continued to be the secretary till 1931, when he resigned owing to certain differences and then started a dispensary known as Dawakhana Hakim Ajmal Khan. The Board of Trustees objected to this as their Hindustani Dawakhana was associated with the name of Hakim Ajmal Khan and was popularly known as "Dawakhana Ajmal Khan," or by other designations to the same effect. The Board of Trustees had therefore to sue Muhammad Jamil Khan to restrain him from using the name of Hakim Ajmal Khan in connexion with his dispensary. Muhammad Jamil Khan also brought a cross-suit. These suits were referred to the arbitration of Dr. Ansari who gave an award to the effect that Muhammad Jamil Khan should not use the name of his father Hakim Ajmal Khan in connexion with his dispensary provided the Board of Trustees paid him a sum of Rs. 20,000 within three months.

A decree was passed in accordance with the award on 12th February 1932 by Sheikh Abdul Rahman Khan, Subordinate Judge, First Class, Delhi, and the Board paid Muhammad Jamil Khan a sum of Rs. 20,000, according to the terms of the award. Subsequently, another dispensary called Dawakhana Hakim Ajmal Khan was started on behalf of Muhammad Nabi and Ahmad Nabi, two minor sons of Muhammad Jamil Khan, and P. Safdar Ali, who was acting as a Mukhtariam of Muhammad Jamil Khan in the previous litigation, became its manager. This having been objected to by the Board of Trustees a suit was instituted against them on 13th June 1932 on behalf of the minors praying that the defendants be restrained from preventing the plaintiffs from using the name of Hakim Ajmal Khan in connexion with this new dispensary and for certain other reliefs. This suit was instituted in the Court of Sheikh Laiq Ali, Additional Subordinate Judge, First Class, Delhi. The Board of Trustees brought a counter-suit against the minors praying for similar reliefs in their favour, which was sent to the Court of Sheikh Abdul Rahman, Subordinate Judge, First Class. The subject-matter of both these suits was practically the same and it is difficult to understand why the Board of Trustees thought it necessary to institute this suit. It is equally difficult to understand why these suits were sent to two different Courts and why no attempt was made to get one of the suits stayed or transferred to the other Court. The result was that the suits proceeded in the two Courts and conflicting orders were passed. On 5th July 1932 the Board succeeded in obtaining a temporary injunction from the Court of Sheikh Abdul Rahman restraining the defendants (minor sons of Muhammad Jamil Khan and Safdar Ali) from using the name of Hakim Ajmal Khan in connexion with the new dispensary. In the suit instituted on behalf of the minors a similar application then had been made and Sheikh Laiq Ali granted them a similar injunction against the Board of Trustees and on 24th February 1933, directed that the Board should not receive post-cards, letters, money-orders, etc., addressed to Dawakhana Hakim Ajmal Khan. The Post Office was also instructed accordingly. The minors had also prayed for the Board being proceeded against for "contempt of Court" in obtaining an injunction from the Court of Sheikh Abdul Rahman while their application was pending in the Court of Sheikh Laiq Ali. This prayer was however rejected.

The Board of Trustees have now appealed from the temporary injunction dated 24th February 1933, granted against them by Sheikh Laiq Ali, while a cross-appeal has been filed on behalf of the minors in respect of their prayer for action being taken against the Board for contempt of Court which was rejected by the same learned Judge. It may be mentioned here that no appeal was filed against the temporary injunction granted by Sheikh Abdul Rahman in favour of the Board and that injunction still stands. A preliminary objection was raised in the appeal filed by the Board of Trustees that the appeal was not properly instituted as it was not instituted by the joint secretary as required by the rules of the Trust. There seems to be no force in this contention in view of the fact that the minors themselves had sued the Board through the secretary in the Court below and the latter was conducting the litigation on their behalf. It appears further that the rules provide that the secretary may act in the absence of the joint secretary and that he may also be specially authorized by the Board. In view of these facts I overrule this objection.

As regards merits, it is a well-established rule that a temporary injunction pendente lite will not be granted unless the plaintiffs have a good prima facie case and unless there is risk of irreparable injury being caused if the injunction is not granted. It seems to my mind perfectly clear that neither of these conditions can be said to have been satisfied in this case. The minors' suit is based on the allegation that the use of the trade-name "Dawakhana of Hakim Ajmal Khan" was gifted in their favour by the widow and two daughters Hakim Ajmal Khan. It is not alleged that these ladies were carrying on Hakim Ajmal Khan's dispensary in that name, and it is not clear how they were in a position to make any such gift at all. It is also not disputed that the "Hindustani Dawakhana," which has been in existence for many years is popularly known as "Dawakhana Hakim Ajmal Khan" or by similar appellations containing his name and that letters, parcels, etc., so addressed used to be delivered to the Manager Hindustani Dawakhana. The minors' dispensary was only recently started. All that is claimed on behalf of the minors is that the Board has not acquired any legal right to the use of the particular name "Dawakhana Hakim Ajmal Khan." The learned counsel for the Board of Trustees has urged that in view of these facts, the minor plaintiffs have really no cause of action at all to maintain this suit and has referred to *A. I. R.* 1931 *P. C.* 15 and *Gurkha Association, Simla* v. *Mahomed Umar* (1). It is unnecessary for me to express any opinion on the latter point at this stage; but I feel no hesitation in saying that in view of the facts mentioned above, it does not certainly appear that the minors have any strong prima facie case. Not only this, but the suit appears prima facie collusive. I have already mentioned that there was a similar dispute between Mohammad Jamil Khan and the Board which was settled by arbitration and in accordance with the award given therein, Mohammad Jamil Khan gave up his claim on receiving Rs. 20,000. Now, a similar claim has been set up on behalf of his minor sons and prima facie there are good grounds to suspect that the suit is really instituted in the interests of Mohammad Jamil Khan himself.

Secondly, there is no risk of any irreparable injury being caused. The Board of Trustees is a registered body with good income from their dispensary and the accounts are properly kept. Even if the suit of the minors succeeds they can be easily compensated for the loss of income during the intervening period. In view of the above circumstances the temporary injunction granted by the learned Subordinate Judge seems to be clearly unsustainable. The appeal filed on behalf of the minors as regards the question of contempt of Court has obviously no force and was not pressed. I accordingly accept Civil Appeal No. 342 of 1933 with costs and set aside the temporary injunction granted by Sheikh Laiq Ali. The instructions issued to the Post Office in pursuance thereof are also cancelled. The cross-appeal (Civil Appeal No. 528 of 1933) is dismissed with costs. It seems unfortunate that these two suits should have been allowed to go on in two different Courts. I understand that Sheikh Laiq Ali has been now transferred from Delhi. Sheikh Abdul Rahman has been already dealing with this litigation and it seems desirable that the case which was pending in the Court of Sheikh Laiq Ali (Suit No. 14 of 1933) should be transferred to him. The learned counsel for the minor sons of Mohammad Jamil Khan requested that the case may be transferred to some other Court, but I am unable to find any good ground for believing that Sheikh Abdul Rahman will not deal with the cases in a fair and impartial manner. Under S. 24, Civil P. C., I therefore direct that Suit No. 14 of 1933 be transferred to the Court of Sheikh Abdul Rahman for disposal.

K.S. *Order accordingly.*

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1. AIR 1919 Lah 193=51 I C 905.

A. I. R. 1933 Lahore 623

ABDUL QADIR AND MONROE, JJ.

Asa Ram and *others* — Convicts — Appellants.

v.

Emperor — Opposite Party.

Criminal Appeal No. 1157 of 1932, Decided on 14th February 1933, from order of Addl. Sess. Judge, Ferozepore, D/- 5th September 1932.

(a) Evidence Act (1872), S. 133—Uncorroborated evidence of co-accused and motive and suspicion are not enough for conviction for murder.

An accused cannot be convicted merely on the retracted confession of a co-accused person, in spite of there being the evidence of motive against him, and in spite of the fact that one feels morally certain that he had something to do with the murder alleged against him. [P 625 C 2]

(b) Penal Code (1860), S. 302 — Wanton murder by person hired or desiring to please instigator—No grudge against deceased—No-

direct evidence against instigator—Extreme penalty cannot be avoided.

The fact that an assassin had no personal grudge against the deceased and was either a hired murderer or one who was ready to kill another to please his master or landlord, is no ground for showing any leniency or any justification for avoiding the capital sentence, in a case where the murder was wanton and cold-blooded. The reason that the instigator could not be convicted on any direct evidence is also no reason for mitigating the sentence of the murderer. [P 625 C 2; P626 C1]

J. G. Sethi—for Appellants.

D. R. Sawhney—for the Crown.

Abdul Qadir, J.—The three appellants, Asa Ram, Kalu and Haria, have been convicted of offences under S. 120-B/302, Penal Code, and S. 302, Penal Code, for a conspiracy to murder Shivji and for having caused his death in consequence of that conspiracy. They have all been sentenced to transportation for life and have appealed against their convictions and sentences. There is, on the other hand, a petition for revision on behalf of the Crown for an enhancement of their sentences, urging that on the findings of the learned Additional Sessions Judge, the capital sentence ought to have been awarded against all the three accused persons.

The presecution story briefly is that there was an intimacy between Mt. Dhapali alias Dhapan, wife of Shivji and Asa Ram, and therefore the latter was anxious to get Shivji out of the way. He arranged with Kalu and Haria to help him and one day about the end of February 1932, Shivji was killed as a result of this conspiracy and his body was removed from the place where he was killed near a foot-path between the village Panjkosi and Saidwala, when he was coming from Panjkosi, from the house of Jiwan Kumbar. As Shivji did not return to Saidwala in the evening, his relatives were looking about for him, but for several days they could not know what had happened to him. On 5th March 1932, Jaimal lambardar was informed by a tenant of his named Chuni, (P. W. 8), that he had found a human dead body in an advanced state of decomposition, from which bad smell was coming, in a field near the boundary walls of the two villages mentioned above. Jaimal and Chuni thereupon took two chaukidars with them and leaving them near the dead body they went to the police to make a report. The Sub-Inspector on his arrival at the spot sent for the people of the neighbouring villages to see if they could identify the body, but none of those who came, including some of the people from Saidwala, did so, because it was not identifiable. The body was then sent for post mortem examination with the result that it was discovered that the deceased person had died of a fracture of the skull. When the clothes of the deceased, which were a safa, a black coat, a shirt and a dhoti, were brought back with the pair of shoes, which were on the feet of the deceased, by Mohan Singh constable, some persons came forward to identify the clothes as those belonging to Shivji. Among those was Jiwan with whom Shivji had been working for two days before this occurrence and whose house he had left that very evening when he mysteriously disappeared. He identified the clothes as those which he had seen the deceased wearing when he left him. Ganpat also identified the clothes Exs. P-1 to P-4, Jiwan and Ganpat did not prefess to identify the shoes. Babu, a shoe-maker of the village, (P. W. 7), says that the shoes were made by him for Shivji.

As the story of the intimacy between Asa Ram and Mt. Dhapali was known to the relatives of the deceased and other people in the village, suspicion fell on Asa Ram and his tenant Kalu and Haria. Two other persons Mula and Khiraj were also suspected as being concerned in this crime, but the investigating police officer got them discharged. Kalu and Haria were arrested on the 9th March and pointed out to the police spots where the deceased had been killed and where his body had been subsequently thrown and another place where some blood-stained earth, scraped from the scene of murder, was thrown in a field of wheat and gram. They were placed before Lala Diwan Chand, Magistrate on 12th March 1932, to have their confessions recorded. Kalu made a confession, which is marked Ex. P-J, and which has been proved by the Magistrate who recorded it. He stated therein that he and Haria had killed him. No mention was made of Asa Ram in this confession. The statement of Haria to the same Magistrate on the same day, marked Ex. P-Q, admitted that he was with Kalu, when the latter killed Shivji by striking a lathi on his head, but he added that he was asked also to strike Shivji with a lathi and refused to do so. He also added that he and Kalu carried Shivji, who had expired at the spot, to a wheat field where he was thrown. He remained there when Kalu took the blood-stained earth and threw it in a field at a distance of nearly 500 karams from the place of murder. After making his confession Kalu showed the spots already mentioned to the Magistrate and so did Haria independently of Kalu. Asa Ram was not in the village when the other two were arrested; but even when he was arrested he did not admit any connexion with this crime nor did he point out any place.

So far as Kalu is concerned, he made a supplementary confessional statement saying that after this offence he had been told by Asa Ram that if the body of Shivji came to be identified and if the police questioned Kalu, he should not name Asa Ram in connexion with this offence, but should take the whole responsibility on himself and Haria. Another confession attributed to Kalu is that he took into his confidence a man named Narinjan Singh, with whom he was in the judicial lock up for some time, and told him all about this affair including the complicity of Asa Ram. Narinjan Singh, (P. W. 23), has been produced as a witness and proves the confession orally made to him by Kalu.

As to the existence of the intimacy between Asa Ram and Mt. Dhapali, there is the testimony of Rura, (P. W. 18), brother of Shivji, as well as of Rama, (P. W. 22). Ganpat, (P. W. 10) and Gowardhan, (P. W. 11), also mention this intimacy. Asa Ram however denies it, but the opinion expressed by the assessors at the trial was that the intimacy was proved and the learned Additional Sessions Judge has agreed with that opinion. In my judgment also the evidence on the record proves that the story of connexion between Asa Ram and the wife of the deceased is true. Thus Asa Ram had certainly a motive to commit this offence, but the question to be determined, so far as he is concerned, is whether, apart from the motive, there exists any evidence against him which can be acted upon. So far as I can see, there is nothing against him except the supplementary confession of Kalu and the oral confession made by Kalu to Narinjan Singh. These confessions have been retracted by Kalu at the trial. He states that he confessed before the Magistrate as he was tortured by the police and also because he was made to drink something and he did not know what he said under the influence of that drink. With regard to the confession which he made to Narinjan Singh, he began by saying that a policeman named Khushi Mohammad had tortured him; but then said that Narinjan Singh suggested to him that he should make the statement, which Khushi Mohammad required him to make in order to save himself from further beating. I am afraid Asa Ram cannot be convicted on the retracted confession of a co-accused person, in spite of there being the evidence of motive against him, and in spite of the fact that one feels morally certain that he had something to do with the death of Shivji. (His Lordship then considered the facts and concluded that Kalu was guilty under S. 302 and Haria under S. 201 and proceeded). The last question to be considered is what would be the appropriate sentence for Kalu under S. 302, Penal Code. The judgment of the learned Sessions Judge contains the following concluding remarks to justify the order of transportation for life against all the three convicts.

> "The result is that I find all the three accused guilty of conspiracy to murder Shivji and convict them under S. 120-B read with S. 302, I. P. C. and Kalu and Haria guilty of actual murder, and convict them also under S. 202, I. P. C. There can be no doubt with regard to the heinous nature of the offence. The motive was wicked and the act in itself cold-blooded. Under ordinary circumstances all the three accused would well deserve the extreme penalty of law. But considering that the evidence against the chief culprit is partly circumstantial and partly the statement of his accomplices, the sentence should not be that of death. And when this is the case with him it would not be fair to hang the other two, who allowed themselves to be used as blind instruments in the execution of his nefarious designs. I therefore sentence them all to transportation for life."

It was urged on behalf of the Crown that the reasons for not giving the capital sentence in the above passage are not sound. It was conceded by Mr. J. G. Sethi at the very outset that the penalty of transportation for life could not be justified on the reasons given by the learned Sessions Judge. He urged however that as the Court below considered Asa Ram to be the principal offender and it was obvious that the part taken by Kalu in committing the murder was due to the latter's influence or instigation and that Kalu had really no personal motive to kill Shivji, therefore the extreme penalty of the law should not be executed in his case. I do not think these reasons can help the appellant any better than those given by the learned Judge. The fact that he had no personal grudge against the deceased and was either a hired murderer or one who was ready to kill another to please his master or landlord, is no ground for showing any leniency to such a murderer. I do not see any justification for avoiding the capital sentence in the case of Kalu. I have no doubt that the learned Sessions Judge was mistaken in the view he took of the proper punishment for the offence of any one proved guilty in a case of cold-blooded and wanton murder like the one before us. I would therefore dismiss the appeal of Kalu and accepting the petition of revision filed by the Crown for the enhancement of his sentence, would order him to be hanged by the neck until he be dead. I would accept the appeal of Haria to the extent indicated above and reject the petition of the Crown for enhancement of his sentence.

I would reluctantly accept the appeal of Asa Ram, for the reasons given above and order that he be acquitted and set at liberty. I would reject the petition of the Crown for enhancement of his sentence. The charge under S. 120-B, Penal Code, has not been brought home against any of the appellants and their convictions under that head are set aside.

Monroe, J.—I agree.

M.N. *Order accordingly.*

A.I. R. 1933 Lahore 626

BHIDE, J.

Mt. Gian Devi—Appellant.

v.

Mt. Sham Devi and *others* — Respondents.

Misc. First Appeal No. 1853 of 1932, Decided on 17th March 1933, from order of Addl. Dist. Judge, Lahore, D/- 19th November 1932.

Lunacy Act (1912), Ss. 63 and 80—"Curator" means public curator appointed under Succession (Property Protection) Act.

The word "curator" is used in the Lunacy Act in the sense of a public curator appointed under the Succession (Property Protection) Act. Hence a person who has not been appointed curator in the above sense can be removed from guardian of the lunatic under S. 80, Lunacy Act. [P 627 C 1]

Mehr Chand Mahajan and *Harnam Singh*—for Appellant.

Mukand Lal Puri—for Respondents.

Judgment.—This is an appeal from the order of the Additional District Judge, removing the appellant, Mt Gian Devi, from the guardianship of her mother Mt. Bal Kaur, who is a lunatic, and appointing Lala Amar Nath Anand, pleader, in her place as guardian of the person and property of Mt. Bal Kaur. It appears that Mt. Gian Devi had been appointed guardian of Mt. Bal Kaur by the Additional District Judge by order dated 8th May 1929. On 9th January 1932, an application was presented by Mt. Sham Devi, sister of Mt. Gian Devi, alleging that Mt. Gian Devi was leading an immoral life and was not taking proper care of her mother, Mt. Bal Kaur, and that some other suitable guardian be appointed in her place. A similar application was put in by another relation named, Jugal Kishore. Both the applications were consolidated and were heard together. Mt. Gian Devi denied the allegations made against her. Both parties produced evidence which has been discussed in detail by the learned Additional District Judge in his order. He came to the conclusion that the allegations against Mt. Gian Devi were well-founded and that she was not fit to remain as guardian of her mother in the circumstances. The evidence produced by the petitioners seems to be of a reliable character and the witnesses include a number of respectable gentlemen from the Mohalla, for instance, Ghanshyam Das, Deputy Superintendent, Public Works Department, Secretariat, Punjab, (P. W. 1), Rikhi Kesh, Clerk, Legislative Council, (P. W. 2), Diwan Chand, Head Clerk Agent's Office, Lahore, and Manak Chand, Clerk, Commissioner's Office, etc. These witnesses do not appear to have any motive for giving false evidence against the appellant. The only criticism which the learned counsel for the appellant had to make on their evidence was that their evidence is vague and that they have no given details of the disreputable persons who are said to be visiting Mt. Gian Devi.

But I do not think there is much force in this contention. Although the witnesses may not be personally acquainted with the disreputable persons, I do not think the truth of their allegation that Mt. Gian Devi is leading an immoral life and is visited by men of bad reputation can be reasonably doubted. Mt. Gian Devi made an attempt to show that she had been married, but the attempt has failed hopelessly. The person who is said to have performed the marriage ceremony, admitted that he was keeping a marriage register, but this marriage was not entered in that register. It is said to have been entered in another register in the custody of a different person, but that register was not produced. The alleged husband of Mt. Gian Devi also did not venture to appear in the witness-box. The witnesses produced by the appellant were mostly Mahomedans who were not connected with the parties and were not expected to have any knowledge of their affairs. In view of these facts I see no reason to dissent from the findings of fact arrived at by the learned Additional District Judge.

The learned counsel for the appellant next contended that Mt. Gian Devi was a "curator" and could not therefore be removed under S. 80, Lunacy Act. This contention however is not sound. It is true that the word "curator" was used in the order of the District Judge, dated 8th May 1929, but this appears to have been done through inadvertence. It appears from S. 63, Lunacy Act, that the word "curator" has been used in the Act in the sense of a "public curator, appointed under the Succession (Property Protection) Act, 1841." It is not disputed that Mt. Gian Devi was never appointed "curator" in this sense and consequently there was no bar to her removal under S. 80 of the Act. The next point urged was that there was no evidence to show that Mt. Gian Devi was wasting the property of the lunatic and there was therefore no objection to her continuing as guardian of the property under the Act. The learned Additional District Judge has however pointed out that Mt. Gian Devi had not submitted any accounts since her appointemnt. In view of the fact that she has been leading an immoral life and has not taken proper care of her mother, there is reason to suspect that she has been misappropriating the income from the property. I am therefore of opinion that there was sufficient justification for her removal from the guardianship of the property as well. I dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 627

ABDUL QADIR, J.

Sheru and *others*—Defendants—Appellants.

v.

Sham Singh and *another* — Plaintiff and Defendants—Respondents.

Second Appeal No. 2101 of 1931, Decided on 13th April 1932, from decree of Dist. Judge, Ludhiana, D/- 2nd October 1931.

Limitation Act (1908), Arts. 142 and 144 Suit for possession— Plaint alleging recent forcible dispossession by defendant—Article applicable is Art. 142 and not Art. 144 — Plaintiff must prove forcible dispossession within 12 years of suit.

Where the plaintiff suing for possession of land definitely alleges in the plaint that he had recently been forcibly dispossessed by the defendant, the article applicable is Art. 142 and the burden of proving forcible dispossession within 12 years of suit lies on the plaintiff: *AIR* 1928 *Lah* 32 and 704, *Rel on.* [P 628 C 1]

Jhanda Singh—for Appellants.

Gobind Ram Khanna— for Respondents.

Judgment.—In the suit which has given rise to this second appeal the plaintiff sued the defendants for possession of 2 biswas and 4 biswansis of land, alleging that it belonged to him, but the defendants had forcibly included it in their adjoining field, about three years before suit, and have been in unlawful possession of it since that time. The defendants denied the plaintiff's allegations and said that they had been in possession for a long time either as owners or by adverse possession for more than twelve years. The trial Court framed the following issues: (1) Whether the defendants have included the land in suit belonging to the plaintiff into their own field by means of encroachment and when ? (2) Whether the plaintiff has been in possession of the land in question within twelve years of the suit ? (3) Whether the defendants have been in possession of the land in question adversely for a period exceeding twelve years ? (4) To what relief is the plaintiff entitled ?

The Court based its decision on issue 1 on the report of a Naib Tahsildar, appointed as commissioner, to make measurements on the spot in the presence of the parties, who reported that 1 biswa and 12 biswansis appeared to have been encroached upon, though it could not be said when. On issue 2 the findings of the trial Court was that the defendants appeared to have been in adverse possession of the land in dispute for about eighteen years. The Court decided issue 2 against the plaintiff and issue 3 in favour of the defendants, and dismissed the plaintiff's claim with costs. On appeal by the plaintiff the learned District Judge set aside the order of the Court below and granted the plaintiff a decree for possession of 1 biswa and 12 biswansis of land, according to the report of the Naib Tahsildar, with costs throughout. He was of opinion that the suit was based on title, which vested prima facie in the plaintiff according to the entries in the revenue records, and that, under the circumstances, it was not necessary for the plaintiff to prove his possession for more than twelve years. He held that the article applicable to the suit was Art. 144, Limitation Act, and not Art. 142. Against the decree of the lower appellate Court the defendants have preferred a second appeal, through Sardar Jhanda Singh, whom I have heard. I have also heard Mr. Gobind Ram Khanna for the respondent and am of opinion that this appeal must succeed.

The main contention of the appellants is that the plaintiff clearly alleged recent forcible dispossession and adduced evidence to prove it. According to the findings of both the Courts below that evidence was unreliable and it was held by both the Courts that the story of recent dispossession was untrue. It is urged that, in these circumstances, Art. 142, Limitation Act, is applicable and it was for the plaintiff to prove his possession for twelve years, which he has failed to do. Mr. G. R. Khanna says that the plaintiff did not mean to allege definitely, in his plaint, that he had been dispossessed about three years before suit. All that he meant was that he had come to know, through a report made by the Naib Tahsildar, that some land of his had been encroached upon. He was really not sure when it was encroached upon. He claimed on the basis of title and ought to succeed on that basis. I have looked at the plaint and, in my opinion, the words used by the plaintiff definitely allege recent dispossession and the construction which his learned counsel wants to place on them cannot be accepted as correct. Counsel for the appellants refers to *A. I. R.* 1928 *Lah*. 32. where it is held that:

> " in a case for possession where it is alleged that defendants had taken forcible possession of the land in dispute two years before the institution of the suit and it was expressly stated in the plaint that the defendants had no right whatsoever to dispossess the plaintiffs, the burden of proving possession by the plaintiffs, within 12 years of the institution of the suit was on them."

Another case in which a similar rule was laid down is referred to by the appellants, *A. I. R.* 1928 *Lah*. 704, which lays down that it is not for the defendant to prove his adverse possession for more than twelve years and the plaintiff must establish his previous possession and dispossession by the defendant. I think the authorities cited by the appellants are applicable to the facts of of this case and the suit of the plaintiff must fail. Counsel for the appellants argued certain other points before me. He urged, inter alia, that even if there was any onus on the defendants to establish adverse possession, they had succeeded in discharging it by proving the plaintiff's own admission in an application filed by him in certain criminal proceedings between the parties to the effect that the defendants had been in forcible possession of the land in dispute for about eighteen years. It is not necessary, however to go into this point in view of my decision on the main point in the case. I accept this appeal and dismiss the suit of the plaintiff with costs throughout.

R.K. *Appeal accepted.*

A. I. R. 1933 Lahore 628

BHIDE, J.

Fazal Din—Appellant.

v.

Thakar Singh and *others*—Respondents.

Misc. Second Appeal No. 1036 of 1932, Decided on 31st January 1933, from order of Dist. Judge, Gujranwala, D/- 28th April 1932.

Provincial Insolvency Act (1920), S. 4—Insolvent's holding held saleable and sold—Revenue Court subsequently holding sale to be invalid at landlord's instance—Purchaser applying for refund of purchase money—Question of title triable under S. 4 held not involved and no appeal lay.

An occupancy holding belonged to the insolvent. The insolvency Court decided that it was saleable and the holding was accordingly sold to *F*. The sale was subsequently held to be invalid by a Revenue Court at the instance of the landlords. The purchaser applied for refund of purchase money:

Held: that the only point for consideration was whether the purchaser was entitled to a refund of the purchase money. He was not challenging the correctness of the decision of the Revenue Court, but was basing his claim purely on grounds of equity. No question of title triable under S. 4 was involved in these circumstances. [P 629 C 1]

Muhammad Amin—for Appellant.

Ram Lal Anand—for Respondents.

Judgment.—This is an appeal arising out of insolvency proceedings. Certain land belonging to the insolvent Thakar Singh was sold. The insolvent claimed that he had occupancy rights under S. 6, Tenancy Act, in this land, but the learned District Judge after inquiry found that the occupancy rights were under S. 5 only and were therefore liable to be sold. The land was accordingly sold for Rs. 1,500 to one Fazal Din and the amount was recovered by the Receiver. The landlords subsequently instituted a suit against Fazal Din for possession of the land on the ground that the occupancy rights were under S. 6 and could not be sold: vide S. 56, Punjab Tenancy Act. The suit succeeded and Fazal Din was then deprived of the land. Fazal Din then made an application to the Insolvency Court for refund of the sum of Rs. 1,500 which had been recovered from him as the price of the land and was lying with the Receiver. The learned District Judge however held that Fazal Din himself was to blame in not contesting the suit of the landlords and in not making the Receiver a party to that suit. He was of opinion that as the Receiver was not a party to the suit by the landlords, he was not bound by the decree passed by the Revenue Court and the money was therefore not liable to be refunded. The learned District Judge accordingly dismissed the petition of Fazal Din for refund of the sum of Rs. 1,500 and from this decision the present appeal has been preferred.

The order under appeal was passed by the Senior Subordinate Judge, Gujrat, in the exercise of his insolvency jurisdiction and was confirmed by the District Judge on appeal. The first point for consideration in the circumstances is whether an appeal lies. The learned counsel for the appellant has urged that a question of title triable under S. 4, Provincial Insolvency Act, 1920, is involved and hence an appeal is competent under S. 75 of the Act. I do not think this argument has any force. There is no doubt that the occupancy holding belonged to the insolvent Thakar Singh. The Insolvency Court decided that it was saleable and the holding was accordingly sold to Fazal Din. The sale was subsequently held to be invalid by a Revenue Court at the instance of the landlords and the only point for consideration is whether the appellant is entitled to a refund of the purchase money. The appellant is not challenging the correctness of the decision of the Revenue Court. He is basing his claim purely on grounds of equity. I am unable to see that any question of title triable under S. 4 of the Act is involved in these circumstances.

It was next requested that the appeal may be treated as a petition for revision. It is urged that the order of the Courts below is contrary to law, as Fazal Din being deprived of the land, is entitled in equity to get back his money. But it appears that Fazal Din is himself to blame for the situation in which he is now placed. The learned counsel who appeared for Fazal Din had to admit that there was nothing on the record to show that the occupancy rights were under S. 6 at all. The Insolvency Court carefully considered the evidence (including the entries in the revenue record) and came to the conclusion that the occupancy rights were not under S. 6 (vide order dated 15th June 1925 of the District Judge, when the case was at first before him as Insolvency Judge). The suit in the Revenue Court was not contested by Fazal Din, and the point seems to have been lost sight of by the Revenue Court. It appears from Fazal Din's statement that he filed an appeal, but compromised the case with the landlords. The learned counsel for Fazal Din was unable to say why he adopted this course, when the order of the Insolvency Court was in his favour and there was (apparently) no evidence to the contrary. There is therefore reason to think that Fazal Din has not acted bona fide in the matter. By virtue of the sale of the occupancy rights, the creditors are now entitled to get the money and I do not see any good reason why they should suffer for Fazal Din's negligence.

I hold that no appeal is competent and that there is also no adequate ground for interference in revision. But in view of all the circumstances, I leave the parties to bear their costs in this Court.

R.K. *Order accordingly.*

A. I. R. 1933 Lahore 629

BHIDE, J.

Kanshi Ram and *others*—Creditors—Appellants.

v.

Jugal Kishore and *another*—Judgment-debtors—Respondents.

Misc. First Appeal No. 1272 of 1932, Decided on 19th April 1933, from order of Dist. Judge, Attock, D/- 9th May 1932.

Provincial Insolvency Act (1920), S. 24—Petition by debtor for adjudication on ground of inability to pay debts—Creditor should be allowed to produce evidence to show that debts are fictitious.

Where a debtor files a petition for adjudication on the ground of inability to pay debts, though it is not necessary to hold an elaborate enquiry as to debtor's inability to pay his debts, the creditor should not be refused to let in evidence to show that several of the debts are fictitious. He is entitled to show that the debtor is in a position to discharge his liabilities and that he has no right to present the petition. [P 630 C 1]

Hem Raj Mahajan for *Gobind Ram Khanna*—for Appellants.

Shamair Chand—for Respondents.

Judgment.—In this case, which relates to an insolvency petition by a debtor, the learned District Judge has accepted the statement of the debtor as sufficient proof of his inability to pay his debts and has adjudged him insolvent. The creditors opposed the peti-

S. N. DAR, B.A.LL.B.,
Vakil High Court,

tion alleging that several of the debts were fictititous and that the debtor was in a position to pay his debts. The learned District Judge however did not allow the creditors to produce any evidence in support of their allegations. He further found that even if the debts alleged to be fictitious be excluded there was still a balance of Rs. 2,698 due from the petitioner and this was in excess of his assets which were valued at Rs. 2,536 only.

It is urged on behalf of the creditors who have preferred the present appeal that the learned District Judge was not right in refusing to take the evidence of the creditors before adjudication; and secondly, that in any case his judgment is based on an erroneous assumption that the petitioner's debts exceeded his assets. As regards the latter point, my attention was drawn to the fact that a sum of over Rs. 500 was due to the petitioner and this was not taken into account by the learned District Judge. The learned counsel for the respondents conceded the correctness of this contention. It is true that it is not necessary to hold an elaborate inquiry as to the debtor's inability to pay his debts before an order of adjudication, but the learned District Judge was not, in my opinion, justified in refusing to examine any of the witnesses for the creditors in support of their allegation that several of the debts were fictitious. According to the provisions of S. 24, Provincial Insolvency Act, the creditors were entitled to produce evidence to show that the debtor was in a position to discharge his liabilities and had therefore no right to present the petition and such evidence should have been, in my opinion, allowed to be produced.

I accordingly accept the appeal and setting aside the order of the learned District Judge remand the case to him for re-decision after taking down the evidence of the creditors. Costs will follow final decision.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 630

ADDISON, J.

Committee of Management of Gurdwara Teja Kalan—Appellant.

v.

Dhian Das and *another*—Respondents.

First Appeal No. 1644 of 1932, Decided on 24th April 1933, from order of Dist. Judge, Gurdaspur, D/- 31st August 1932.

Punjab Sikh Gurudwaras, Act (1925) Ss. 12 (10) and 25—Decree for compensation obtained from tribunal—Mahant should apply to Collector under S. 25 and not ask District Court to execute decree.

Where a decree by the tribunal orders money by way of compensation to be paid to the Mahant, the Mahant should apply to the Collector under S. 25 and should not ask the District Court to execute the decree under S. 12 (10), as the District Judge has no jurisdiction to proceed with the execution. [P 631 C 1]

Achhru Ram for *Bhagat Singh*—for Appellant.

Jagan Nath Aggarwal—for Respondents.

Judgment.—Mahant Dhian Das obtained from the Sikh Gurdwaras Tribunal a decree for compensation under the provisions of S. 11, Sikh Gurdwaras Act, 1925. He took this decree to the Court of the District Judge and asked him to execute it in accordance with the provisions of S. 12 (10) of the Act, which runs as follows:

> "Save as otherwise provided in this Act, a decree or order of a tribunal shall be executed or otherwise given effect to by the District Court of the district in which the gurdwaras in connection with which the decree or order was passed is situated, or by the District Court to which the tribunal directs that any decree or order shall be sent for this purpose, as if the decree or order had been a decree or order passed by such Court."

It was objected that the decree could not be executed by the District Judge by virtue of S. 25 of the same Act. The District Judge repelled this objection without giving any reasons and against his decision this appeal has been preferred to this Court. S. 25 runs as follows:

> "Every sum ordered by a tribunal to be paid out of the income of a gurdwara by way of compensation shall be deposited in the treasury of the tahsil in which the gurdwara is situated, and shall be paid to the persons or persons entitled to it under such order or under the provisions of S. 24 in such manner as may be prescribed, and if it is not so deposited shall be recoverable out of the property or income of such gurdwara by the Collector as if it were an arrear of land revenue."

There is no question that the money in question was ordered by the tribunal to be paid by way of compensation to the Mahant. It follows that, under the provisions of S. 25 the money in question should be deposited in the treasury of the Tahsil in which the Gurdwara is situated and that if it is not so deposited it should be recovered out of the income of such Gurdwara by the Collector as if it were an arrear of land revenue. The opening words of S. 12 (10) are: "Save as otherwise provided in this Act." S. 25 provides for the execution of orders of the Tribunal about compensation. S. 12 (10) therefore does not apply. It is for the Mahant to apply to the Collector under S. 25 and not to ask the District Court to execute the decree or order under the provisions of S. 12 (10). I accordingly accept the appeal, set aside the order of the District Judge on the ground that the District Judge had no jurisdiction to proceed with the execution and direct the Mahant to apply to the Collector for action to be taken under S. 25 of the Act. I make no order as to costs of the proceedings in the civil Courts.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 631

SHADI LAL, C. J. AND BROADWAY, J.

Dina Nath and *others*—Creditors—Appellants.

v.

Ghulam Akbar and *another*—Respondents.

Letters Patent Appeal No. 10 of 1928, Decided on 6th May 1932, against order of Zafar Ali, J., D/- 5th December 1927.

Provincial Insolvency Act (1920), S. 53—Sale by debtor being mere device to withdraw whole of his immovable property from claims of his creditors and reserve it for himself and his family—Court can annul it.

In determining the question of good faith with respect to a transaction it is necessary that the facts should be considered in relation to each other and weighed as a whole, and it is a mistake to take each fact which militates against the bona fides of the transfer, separated from the rest of the facts and to proceed to demonstrate that it is quite consistent with good faith. The fact that the vendor and the purchaser are connected with each other would not per se sustain an inference of collusion but it gives rise to suspicion. Where the circumstances of the case when taken together point to the conclusion that the sale is a mere device resorted by the debtor to withdraw the whole of his immovable property from the claims of his creditors and to reserve it for himself and his family, the Court is justified in annulling the sale at the instance of the receiver in bankruptcy: *AIR* 1919 *P.C.*6, *Rel on.* [P. 632 C 2]

M. L. Puri—for Appellants.

Mohammad Amin—for Respondents.

Shadi Lal, C. J.—On 1st August 1924, Feroze Din executed, in favour of Sheikh Ghulam Akbar, a deed by which he sold to the latter two houses at Batala and one house at Lahore for a lump sum of Rs. 12,000. On 16th June 1925, he made an application for insolvency, and this application was allowed and an order of adjudication passed on 26th October 1925. The Receiver of the insolvent's estate then applied to the Court to annul the sale, and the District Judge, Mr. Skemp, after making an exhaustive inquiry into the matter, came to the conclusion

> "that the sale to Sheikh Ghulam Akbar was not a reality but was a sham intended to save the property for the creditors. I hold that Sheikh Ghulam Akbar had full knowledge of the circumstances and that he participated in this fraudulent intention."

The learned Judge accordingly annulled the sale, but his judgment has been reversed by a Judge of this Court. From the judgment of the Single Bench the Receiver has preferred the present appeal under Cl. 10, Letters Patent, and the question debated before us is whether the transfer is or is not voidable as against the Receiver. Now, it is enacted by the S. 53, Provincial Insolvency Act, 5 of 1920, that:

> "Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be voidable as against the Receiver and may be annulled by the Court."

The order of adjudication was undoubtedly made within two years after the date of the transfer, and the only question is whether the transfer was, or was not, made in good faith and for valuable consideration. Now, the first circumstance, to which our attention has been invited, is that the insolvent transferred the entire immovable property which he owned at the date of the transfer and that he was financially embarrassed at this time. Moreover, it is common ground that the vendee's son is married to the insolvent's daughter, and it is urged that the transfer was not a genuine transaction, but that it was made in order to save the property from the creditors. The fact that the vendor and the purchaser are connected with each other would not per se sustain an inference of collusion, but it does give rise to suspicion. It is a matter of common knowledge that a hard-pressed debtor, anxious to save for himself something out of the wreck, naturally turns to his relatives and friends to lend him their names in his predicament. The learned advocate for the vendee relies mainly upon the fact that of the price for the sale, Rs. 8,000 were paid by his client before the Sub-Registrar, and the balance, namely, Rs. 4,000 was due to him on a promissory note executed in his favour by the insolvent on 1st February 1924. It is however argued on behalf of the Receiver that, if two persons connected with each other desire to enter into a colourable transaction in order to defraud the creditors, it is not difficult to produce before the Sub-Registrar money which is nominally meant for the transferor, but ultimately goes back to its original source. In the present case there is no doubt that the usual endorsement as to payment was made by the Sub-Registrar, but all the other circumstances show that there was no real payment of the price to the vendor. It is significant that, though the vendor, who was carrying on business and had dealings with several persons, was expected to keep accounts, he has not produced any account books showing the receipt of Rs. 8,000. Nor has he explained how he disposed of this large sum, if he actually received it from the transferee. Even the latter has produced no accounts showing the payment of the money by him or the source from which he had received it. He has relied on the usual explanation that he had got the money from his house for which he did not keep any account.

These observations relating to the alleged payment of Rs. 8,000 apply with greater force to the recital in the deed that Rs. 4,000 were due to the vendee on a promissory note executed in his favour by the vendor six months before the date of the sale. It is to be observed that, though the property sold consisted of two houses at Batala and one house at Lahore, there is no specification in the deed of the separate value of each house. The learned District Judge points out that there was apparently "no distinction in the mind of the parties as to the separate value of each house" because the vendee when examined by him stated: "I valued the Lahore house at Rs. 4,000 or Rs. 5,000 and the two Batala houses at Rupees 7,000 or Rs. 8,000." In a genuine transaction for such a large sum of money one would ordinarily expect the vendee to make an accurate valuation of each lot of the property to be purchased by him in order to settle the price to be paid by him for the bargain.

The learned District Judge is also justified in holding that the property was sold for a price less than its real value. It is admitted that the vendor himself had purchased the house at Lahore for Rs. 6,000 in December 1920, and in January 1924, he had valued it as Rs. 8,000 in his application to a Bank for a loan of Rs. 2,000. There may be some exaggeration in this valuation, but the market price of the property could not be less than Rs. 6,000 at the time of the transfer in question. As to the two houses at Batala we find that the vendor valued them at Rs. 14,000 in May 1918, and at Rs. 25,000 in January 1924. Here again, there may be some exaggeration, but it appears that the value of these two houses was about twice the market value of the Lahore house. The combined value of the three houses would therefore be about Rs. 18,000 which is 50 per cent more than the price mentioned in the deed.

Indeed, the vendor himself admitted in his statement before the District Judge, on 5th October 1925, that the three houses would have fetched Rupees 15,000 or Rs. 16,000. The material on the record may be insufficient for determining the exact market value of the property, but there can be little doubt that the price alleged to have been paid by the vendee was much less than its real value. It is significant that while the alienee claims to be the purchaser of the houses, he has not got title-deeds with respect to them. The title-deed of the house at Lahore was produced in Court by the insolvent himself, and the title-deed of one of the Batala houses is said to be with a Bank. The vendee, who resides at Batala, explains that he purchased the house at Lahore for the residence of his sons who were receiving education there. It is however strange that the house was never used for the purpose contemplated by him, because it is admitted that it was occupied by one Bashir, who is a relative of the insolvent's wife. It was in favour of this Bashir that the vendee executed a mortgage with possession of the house for Rs. 5,000, at the end of 1925 or the beginning of 1926.

As observed by their Lordships of the Privy Council in *Seth Ghunsham Das* v. *Umapershad* (1), in determining the question of good faith with respect to a transaction of this character it is necessary that the facts should be considered in relation to each other and weighed as a whole, and it is a mistake to take each fact, which militates against the bona fides of the transfer, separated from the rest of the facts, and to proceed to demonstrate that it was quite consistent with good faith. The circumstances of this case when taken together point to the conclusion that the sale was a mere device resorted to by the debtor to withdraw the whole of his immovable property from

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1. A I R 1919 P C 6=50 I C 264=15N L R 68 (P C).

the claims of his creditors and to reserve it for himself and his family. The learned District Judge was therefore justified in annulling the transaction at the instance of the Receiver in bankruptcy. The appeal preferred by the Receiver is accordingly allowed and the judgment of the District Judge is restored with costs throughout.

Broadway, J.—I agree.

P.N./R.K *Appeal allowed.*

A. I. R. 1933 Lahore 633

BHIDE, J.

Mt. Niamati Bai—Plaintiff—Appellant.

v.

Thakar Daulat Ram and *another*—Defendants—Respondents.

Second Appeal No. 1823 of 1932, Decided on 26th April 1933, from decree of Dist. Judge, Multan, D/- 15th June 1932.

Court-fees Act (1870), S. 7 (4) (f)—Account suit referred to referee with consent of parties—Decree in accordance with report—Objections to report dismissed—Appeal from such order—Appellant should value relief on excess claimed and pay ad valorem court-fee thereon.

In an account suit, two persons were appointed as referees with consent of parties for the purpose of going into the accounts. A decree was passed in accordance with the report disallowing the objection raised by the plaintiff. An appeal was preferred by plaintiff to the District Judge on a court-fee stamp of Rs. 10:

Held: that the proper course for the plaintiff was to value the relief claimed by him and pay ad valorem court-fee thereon.

Held further: that the value of the relief in this case would be the amount which plaintiff claims in excess of the amount decreed in his favour by the trial Court and that plaintiff should be given a reasonable opportunty to value the relief sought in appeal and pay court-fee thereon even though he had not expressed his readiness to make up the court-fee in course of arguments. *Case law reviewed.* [P 634 C 1, 2]

Har Gopal—for Appellant.

Nawal Kishore—for Respondents.

Judgment.—This second appeal arises out of a suit for rendition of accounts. A preliminary decree was passed on 9th January 1931, and thereafter two persons were appointed as referees with the consent of the parties for the purpose of going into the accounts. The trial Court passed a decree in accordance with their report disallowing the objections raised by the plaintiff, on the ground that it was not open to her to raise any objections, as the referees were appointed with her consent. An appeal was preferred by the plaintiff to the District Judge on a court-fee stamp of Rs. 10. This was objected to by the respondents on the ground that ad valorem court-fee should have been paid on the amount actually claimed by the plaintiff. This objection was upheld by the learned District Judge and the appeal was dismissed. From this decision the plaintiff has preferred the present appeal.

The sole point that requires decision in this case is that of court-fee. The learned counsel for the appellant has urged that the suit being one for accounts, the plaintiff had the option of fixing the valuation both for the plaint and for the memorandum of appeal. In support of this contention he has relied on *Faizulla Khan* v. *Mauladad Khan* (1) a decision of their Lordships of the Privy Council. He has further cited *Umar* v. *Ali Umar* (2) and *A. I. R.* 1933 *Mad.* 330 in supoprt of his contention that the plaintiff was entitled to fix the valuation for the purpose of the appeal different to that placed by her on the plaint. The learned counsel for the respondent has referred to *Dhupati Srinivasacharyalu* v. *Perinevamma* (3) and *Kanji Mal* v. *Panna Lal* (4). The latter ruling does not appear to be in point as all that was really decided therein was that a suit for accounts is governed for the purpose of court-fee by S. 7, Court-fees Act, and not by Art. 17, Sch. 2 of that Act. As regards that point it may be stated here that Art. 17 (vi), Sch. 2 was relied upon by the appellant in the Court below and also in the memorandum of appeal, but at the time of arguments before me, the learned counsel for the appellant gave up this position and relied solely on the wording of S. 7 (iv) (f), Court-fees Act, which is clearly applicable to a suit for accounts and would therefore exclude Cl. 6, Art. 17, Sch. 2. The other ruling, viz., *Dhupati Srinivasacharyalu* v. *Perinevamma* (3), a Full Bench ruling of the Mardas High Court no doubt supports the contention of the learned counsel for the respondent, that once a value is put upon a plaint for the purposes of court-fees, that should also govern the court-fee on appeal. In that case, the appeal was filed by a defendant, but it is urged that the same rule would a fortiori govern an appeal filed by a plaintiff as in the present case. This ruling of the Madras High Court was

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1. A I R 1929 P C 147=117 I C 493=56 I A 232=10 Lah 737 (P C).
2. A I R 1931 Rang 146=133 I C 91=9 Rang 165 (F B).
3. (1916) 39 Mad 725=33 I C 602.
4. (1915) 7 P R 1915=28 I C 262.

discussed by a Full Bench of the Rangoon High Court in *Umar* v. *Ali Umar* (2) and it was pointed out therein that the Madras view is not supported by the wording of S. 7 (iv) (f), Court-fees Act, and is also in conflict with the decision of their Lordship of the Privy Council in *Faizulla Khan* v. *Mauladad Khan* (1). The interpretation placed upon the latter judgment by the Rangoon High Court was followed recently by a Division Bench of the Madras High Court in *A. I. R.* 1933 *Mad.* 330.

After carefully considering the point at issue in the light of the above authorities, it seems to me clear that it was for the appellant to value the relief sought in the appeal. She did not however do so and paid a court-fee of Rs. 10 only under Art. 17, Sch. 2, Court-fees Act. As stated already, the learned counsel for the appellant conceded that this was wrong. It was suggested that the plaintiff should be taken to have valued her relief at a figure for which a court-fee stamp of Rs. 10 would be sufficient. But I do not think that this would be proper, as the court-fee of Rs. 10 was not paid on this basis at all. It was for the plaintiff to value properly the relief sought in the memorandum of appeal as required by law, but she had not done so. In the circumstances it seems to me that the proper course would have been to ask the plaintiff to value the relief sought for the purposes of the appeal and pay the court-fees thereon. The value of the relief sought would, in my opinion, in the present case naturally be the amount which the plaintiff claims in excess of the amount decreed in her favour by the trial Court. Although the plaintiff prayed in her appeal that the case should be remanded for her objections being decided on merits, the real relief she wanted was the amount claimed in her objections. It should be noted in this connexion that the appeal lay from the decree and not from the order refusing to decide the objections on merits. The case might have been different, if it were impossible for the plaintiff to say what amount she would be entitled to. But as the learned District Judge points out in his judgment, the plaintiff claimed definite items amounting to about Rs. 1,450 in excess of the sum recommended by the referees.

The learned District Judge has remarked in the course of his judgment that the appellant's counsel has not expressed readiness to make up the court-fees. The appellant has filed an affidavit that she was prepared to make up the court-fee and was not given an opportunity. Even if counsel for the appellant had not expressed his readiness in the course of his arguments, to make up the court-fee, the proper course in the circumstances of the case would have been, I think, to inform him of the decision of the Court on the point and give him a reasonable opportunity to value the relief sought in appeal as required by S. 7 (iv) (f), Court-fees Act, and pay court-fee thereon. I would invite attention in this connexion to the remarks of their Lordships of the Privy Council in *Faizulla Khan* v. *Mauladad Khan* (1), at pp. 742-3 (of 10 *Lah.*).

I accept the appeal and remand the case to the learned District Judge for re-decision with the direction that the plaintiff shall value the relief sought in appeal and pay ad valorem court-fee thereon as required by S. 7 (iv) (f), Court-fees Act, within one month of this date. If she does so, the appeal shall be heard on merits and in that case the costs of this appeal shall be borne by the parties. If on the other hand, she fails to do so, the appeal will be liable to be rejected and the costs of the present appeal will also be borne by her. Court-fee on this appeal to be refunded.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 634

BHIDE, J.

Chet Ram Ramrachh Pal—Creditor—Appellant.

v.

Atma Ram and *others*—Insolvents—Respondents.

Misc. Second Appeal No. 1234 of 1932, Decided on 19th April 1933, from order of Dist. Judge, Multan, D/- 11th June 1932.

Provincial Insolvency Act (1920), Ss. 53, 4 and 75—Application by official receiver to set aside mortgage as being fictitious and for defrauding creditors dismissed—Appeal therefrom also dismissed—No second appeal lies.

The Official Receiver filed an application for setting aside a mortgage effected by the insolvent on the ground that the transaction was fictitious and intended to defraud creditors. The application was dismissed and appeal therefrom to the District Judge was also dismissed.

Held: that S. 53 was clearly applicable to the case and not S. 4 and that no second appeal lay under S. 75:

Held further: that the memorandum of appeal could not be treated as a petition for revision as the decision of the Courts below was based on erroneous facts. [P 635 C 1]

Nawal Kishore—for Appellant.

Badri Das— for Respondents.

Judgment.—On 2nd July 1930, a firm named, Beli Ram-Lorind Chand, was declared insolvent on a petition filed by the creditors. The Official Receiver thereafter made an application for the setting aside of a mortgage dated 11th July 1928, in favour of Mul Chand and others on the ground that the transaction was fictitious and intended to defeat the creditors. The application was refused by the Insolvency Court and the decision was upheld on appeal by the District Judge. From this decision the creditors have appealed. A preliminary objection is raised that no second appeal is competent under S. 75, Provincial Insolvency Act. The learned counsel for the appellant urged that the decision was under S. 4 of the Act, and hence a second appeal is competent. But this contention has no force as a reference to the judgment of both the Courts below clearly shows that the decision was given under S. 53, Provincial Insolvency Act, which was clearly applicable in the circumstances of the case.

The learned counsel for the appellant next requested that the memorandum of appeal may be treated as a petition for revision. I do not however think that there are any grounds for adopting this course. The question involved in the presnet case, namely, whether the mortgage was or was not a fraudulent transaction was obviously one of fact. The learned counsel urged that the decision of the Courts below was based on erroneous facts inasmuch as part of the consideration included in the mortgage-deed was due from the firm Beli Ram and Company, but it appears that the insolvent firm was also a partner in Bali Ram and Company, and consequently liable for the debt. It seems to me that there is no valid ground for interference even in revision. I therefore dismiss this appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 635

BHIDE, J.

Mt. Zabida Khatoon—Petitioner.

v.

Mohammad Hayat Khan and *others*—**Opposite Parties.**

Civil Misc. Petn. No. 168 of 1933, Decided on 24th April 1933, from decision of Senior Sub-Judge, Sargodha.

(a) Civil P. C. (1908), Ss. 24 and 22—Notice before institution of application is not necessary under S. 24.

Section 24 is wider in scope than S. 22 and no notice before institution of an application for transfer of case is necessary under S. 24. [P 636 C 1]

(b) Civil P. C. (1908), S. 24—Defendant's convenience is no ground for transfer—Suit for dower pending at *R*—Counter to last suit for restitution of conjugal rights filed by husband at *S* — Transfer of suit at *S* was allowed.

The mere convenience of the defendant is no ground for transfer of a case and that a strong case should be made out where such transfer is prayed for. A suit for dower was pending at Rawalpindi and as a counter-blast to it the husband filed a suit in Sargodha for restitution of conjugal rights. The wife put in an application for transfer of the latter case to Rawalpindi as several witnesses likely to be called belonged to Rawalpindi and as the material facts in both suits would be the same:

Held: that both suits should be tried in the same Court in the interests of justice and that the suit should be transferred to Rawalpindi. [P 636 C 1]

Shah Nawaz—for Petitioner.

Ghulam Mohyuddin and *M. A. Majid*—for Opposite Party.

Order.—This is an application for transfer of a civil suit from the Court of the Senior Subordinate Judge, Sargodha, to another Court in Rawalpindi. The allegations of the applicant briefly are that she was married to the respondent Muhammad Hayat Khan in January 1927 and resided with him for some years. Recently he began to ill-treat her and refused to maintain her. He married another woman and since then the petitioner has been living separate from him, which she was entitled according to the terms of kabin nama (deed of marriage settlement). On 10th January 1933 the applicant instituted a suit against the respondent for recovery of Rs. 5,032 as her prompt dower in the Court of the Senior Subordinate Judge, Rawalpindi. She also brought another case against the respondent for maintenance under S. 488, Criminal P. C., at Rawalpindi. Thereupon the respondent instituted the present suit against the applicant for restitution of conjugal rights. This suit was instituted on 19th January 1933, i. e., after the institution of the cases referred to above by the applicant at Rawalpindi. The applicant stated that she is a pardanashin lady, that the parties are residents of Rawalpindi and that the witnesses likely to be called in these cases also belong to Rawalpindi. It is therefore prayed that the suit instituted at Sargodha be transferred to Rawalpindi, as it would be in the interests of justice and general convenience of the parties to do so.

The application was opposed by the respondent on the ground that the plaintiff had the choice to select his forum and the mere fact that it would be more convenient for the applicant to have the suit tried at Rawalpindi is no ground why the suit should be transferred to the latter place. It is also urged that a notice before the institution of the present application was necessary under S. 22, Civil P. C., and as no such notice has been given, the application is not competent.

As regards the question of notice, it may be pointed out that the present application is under S. 24 and not under S. 22, Civil P. C. No notice by a party before the application is required under the former section which is wider in its scope than the latter. In view of the grounds of transfer it does not appear to me that the operation of S. 24, Civil P. C., is excluded in the present case.

On the merits, there is no doubt ample authority in support of the contention of the learned counsel for the respondent that the mere convenience of the defendant is no ground for transfer of a case and that a strong case should be made out where such transfer is prayed for. At the same time in the present case the applicant is not basing her prayer merely on the ground of her own convenience. It is pointed out in the application that a suit for dower is already pending at Rawalpindi. The material facts bearing on the suit and the suit for restitution of conjugal rights would be largely the same and it seems in the interests of justice that both the suits should be tried by the same Court. It is also not disputed that the parties are residents of Rawalpindi and that most of the witnesses to the deed of settlement also belong to that place. All that the learned counsel for the respondent urged in this respect was that some witnesses from Sargodha will depose to the fact that the applicant was residing with the respondent at that place. The respondent is only temporarily residing at Sargodha as he happens to be posted at that place at present. It is also not denied that the respondent has lately married another wife. There is reason to suspect that the suit for restitution of conjugal rights is merely a counterblast and intended to put pressure upon the applicant. In view of all the circumstances it seems to me that the applicant has made out a sufficiently strong case for transfer of the suit to Rawalpindi.

I accordingly accept the application and direct that the suit for restoration of conjugal rights instituted by the respondent in the Court of the Senior Subordinate Judge at Sargodha be transferred to the Court of the Senior Subordinate Judge, Rawalpindi.

K.S. *Application accepted.*

A. I. R. 1933 Lahore 636

ADDISON AND BHIDE, JJ.

Qandhara Singh and *another*—Defendants—Appellants.

v.

Gokal Chand and *another*—Plaintiffs—Respondents.

First Appeal No. 2640 of 1929, Decided on 27th March 1933, from decree of Senior Sub-Judge, Jhelum.

Civil P. C. (1908), S. 66—Strict construction—Suit on mortgagor and subsequent auction-purchaser—Mortgagor can plead that purchaser is benamidar for plaintiff.

Section 66, which must be strictly construed, only bars a suit against a person claiming title on the basis of an auction sale, based on the ground that the purchase was made on behalf of the plaintiffs. But where in a suit on a mortgage against the mortgagors and subsequent auction purchaser the mortgagors plead that the auction-purchaser is benamidar for mortgagee, S. 66 would be no bar: 14 *M I A* 496 (*P C*), *Ref.* [P 637 C 1]

Shamair Chand and *Muhammad Amin*—for Appellants.

A. N. Chona and *Anant Ram Khosla*—for Respondents.

Bhide, J.—This appeal arises out of a suit for recovery of Rs. 5,750 on the basis of a mortgage. The mortgage was alleged to have been executed by defendants 1 to 3 on 1st September 1913, and the mortgaged house was purchased later by defendant 4 at a Court-auction subject to the mortgagee's rights. The main pleas of the defendants were that the personal remedy against defendants 1 to 3 was barred by limitation and that the house had been really purchased by defendant 4 as a benamidar for the benefit of the plaintiffs and consequently the plaintiffs were not competent to sue on the basis of the mortgage, as it has merged in the sale. The Court framed certain preliminary issues and finding that the suit was within limitation as regards the personal liability of defendants 1 to 3, passed a preliminary decree for sale of the house. The amount due to the plaintiffs, not having been paid within the time fixed, a final decree followed. From these decrees the defendants have preferred the present appeals. The learned counsel for the appellants did not seriously challenge the learned Subordinate Judge's finding on the question of limitation, which seems to be quite correct. A feeble attempt was made in the lower Court by Kandhara Singh, defendant 1, to claim exemption from liability on the ground that he did not "complete" the execution of the mortgage-deed. But in the first portion of the defendants' written statement it was clearly admitted that the house was mortgaged by defendants 1 to 3. In view of this admission, there seems to be no force in the above plea of Kandhara Singh.

The main contention of the learned counsel for the appellants was that the learned Subordinate Judge had erred in passing a preliminary decree in favour of the plaintiffs without going into the question whether defendant 4, who had purchased the house, was a mere benamidar of the plaintiff and if so, whether the plaintiffs are entitled to sue on the basis of the mortgage. This contention appears to be correct. This plea was never given up by the defendants and consequently no decree should have been passed without deciding the issues arising therefrom.

The learned counsel for the plaintiffs-respondents urged that it was not open to the appellants to raise the plea as regards the benami character of the sale in view of S. 66, Civil P. C. But that section only bars a suit against a person claiming title on the basis of an auction-sale, based on the ground that the purchase was made on behalf of the plaintiffs. In the present instance the defendants are raising the plea merely in order to show that plaintiffs have no locus standi to sue on the basis of an antecedent mortgage. It has been held that S. 66 must be strictly construed and it would appear from its wording that it is no bar to the plea raised by the defendants in this case *Mt. Buhuns Kower* v. *Buhooree Lall* (1) and *Abdul Hamid* v. *Mahomed Sharif* (2).

In view of the above findings these appeals must succeed. I would accordingly accept these appeals and setting aside the decrees of the learned Subordinate Judge remand the suit under O. 41, R. 23, Civil P. C., for re-decision after trying the necessary issues arising from the above-mentioned plea of the defendants in connexion with the benami character of the auction-sale. Stamp on appeal will be refunded. Costs with the exception of those in these appeal will abide the event.

Addison, J.—I agree.

M.N. *Appeals allowed.*

A. I. R. 1933 Lahore 637

JAI LAL AND MONROE, JJ.

Commissioner of Income Tax, Punjab—Petitioner.

v.

Kishen Kishore—Opposite Party.

Civil Misc. Petn. No. 74 of 1933, Decided on 24th March 1933, for leave to appeal to his Majesty in Council, against order of High Court, D/- 9th November 1932, reported in *A. I. R.* 1933 *Lah.* 284.

Income tax Act (11 of 1922), S. 66-A—All questions referred to High Court answered in favour of assessee— Commissioner not allowed to support assessment on other grounds—Case is not one fit for appeal to Privy Council—Civil P. C.(1908), O. 45, R. 3.

On a reference by the Commissioner under S. 66 (2), Income-tax Act, all the questions referred to were answered in favour of the assessee by the High Court and the Commissioner was not allowed to support the assessment on other provisions of the Act which he had not taken before:

Held: that it was not a fit case for appeal to the Privy Council and that leave should not be granted. [P 638 C 1]

J. N. Aggarwal—for Petitioner.

Badri Das—for Opposite Party.

Order.—This is an application under S. 66-A, Income-tax Act, by the Commissioner, Income-tax, Punjab, for leave to appeal to His Majesty in Council from a judgment of this Court dated 9th November 1932, delivered on a reference made by the Commissioner under S. 66 (2), Income-tax Act. Three questions were referred to this Court:

Whether the assessment in question could be made under S. 34 of the Act, in other words, whether under the circumstances disclosed in the order of reference the income of the assessee could be said to have escaped assessment within the meaning of that section. We answered the question in the negative because we considered that the matter admitted of no doubt; in fact the counsel of the Commissioner practically conceded that the contention of the assessee was correct and he sought to support the assessment by referrence to other provisions of the

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1. (1870-72) 14 M I A 496 (P C).
2. A I R 1920 Lah 491.

Act which we did not permit him to do. We are therefore of opinion that the case is not a fit one for appeal to his Majesty in Council on this point.

The remaining two questions referred for the opinion of this Court were: Whether, having regard to a certain award which regulated the devolution of the family estate, the income of the younger brother of the assessee could be included for the purposes of assessment in the income of the assessee. The third point was whether the assessee who succeeded to the estate by the rule of primogeniture, the estate being impartible, should be deemed to be the managing member of the joint Hindu family consisting of himself and his sons.

We answered both the questions in favour of the assessee, the first having regard to the terms of the award and the second in view of certain decisions of the Privy Council. We are therefore of opinion that these two points also do not satisfy the test laid down for an peal to His Majesty in Council. We are accordingly unable to certify that it is a fit case for an appeal to the Privy Council and dismiss the application with costs.

K.S. *Application dismissed.*

A. I. R. 1933 Lahore 638

ADDISON, J.

Harnand Rai-Phul Chand and *others* —Appellants.

v.

Rup Chand-Chiranji Lal and *another* —Respondents.

Misc. First Appeal No. 591 of 1932, Decided on 26th April 1933, from order of Senior Sub-Judge, Ferozepore, D/- 5th December 1931.

(a) Civil P. C. (1908), O. 21, R. 16—Decree transferred by decree-holder—No legal application by transferee under O. 21, R. 16—Decree-holder can execute decree.

Person appearing on the face of the decree as the decree-holder is the person entitled to execution. Therefore, where the transferee of a decree has not made a legal application for execution under O. 21, R. 16, the executing Court is bound to allow execution at the instance of the transferor, even after the date of the transfer, till the transfer is recognized by the Court: 16 *O C* 70; 31 *I C* 542; 34 *I C* 791; 18 *Cal* 639; *AIR* 1921 *Lah* 116 and *AIR* 1933 *Sind* 1191, *Ref.* [P 639 C 1]

(b) Civil P. C. (1908), O. 21, R. 16—Decree handed over to trustee by decree-holder—No legal application by trustee under O. 21, R. 16—Joint application by decree-holder and trustee—Decree-holder can be allowed to execute decree.

Where a decree is handed over to a trustee by the decree-holder and the trustee makes no application under O. 21, R. 16 but a joint application for execution is made by the trustee and decree-holder, the joint application can be looked upon as two separate applications of two different sets of persons amalgamated for purposes of convenience and hence even though the trustee can be disallowed to execute the decree, the decree-holder can be allowed to do so. [P 639 C 1]

Shamair Chand—for Appellants.

Nawal Kishore—for Respondents.

Judgment.—The firm of Harnand Rai-Phul Chand obtained a money decree against Rup Chand Chiranji Lal in the Bombay High Court, which decree was transferred for execution to the Court of the Senior Subordinate Judge, Ferozepore. Execution was taken out in 1927 and was going on when the judgment-debtors pleaded an adjustment. This plea of adjustment was disallowed on 1st March 1930, and against this order an appeal was instituted in this Court. Further proceedings were stayed by a Judge of this Court on 25th March 1930, till the appeal should come before the usual Motion Bench. It came before that Bench on 9th April 1930, when the appeal was dismissed. Apparently no information as to the dismissal of this appeal was sent to the executing Court with the result that on 9th June 1930, that Court ordered the execution proceedings to be consigned to the record-room for the present as there was an appeal pending in the High Court. It was further stated in the order that, after the appeal had been decided, the decree-holder could have the application restored.

In the meantime the decree-holder firm itself appears to have got into difficulties, and by a composition deed or trust deed, dated 25th May 1929, they appointed certain persons to sell their property and one matter handed over by this deed to the trustees was this decree. On 28th January 1931, the original decree-holder and his trustees put in an application to restore the execution proceedings in accordance with the previous order of 9th June 1930, as the appeal had been decided by this Court. The judgment-debtors objected on the grounds that the decree-holder could not execute the decree as he had assigned it and that the trustees could not execute it until they had got their names recorded by the original Court. These objections were upheld and there was a further finding that the attachment existing prior to the order of 9th June 1930, had ceased to exist as an express order had not been passed to the effect that it should continue. For all these reasons the application for restoration of the previous proceedings was dismissed and against that order this appeal has been preferred.

It follows from Rr. 10 and 16, O. 21, Civil P. C., that the person appearing on the face of the decree as the decree-holder is the person entitled to execution. Therefore, where the transferee of a decree has not made a legal application for execution under O. 21, R. 16, the executing Court is bound to allow execution at the instance of the transferor, even after the date of the transfer, till the transfer is recognized by the Court. There are numerous rulings to this effect such as *Ejaz Husain* v. *Shahzaman Mirza* (1), *Pedayelligadu* v. *Suryarao Bahadur* (2), *Arichetty* v. *Thertha Malai Chetty* (3) and *Jasoda Deye* v. *Kirthibash Das* (4), *A. I. R.* 1931 *Lah*. 116 and *A. I. R.* 1933 *Sind* 119.

It follows that the original decree-holder, at any rate, could be allowed to revive the proceedings if there was no proper application of the trustees to be allowed to do so. It is admitted that the trustees could not make any application under O. 21, R. 16, Civil P. C., to the executing Court; such an application must be to the original Court, that is, the Bombay High Court. There was thus no application in law by the trustees for execution of the decree. It follows that the decree-holder should have been allowed to continue the execution, though, of course, the trustees could not be allowed to do so. It makes no difference that there was a joint application as the order of the Court could have been that the application of the trustees was disallowed and that of the decree-holder allowed. A joint application can be looked upon as two separate applications of the two different sets of persons, amalgamated for the purpose of convenience.

It was conceded before me that the order of the Court to the effect that the proceedings could not be revived on the ground that the attachment had ceased to exist was wrong. Obviously O. 21, R. 57, Civil P. C., does not apply to the present case. The order itself is clear. The record was simply consigned to the record-room as a matter of convenience instead of being kept in the Court, where room is more valuable, but the proceedings were kept pending, awaiting the decision of this Court. For reasons given, I accept this appeal and allow the decree-holder to continue the execution proceedings which will now be restored to the pending file and conducted in accordance with law. The trustees will, of course, not be competent to continue the execution. In the circumstances of the case, I leave the parties to bear their own costs of this appeal.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 639

BHIDE, J.

Hans Raj Khanna—Objecting-creditor—Petitioner.

v.

Ramditta Mal—Creditor — Opposite Party.

Civil Revn. Petn. No. 676 of 1932, Decided on 20th April 1933, from order of Addl. Dist. Judge, Lyallpur, D/- 16th July 1932.

Provincial Insolvency Act (1920), S. 61 (4) —Personal liability of partner does not make "partnership" debt "separate" debt of that partner.

"Partnership" debt means a debt which is due from a partnership. The mere fact that a partner is personally liable for the partnership debt as a partner would not deprive it of its character as a "partnership" debt for the purposes of S. 61 (4). To hold that a debt for which a partner is personally liable ceases to be partnership debt would practically obliterate all distinction between the expressions "partnership" debts and "separate" debts as used in that section: *AIR* 1930 *Bom* 380 and *AIR* 1928 *Sind* 40, *Dist.* [P 640 C 1]

Kishen Dayal—for Petitioner.

Mehr Chand Mahajan—for Opposite Party.

Order.—One Maya Das, who was a partner in a firm named Ganesh Das-Kala Ram, was adjudged insolvent on 2nd March 1929. tained a decree for Rs. 17,905-7-10 against Kala Ram, Maya Das and Nanak Chand as the proprietors of the firm Ganesh Das-Kala Ram on 25th May 1928. The decree was subsequently assigned to one Ram Ditta Mal and he put forward his claim on the basis of the decree in the insolvency proceedings against Maya Das. This claim was raised by certain creditors of Maya Das, who claimed priority in respect of their debts on the ground that the separate debts of Maya Das should

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1. (1913) 16 O C 70=18 I C 97.
2. (1915) 31 I C 542.
3. (1916) 34 I C 791.
4. (1891) 18 Cal 639.

take precedence over the partnership debts of the firm Ganesh Das-Kala Ram according to the provisions of S. 61 (4), Provincial Insolvency Act. This objection was upheld by the learned insolvency Judge, but on appeal his order was set aside by the learned District Judge and Ram Ditta Mal was allowed to rank along with the separate creditors of Maya Das. The official receiver and Chaudhri Raja Ram, a creditor, have preferred a petition for revision of this order.

It is contended on behalf of the petitioners that the debt on the basis of which a decree was obtained by the Punjab National Bank being admittedly due from the firm, Ganesh Das-Kala Ram, Ram Ditta Mal had no right according to law to rank along with the other creditors of Maya Das and that the decision of the Insolvency Judge was correct. The learned counsel for the respondent has urged that in the promissory-notes on which the suit was based the insolvent Maya Das had made himself personally liable for the debt and hence Ram Ditta Mal had the choice to treat it as a separate debt of Maya Das. I have seen the promissory notes in question. These are signed by Maya Das on behalf of the partnership. The notes are on a printed form and the words "jointly and severally" no doubt occur in the body of the promissory-notes, but I do not think that this can affect the legal position. When a debt is incurred on behalf of a partnership the partners are necessarily liable jointly as well as severally (cf. Ss. 43 and 249, Contract Act). In Sub-S. (4), S. 61, Provincial Insolvency Act, the expression "separate" debt is used as opposed to "partnership" debt. I understand the latter to mean a debt which is due from a partnership and in the present instance there is no room for doubt that the debt due to Ram Ditta Mal was originally due from a "partnership" and not from Maya Das personally. Maya Das may have been personally liable for the debt as a partner but that would not, in my opinion, deprive it of its character as a "partnership" debt for the purposes of S. 61 (4), Provincial Insolvency Act. To hold that a debt for which a partner is personally liable ceases to be partnership debt would practically obliterate all distinction between the expressions "partnership" debts and "separate" debts as used in that section. The learned District Judge appears to have relied chiefly on *A. I. R.* 1930 *Bom.* 380. The facts of that case appear to have been rather peculiar as the promissory-note in question, in that case was signed by a partner on behalf of the firm as well as in his own individual capacity. The case is thus distinguishable. The facts in *A. I. R.* 1928 *Sind* 40, to which the learned counsel for the respondent has referred, were also different. In my opinion, the debt of Ram Ditta Mal, being originally due from the firm Ganesh Das-Kala Ram, it cannot rank along with the separate debts of the other creditors and the decision of the learned District Judge, cannot, therefore be upheld.

I accept the petition for revision and setting aside the order of the learned District Judge restore that of the trial Court with costs.

R.K. *Revision accepted.*

A. I. R. 1933 Lahore 640

HARRISON AND ADDISON, JJ.

Ghulam Mohammad and *another*—Defendants—Appellants.

v.

Mt. Zainab Bibi—Plaintiff—Respondent.

First Appeal No. 488 of 1928, Decided on 4th April 1933, from decree of Senior Sub-Judge, Lyallpur, D/- 24th January 1928.

Custom (Punjab)—Succession—Arains.

Among Arains of village Karol in the proximity of Lahore, daughters exclude agnates in the absence of sons. [P 641 C 1]

R. C. Manchanda and *S. C. Manchanda*—for Appellants.

Mohammad Amin and *Balkishan Mehra*—for Respondent.

Judgment.—One Sattar died leaving self-acquired land in Chak No. 441 G. B. Tahsil Samundri, District Lyallpur. This land was first mutated by the revenue authorities in favour of Mt. Zainab Bibi, daughter of Sattar, plaintiff, but on appeal the Collector directed that the name of Mohammad Yar, brother of Sattar, should be entered in the revenue papers. Mohammad Yar has died and the plaintiff has sued his two sons for possession of the land in question. The family is an Arain one and it migrated from village Karol, near Lahore to the Lyallpur Colony. It still possesses its ancestral land in village Karol and in the neighbouring village Aino Bhatti. In these two villages Sattar's land has been mutated in favour of his daughter, the plaintiff, and so far no suit has been brought as regards that land.

Village Karol is an Arain village about six miles from Lahore city. A short time ago owing to redistribution of districts it was taken out of Lahore district and included in Sheighupura district. The only question in this appeal is what is the custom of these Arains of village Karol as regards succession to the land in question. In the introduction to the Customary Law of Lahore district compiled in 1916 by Mr. Bolster occur the following remarks:

> "In 1856 daughters were absolutely excluded from inheritance by collaterals; twelve years later in the 1868 settlement there appears among the Arains of the Lahore and Kasur Tahsils and the Awans and Rajputs of the Lahore Tahsil a relaxation in their favour allowing parents to make them gifts of small areas; finally in the 1892 settlement and now among Rajputs, Dogars and Arains, daughters are held entitled to exclude collaterals five degrees remote, while in the neighbourhood of Lahore, where disturbing causes naturally have largest play and customs change much more rapidly than among the Arains of the Sutlej bank, Arain daughters exclude their cousins in the first degree."

The Wajibularz of this village of the year 1856 is printed at p. 46 of the second papar book. In those days the Wajibularz contained a statement of customs in the village, but this is no longer the case, the Riwajiams of the Tahsil and district alone now recording the customs of the people. In this Wajibularz of 1856 it is said that:

> "If any proprietor by reason of having no male issue gifts his property to his daughter during his lifetime, she of course will be the owner. Otherwise the brothers of other near kindred will be the owners of the estate, and the daughters will live with them, but if there be no one in his family then of course his daughter can become the owner."

It follows from this extract that in 1856 gifts could be made to daughters by their fathers in this village but they were excluded by near collaterals though they were not excluded by the proprietary body in the absence of sons. In the settlement of 1894 a Customary Law of the district was prepared by Mr. G. C. Walker. At p. 10 of this volume it is stated that:

> "Rajputs, Dogars and Arains say that a daughter or sister succeeds to the property if there is no male collaterals nearer related than in the fifth generation."

This is an advance on the Wajibularz of 1856. On the latest Customary Law of the Lahore district compiled by Mr. Bolster in 1916 the answer to question 61 is as follows:

> "Among Jats daughters are also excluded by male lineal descendants through males however distant. All other tribes follow the same custom except that (1) among Arains in the proximity of Lahore (villages of Harbanspura, Salamatpura, Mahmud Buti, Kotli Abdulrahman, Fateh Garh, Baghbanpura, Begampura, Mian Mir, Ganj, Tajpura, Doaich, Shadipura, Babu Sabu, Bhadru, Kot Kamboh, Jhugian Nangra, Saidpura, and Kot Kanjri), daughters of sonless proprietor exclude agnates . . . . ."

The answer to question 62 shows that no distinction is made between self-acquired and ancestral property. The above answer means that among Arains in the proximity of Lahore the custom is that daughters of sonless proprietors exclude agnates however near they are. In para. 3 of the introduction to this volume the compiler stated that the present English volume was a brief abstract of the vernacular compilation designed to assist Courts to a decision on the general principles of the local Customary laws. The vernecular copy of the Riwajiam however does not contain the list of villages given in the English edition. All that the vernacular copy says is that in the proximity of Lahore daughters of Arains succeed to their father in preference to agnates. It follows that the list of villages given in the English edition must not be taken to be exhaustive but was added by way of example when the English edition was prepared and the correct statement of custom must be held to be that given in the vernacular copy.

Coming now to the oral evidence, we find that most of the witnesses who give evidence in favour of the plaintiff either belonged to Karol or migrated from Karol while only one such person gives evidence in favour of the defendants. For this reason the evidence of the plaintiff's witnesses is of more weight than that of the defendants.

Again documentary evidence is in favour of the plaintiff's allegation that in village Karol, which is in the proximity of Lahore, she is entitled to succeed to her father in preference to her first cousins. In 1891 there were two mutations in favour of daughters. In each of the years 1919, 1921 and 1922 there was one mutation in this village in favour of daughters. In 1924 there was another mutation which is of importance. One Mt. Begam described as a daughter of Sairan was succeeded by her sons. There were other cosharers in the holding. From this and from the fact that Mt. Begam is described as daughter there can be no doubt that she succeeded to her father's land as daughter in the presence of collaterals though it is not known in what year this happened. There are thus six mutations from 1891 to the date of suit in favour of daughters while there is no evidence that in this period collaterals have excluded a daughter in this village. It is not without significance that on the death of Sattar, the father of the plaintiff, the plaintiff was recorded as an owner as had been done in similar cases in this village when there were no sons.

An attempt was made to rely upon *Chiragh Din* v. *Mamman* (1), but that relates to Arains of village Behni and there is no evidence on the record to show where that village is and whether it is in the proximity of Lahore. Similarly certain other mutations were mentioned but there is no evidence as to where the villages are situated to which they refer. It must therefore be held that in this village since 1891 daughters have always excluded agnates when there are no sons. The village is in the proximity of Lahore and the statement of the Customary Law is also thus in favour of the plaintiff. There is no proof that agnates have ever excluded daughters in this village. In these circumstances it must be held proved that by custom in this village daughters exclude agnates in the absence of sons. For the reasons given the appeal must be dismissed with costs.

K.S. *Appeal dismissed.*

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1. (1893) 28 P R 1893.

A. I. R. 1933 Lahore 642 (1)

ADDISON, J.

Mt. Bholi—Defendant—Appellant.

v.

Puran Singh and *others*—Plaintiffs—Respondents.

Misc. First Appeal No. 812 of 1932, Decided on 25th April 1933, from order of Dist. Judge, Ferozepore.

Civil P. C. (1908), O. 41, R. 19—Appeal dismissed for not depositing process-fees—Careless mistake of counsel or his clerk is not sufficient cause.

The laches of an advocate or the careless mistake of his clerk is not sufficient cause for the restoration of an appeal dismissed for not depositing the process-fees : *AIR* 1926 *Rang* 50, *Rel on.* [P 642 C 2]

Bodh Raj Sawhney—for Appellant.

Fakir Chand—for Respondents.

Judgment.—On 8th June 1931, the appeal of Mt. Bholi was dismissed by the District Judge, Ferozepore, on the ground that she had not paid process-fees and that she already had several adjournments for this purpose and was not entitled to another. On 16th June 1931, she applied for the re-admission of the appeal alleging as a ground that she had given the process-fees and a registered envelope to the clerk of her counsel who had failed to put them into Court. The District Judge rejected this application and against his decision Mt. Bholi has instituted this appeal.

She had three opportunities to put in the process-fees and on 8th May 1931, she was told that that was the last opportunity she would get. Again she failed. It was argued, however, by her counsel that she was entitled to a trial of the question as to whether she had not handed over the fees to her counsel's clerk. This would be so, if the doing of that act were sufficient cause for not depositing the sum required. This Court and the Rangoon Court have both held that the laches of an advocate or the careless mistake of his clerk is not sufficient cause for the restoration of an appeal dismissed for default: see for instance *Maung Than* v. *Zainat Bibi* (1). The application for re-admission of the appeal has been made under O. 41, R. 19, Civil Procedure Code, and under this rule come applications for readmission of appeals dismissed for default of appearance as well as for re-admission of appeals dismissed for not depositing the process-fees. If laches of a pleader's clerk is not sufficient cause in one class of dismissal it cannot be sufficient in the other class legislated for in the same rule. She was therefore, not entitled to an opportunity to prove the allegation as the allegation in itself could not amount to sufficient cause.

For the reasons given I dismiss the appeal but make no order as to costs here.

R.K. *Appeal dismissed.*

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1. AIR 1926 Rang 50=92 I C 208=3 Rang 488.

A. I. R. 1933 Lahore 642 (2)

CURRIE, J.

Lorind Chand-Parma Nand — Insolvents—Appellants.

v.

Mohammad Akram Khan and *others*—Creditors—Respondents.

Misc. First Appeal No. 1166 of 1932, Decided on 31st January 1933.

(a) Provincial Insolvency Act (1920), S. 75 (3)—Where appeal is admitted to hearing High Court's leave should be deemed as granted.

Where an appeal only lies under the provisions of S. 75 (3) the leave of either the District Judge or the High Court is necessary. But if such appeal has been admitted to hearing by the High Court it should be considered that the necessary leave has been granted: *AIR* 1928 *Pat* 338, *Foll.* [P 643 C 2]

(b) Provincial Insolvency Act (1920), Ss. 9 and 13—Impleading of all creditors, whether necessary—*Quaere.*

Whether there is no obligation on a petitioning creditor to implead other creditors and whether he only has to comply with the requirements of Ss. 9 and 13 (2) neither of which demands the impleading of other creditors. [P 644 C 1]

(c) Insolvency — Petitioning creditor impleaded—Death of such creditor pending appeal—Inclusion of name of his representative on appeal is essential—Civil P. C. (1908), O. 22, R. 3.

Where one of the petitioning creditors having once been impleaded as a party to an insolvency proceeding dies pending an appeal it is necessary to implead his representatives. It is obvious that when he has been impleaded as a respondent he has as much interest in the proceedings relating to the insolvent's estate as any other creditor and any order passed in favour of the petitioning creditors would also affect him. It cannot be said that he is merely a pro forma defendant. The inclusion of his name and that of his representatives in the appeal is, therefore, essential. [P 644 C 1]

(d) Insolvency—Petitioning creditor dying pending appeal—Insolvent appellant should see that his legal representatives are brought on record—Civil P. C. (1908), O. 22, R. 4.

No doubt if the petitioning creditor dies no valid order of adjudication can be made. But where a person, who is not directly participating in the insolvency proceedings dies pending an appeal the first step for the insolvent-appellant to take is to bring his own appeal into order by getting the legal representatives of deceased petitioning-creditor impleaded before urging that the order of adjudication itself is a nullity: *AIR* 1929 *Cal* 527; *AIR* 1930 *Sind* 259; *AIR* 1931 *Lah* 73 and 4 *I C* 137, *Dist;* *AIR* 1928 *Lah* 359; *AIR* 1932 *Lah* 305 and *AIR* 1924 *Lah* 429, *Ref.* [P 644 C 2]

Mehr Chand—for Appellants.

Nawal Kishore and *Hargopal* — for Respondents.

Judgment.—On the 18th February 1930 some of the creditors of the firm Lorind Chand Parma Nand applied that that firm should be adjudicated insolvent. The petitioning creditors impleaded a number of other creditors along with the firm and among these was one Mt. Ishar Devi widow of Ishar Das. Eventually on 24th August 1931, the Senior Subordinate Judge of Jhelum passed an order adjudicating the firm Lorind Chand Parma Nand insolvent. Against this order the firm preferred an appeal in the Court of the District Judge. That appeal was fixed for hearing for the 15th December 1931. On the notice issued to Mr. Ishar Devi it was reported that she had died some months previously. Accordingly notice was issued on 8th December to the appellants to bring Mt. Ishar Devi's representatives on the record within four days. This they did not do and the appeal was heard on 15th December on which date one of the respondents stated that Ishar Devi had died four months previously while Gurdas Mal appellant stated that he had recently learnt that she had died. The learned District Judge by his order of the 15th December 1931, held that the appeal had abated and accordingly dismissed it. On 1st February 1932, the appellants presented an application dated the 28th January 1932, asking that the order of abatement be set aside, the representatives of the deceased brought on the record and the appeal decided on the merits. Accordingly notice was issued and eventually the learned District Judge refused to alter his order on 27th June 1932. The firm has now preferred this appeal.

A preliminary objection was raised by Mr. Nawal Kishore that the appeal does not come within the purview of S. 75 (1) of the Provincial Insolvency Act and hence no second appeal lies. That is clearly correct but Dewan Mehr Chand urged that the appeal was in reality from the order of the learned District Judge dated the 27th June 1932, refusing to set aside the abatement. To this Mr. Nawal Kishore replies that in that case an appeal can only lie under the provisions of S. 75 (3) with the leave of either the District Judge or the High Court. He urges, therefore, that this second appeal should be rejected as no such leave has been obtained. No application for leave was made but Diwan Mehr Chand relies on *Gopal Ram* v. *Magni Ram* (1). In that case the learned Judge held that there is force in the contention as the appeal had been admitted to a hearing by a Division Bench it should be considered that the necessary leave had been granted. He further held that in that particular case he would have granted the leave and accordingly proceeded to hear the appeal. In the present case the appeal having been admitted to a hearing I think the best course will be to dispose of it on the

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1. AIR 1928 Pat 338=107 I C 830=7 Pat 375 (FB).

merits. I accordingly overrule the preliminary objection.

The question that arises for decision is whether the failure of the appellants to implead Mt. Ishar Devi's representatives causes the appeal to abate. Dewan Mehr Chand urges that Mt. Ishar Devi was merely a proforma defendant and that her absence on the record is immaterial. He urges that there is no obligation on a petitioning creditor to implead other creditors. He only has to comply with the requirements of Ss. 9 and 13 (2) of the Provincial Insolvency Act neither of which demands the impleading of other creditors. Mr. Nawal Kishore has not been able to prduce any authority which lays down that all creditors must be impleaded. The question however is really whether Mt. Ishar Devi having once been impleaded as a party it was necessary to implead her representatives. It is obvious that when she had been impleaded as a respondent she had as much interest in the proceedings relating to the insolvent's estate as any other creditor and any order passed in favour of the petitioning creditors would also affect her. In my opinion, therefore, it cannot be said that she was merely a pro forma defendant. The inclusion of her name and that of her representatives in the appeal was, therefore, essential. It has been urged that Mt. Ishar Devi died before the proceedings in the insolvency Court were completed and that therefore, as far as she is concerned the order of that Court was a nullity. In this connection reference is made to a copy of a certificate relating to Mt. Ishar Devi according to which her death was recorded as taking place on 24th June 1931. The arguments in the case were heard on 1st August and orders pronounced on 24th August. The learned District Judge remarked that there was no definite material or conclusive evidence before him to prove the date of the death of Mt. Ishar Devi. He then proceeded to follow *A. I. R.* 1929 *Cal.* 527 and held that an order passed in favour of the dead person would not altogether and in all the circumstances be a nullity. If a party is dead the record stands so far as the living parties are concerned and any disposal of the case notwithstanding the death of one of the parties would be valid subject to its being vacated at the instance of the legal representatives of the person who had died. He therefore held that the order of adjudication operated validly in favour of Mt. Ishar Devi. In *A. I. R.* 1930 *Sind* 259, it was remarked that in the above case O. 22, R. 6, had not been considered and it followed from O. 22, R. 6, that if the death took place before the conclusion of the hearing and the legal representatives of the dead person were not brought on the record the judgment had not the same effect and force as if it had been pronounced before the party's death. This case, however, was decided on the ground that the sole appellant having died prior to the hearing of the appeal and his representatives not having been brought on the record there was no appeal. That would not apply to the present case.

Dewan Mehr Chand also cited *A. I. R.* 1931 *Lah.* 73 and *Vishvanath* v. *Lallu Kelba* (2). In both these cases the view was taken that on the facts of those cases as the death of the defendant or plaintiff had not taken place within the period between the hearing of the arguments and the delivery of judgments and O. 22, R. 6, could not be applied, therefore, no valid decree could be passed. These cases again are somewhat different to the present proceedings. No doubt if the petitioning creditor died no valid order of adjudication could have been made. But here we have a person, who is not directly participating in the proceedings, dying, it appears to me that the first step for the appellants to take was to bring their own appeal into order by getting the legal representatives of Mt. Ishar Devi impleaded before urging that the order of adjudication itself was a nullity. This they failed to do. Dewan Mehr Chand has urged that the lower appellate Court should have proceeded on the lines of *Roop Chand* v. *Sardar Khan* (3) and struck out the name of Mt. Ishar Devi and considered whether the appeal could proceed in her absence and if it decided that it could not so proceed without her, should then have allowed the hearing of the appeal to be amended and allowed the necessary extension of time. In this connection reference is made to *A. I. R.* 1932 *Lah.* 305 and *A. I. R.* 1924 *Lah.* 429. Whether such amendment should be allowed or whether time should be extended or no depends on the particular circumstances of each case. As Mr. Nawal Kishore pointed out, citing *Mahomed Askari* v. *Lallu* (4), *Inant* v. *Ganga* (5) and *Daya*

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2. (1909) 4 I C 137.
3. AIR 1928 Lah 359=110 I C 281=9 Lah 526.
4. AIR 1918 Oudh 304=45 I C 594=21 O C 68.
5. (1916) 3 P R 1916=32 I C 829.

Singh v. *Buta Singh* (6), it is the duty of the parties to keep themselves informed.

In the present case the appellants seem to me to have no claim to any indulgence. The fact that Mt. Ishar Devi had died was as is admitted in their affidavit brought to their notice on 9th December i. e. six days before the hearing of the appeal. Instead of applying for her representatives to be brought on the record or asking for an adjournment to enable them to discover the names of the representatives if they did not know them they argued the case on 15th December and after that date it took them till the first February to file an application stating who her representatives were and asking for the order of abatement to be set aside. It is obvious that with due diligence they might have discovered all these facts long before and brought them to the notice of the Court. The material before it, as far as I can see, afforded no ground for the lower appellate Court to condone the negligence of the appellants. Their application was therefore rightly dismissed and I dismiss the appeal with costs.

V.S. *Appeal dismissed.*

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6. (1916) 118 P R 1916=38 I C 7.

A. I. R. 1933 Lahore 645

TEK CHAND AND COLDSTREAM, JJ.

Ahmad Ali Shah — Plaintiff—Appellant.

v.

Mahommad Ashraf Alam Shah and *others*—Defendants—Respondents.

First Appeal No. 1251 of 1927, Decided on 22nd March 1933, from decree of Senior Sub-Judge, Sheikhupura, D/- 23rd December 1926.

Custom (Punjab) — Alienation—Collateral cannot restrict alienation by male collateral.

A collateral has no locus standi to restrict an alienation by a male proprietor unless the property alienated is ancestral qua himself and the alienor. [P 646 C 1]

Mohsin Shah and *Mohammad Amin*—for Appellant.

GhulamMohiud-Din and *Nawal Kishore*—for Respondents.

Coldstream, J.—The suit from which this appeal has arisen related to land in the village of Ratta Gujran in the Shahdara Tahsil of the Sheikhupura district. The land belonged to one Ghulam Haidar Shah, a Hashmi Qureshi, and, on his death, passed to his widow Mt. Karim Sultan, who, in accordance with the Customary Law of the Province, took possession of it as a life estate. She died and the land was recorded by the revenue authorities as having passed to Muhammad Ashraf Alam Shah, a second cousin of Ghulam Haidar Shah. Muhammad Ashraf Alam Shah however gifted the land to Ghulam Haidar Shah's daughters. Mt. Mehtab Sultan and Mt. Nawab Sultan, and a mutation was made accordingly in the land revenue records on 16th November 1925.

On 4th May 1926 Ahmad Ali Shah, a collateral of Ghulam Haidar Shah. in the fourth degree, instituted a suit against Mohammad Ashraf Alam Shah, Mt. Mehtab Sultan, Mt. Nawab Sultan and all the other existing collaterals of Ghulam Haidar Shah, asking for declaration that the gift by Muhammad Ashraf Alam Shah was illegal and would not affect his rights and the rights of other collaterals of the donor. It was admitted by the plaintiff's counsel that the land was not ancestral of the parties, and the Court dismissed the suit on the ground that the plaintiff had no locus standi to object to the alienation. Against this decision Ahmad Ali Shah submitted an appeal on 7th April 1927.

On 21st June 1930 one of the principal respondents, Mt. Nawab Sultan, died. After inquiry her share of the land was recorded as the property of her descendants. The fact of her death was not however brought to the notice of this Court until 22nd October 1931, when Mr. Moshin Shah, the appellant's counsel, submitted an application under O. 22, R. 4, Civil P. C., stating that Ahmad Ali Shah, husband of Mt. Nawab Sultan and one of the defendants (5) in the suit was Mt. Nawab Sultan's heir and legal representative, and asking for it to be noted on the record that he was now impleaded as a representative of the deceased.

On the appeal coming up for hearing before us today it was objected by Mr. Ghulam Mohyuddin that, so far as the share of Mt. Nawab Sultan in the land gifted is concerned, the appeal has abated, there having been no application made within time to bring her legal representatives upon the record. Mr. Mohsin Shah in reply contended that Ahmad Ali Shah (5) being the father of Mt. Nawab Sultan's children may reasonably be held to represent her heirs sufficiently for the purposes of the appeal. Mr. Moshin Shah admitted however that Mt. Nawab Sultan's real heirs are those persons in whose favour her land was recorded by mutation after her death. It is also evident from the record that the appellant was present during the mutation proceedings and himself proposed that Mt. Nawab Sultan's property should be recorded in the name of her real heirs. In the circumstances I can see no sufficient reason for condoning the negligence of the appellant in failing to implead Mt. Nawab Sultan's heirs until now. The appeal however will not abate as a whole: see *Sant Singh* v. *Gulab Singh* (1) and we have accordingly heard Mr. Mohsin Shah in respect of the appeal so far as it relates to the property gifted to Mt. Mehtab Sultan.

Mr. Mohsin Shah's case is that the family of Farrukh Bakhsh and his client belonged originally to Amritsar district and that, according to the Customary Law of that district, which is applicable to the parties, the collateral of an alienor of ancestral immovable property is entitled to object to the alienation, even if the property was never held by a common ancestor of the collateral and the alienor. I may first observe that there is no proof on the record that the family of the parties originally belonged to Amritsar. In support of his contention that Ahmad Ali Shah is entitled to object to the gift in dispute, Mr. Mohsin Shah has referred to a Riwajiam of the Amritsar district compiled in 1865. The value of this Riwajiam as a piece of evidence has been discounted by this Court in *Gurdit Singh* v. *Mt. Ishar Kaur* (2) as well as by the Chief Court in *Diat Singh* v. *Dewa Singh* (3). In the current Riwajiam of the Amritsar district there is nothing (and this is admitted by Mr. Mohsin Shah) to support his contention, which runs counter to the well-established general rule of custom according to which a collateral has no locus standi to restrict an alienation by a male collateral unless the property alienated is ancestral qua himself and the alienor. The lower Court's decision is correct and the appeal must accordingly be dismissed with costs.

Tek Chand, J.—I agree.

K.S. *Appeal dismissed.*

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1. A I R 1928 Lah 572=114 I C 417=10 Lah 7.
2. A I R 1922 Lah 392=68 I C 551=3 Lah 257.
3. (1885) 5 P R 1885.

A. I. R. 1933 Lahore 646

ADDISON AND AGHA HAIDAR, JJ.

Kapuria and *others*—Plaintiffs—Appellants.

v.

Mt. Ganga Devi and *others*—Defendants—Respondents.

Second Appeal No. 2574 of 1927, Decided on 2nd February 1933, from decree of Dist. Judge, Ambala, D/- 25th June 1927.

Civil P. C. (1908), S. 11 — Where case clearly comes within S. 11, doctrine of general principles should not be resorted to—Decision by Court having no jurisdiction to try subsequent suit—Such decision is not res judicata in later suit.

The general rule of res judicata which exists apart from the provisions of S. 11 can be resorted to only in those cases which do not fall within the four corners of S, 11. In other words, if a case clearly comes within the purview of S. 11 then it is not allowable to fall back upon the more or less nebulous doctrine of the general principles of res judicata, and cases must be decided according to the language of S. 11 as interpreted by Courts. Therefore a previous decision cannot be held to be a final decision on the question decided by it, where the Court which gave that decision had no pecuniary jurisdiction to try the subsequent suit: *AIR* 1926 *Lah* 603, *Disappr.* [P 647 C 1]

J. L. Kapur for *Jagan Nath Aggarwal*—for Appellants.

Nanak Chand—for Respondents.

Agha Haidar, J.—This appeal arises out of a suit for possession of certain lands situate at Mauza Chadiali, tahsil Ambala. The trial Court decreed the plaintiffs' claim, but, on appeal by the defendant, the lower appellate Court set aside the decree of the trial Court and dismissed the plaintiffs' suit. The plaintiffs have come up to this Court in second appeal. The facts leading up to the present litigation, in so far as they are necessary for the purposes of the present appeal, are as follows:

One Munshi died many years ago, leaving him surviving a widow, Mt. Bhagirti, and two children, Ram Bhaj (son) and Mt. Ganga Devi (daughter). On the death of Munshi the property was mutated in the name of Ram Bhaj, his son, but Ram Bhaj also died some 8 or 9 months after the death of his father and the property was once again mutated in the name of Mt. Bhagirti, the widow of Munshi and mother of Ram Bhaj. On 5th July 1922, Mt. Bhagirti gifted 61 bighas, 8 biswas of land to her daughter, Mt. Ganga Devi. In December 1923 Mt. Bhagirti died and the property was mutated in the name of Mt. Ganga Devi, the sister of the last male owner, namely, Ram Bhaj. The plaintiffs who claim to be the collaterals of Munshi Ram brought the present suit against Mt. Ganga Devi on the allegations that Mt. Ganga Devi, as the sister of the last male owner could not succeed to the property in suit and that the gift of the property by Mt. Bhagirti in her favour was invalid. The plaintiff's suit was decreed by the Subordinate Judge on the ground that Mt. Ganga Devi, who was the sister of the last male owner, Ram Bhaj, could not succeed to her brother and that the plaintiffs had a superior right as against her. Mt. Ganga Devi, the sister, appealed to the District Judge who held that, in view of a previous decision between Kapuria, one of the plaintiffs who represented the collaterals, and Mt. Bhagirti and some of her alienees, the present suit could not be maintained and was barred by res judicata. He accordingly dismissed the plaintiffs' suit on this ground.

The question of res judicata in the present case arises in this way: Mt. Bhagirti had made a mortgage in favour of certain persons for a sum of Rs. 500 some time in 1907. In April 1907, the suit was brought by Kapuria, one of the present plaintiffs, who then claimed to be the collateral of Munshi in the 6th degree, against Mt. Bhagirti and her mortgagees on the ground that Mt. Bhagirti had no right to make any alienation of property which would injuriously affect the reversionary rights and interests of the plaintiff. That suit was decreed by the Munsif First Class; but on appeal the judgment of the Munsif was set aside and the suit was dismissed by Mr. Dundas, Divisional Judge, on 9th November 1907. In that decision the following points were decided: (1) that the plaintiff was Munshi's collateral in the 6th degree; (2) that the plaintiff and Munshi were governed by Hindu law, although they were agriculturists, in matters of succession and alienation; and (3) that Kapuria, was not an heir of the last male owner, Ram Bhaj, under the Hindu law. The learned Judge of the lower appellate Court has held that the decision of Mr. Dundas operated as res judicata because in that decision it was held that the plaintiff Kapuria was not an heir of the late Ram Bhaj under the Hindu law.

Reliance was placed on a decision reported as *Mt. Sahib Zadi Begum v. Muhammad Umar* (1). There cannot be any doubt that this decision supports the plea of res judicata raised on behalf of the defendant, since it lays down that the rule of res judicata is not confined to the provisions of S. 11, Civil P. C., but may be invoked as a general principle of law and the previous decision should be held to be a final decision on the question decided by it, although the Court which gave that decision had no pecuniary jurisdiction to try the subsequent suit. With the utmost respect for the learned Judges who decided that case, I beg to disagree with them. The general rule of res judicata which exists apart from the provisions of S. 11, Civil P. C., can be resorted to only in those cases which do not fall within the four corners of S. 11 of the Code. In other words, if a case clearly comes within the purview of S. 11 then it is not allowable to fall back upon the more or less nebulous doctrine of the general principles of res judicata and cases must be decided according to the language of S. 11, as interpreted by Courts. In the present case it is perfectly clear on the record that the judgment in the previous litigation was given in a case which was decided by a Munsif of the First Class whose pecuniary jurisdiction extended to Rs. 1,000 only. The present suit was brought in Court with a higher pecuniary jurisdiction and could not have been decided by the Munsif who tried the previous suit and that the fact that the decision of the learned Munsif went up in appeal to Mr. Dundas, Divisional Judge, does not make any difference in principle. In my judgment therefore the point of res judicata was wrongly decided by the learned Judge of the lower appellate Court on the authority of the decision quoted above.

I am fortified in my view by a judgment of this Court in an unreported case in *Fazl Hussan* v. *Jiwan Shah* (2) decided by Tek Chand and Monroe, JJ., with which I fully agree. No other point has been argued. This being the position, I would accept this appeal and set aside the judgment and decree of the lower appellate Court. As the case has been disposed of on a preliminary point I remand the case for decision on the remaining issues under the provisions of O. 41, R. 23, Civil P. C. Costs heretofore shall abide the result. The appellants shall be entitled to a refund of the court-fee

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1. A I R 1926 Lah 603=96 I C 1002=8 Lah 15.

2. A I R 1933 Lah 551=141 I C 454.

paid on the memorandum of appeal in this Court.

Addison, J.—I agree.

V.S. *Appeal accepted.*

** A. I. R. 1933 Lahore 648 (1)

ADDISON AND AGHA HAIDAR, JJ.

M. D. Puri & Sons—Defendants—Appellants.

v.

Lyons Cinema, Ltd.—Plaintiffs—Respondents.

First Appeal No. 1551 of 1931, Decided on 16th December 1932, from decree of Senior Sub-Judge, Rawalpindi, D/- 11th March 1929.

**** Civil P. C. (1908), S. 98—Difference of opinion between two Judges on question of fact in appeal from lower Court — Cl. 26, Letters Patent, applies — Letters Patent (Lahore), Cl. 26.**

On a difference of opinion between two Judges on a question of fact in an appeal from the decision of a lower Court Cl. 26, Letters Patent, applies and not S. 98, Civil P. C and the case should be laid before another Judge for decision upon such point : *AIR* 1929 *Mad* 641 (*FB*), *Foll.* [P 648 C 2]

Mehar Chand Mahajan and *Shiv Dayal*—for Appellants.

D. C. Ralli and *Madan Gopal* — for Respondents.

Facts.—The Lyons Cinema Company, Rawalpindi, was a limited liability concern which went into liquidation under the supervision of the District Judge, Rawalpindi. Arjan Das, Lintott and Bakhshi Dalip Singh were appointed liquidators and there was an Advisory Board consisting of four persons. This Advisory Board, on 25th April 1924, made a representation to the District Judge, Rawalpindi, reccoomending that a lease of the Lyon Rink Cinema with with all its quarters, offices, machinery, etc. may be given to Mr. Puri, defendant-appellant. On 21st May 1924,the District Judge sanctioned the granting of the lease on a rent of Rs. 760, per mensem provided Mr. Puri deposited in the Imperial Bank of India, Rawalpindi, six months' rent in advance, i. e. Rs. 4,560. The lease was to be for one year, but it is admitted on all hands that no formal leave was ever executed or registered by Mr. Puri. According to the plaintiffs' case the defendant really took possession of the building somewhere at the end of July 1924, although for the purpose of calculating the rent they have in their plaint fixed the date, on which the defendant is said to have taken possession of the rented premises, as the 15th August 1924. The defendant is alleged to have continued in possession till the 1st December 1926. The defendant pleaded that possession was not delivered to him until the 16th November 1924, and he was ejected by the plaintiffs early in October 1926. He claimed certain remissions on account of the non-delivery of portions of the building and machinery and further claimed a set-off for the money spent by him in executing certain repairs. The trial Court has held that possession was delivered to the defendant about the middle of August 1924, and that he was ejected early in October 1926. The plaintiffs have submitted to the decree of the Court below; but the defendant filed an appeal against it, which was posted to a Bench of two Judges, viz. Addison and Agha Haidar, JJ. Addison, J., held that the tenancy did not start till the middle of November; but Agha Haidar, J., agreeing with the trial Court, affirmed the decree of the lower Court. And an order was passed by the Court under S. 98, C. P. C. that the appeal is dismissed. The next day, after hearing counsel for both parties, the following order was passed by the Court.

Order.—Counsel are present and we have heard them. We are now of opinion that Cl. 26 of the Letters Patent, apply as held in *Dhanaraju* v. *Balkissen Das Moti Lal* (1), with which we are in agreement. We therefore substitute for our order of yesterday an order under Cl. 26, stating the point upon which we differ so that the Hon'ble Chief Justice can send it to be decided by another Judge. The point is "When did the tenancy commence," which is the only point in the appeal. One of us has held that it commenced on 15th August and the other on 16th November 1932.

(The case was then laid before Dalip Singh, J., but it was compromised at that stage).

K.S. *Order accordingly.*

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1. AIR 1929 Mad 641=116 I C 343=52 Mad 563 (FB).

A. I. R. 1933 Lahore 648 (2)

ADDISON AND BHIDE, JJ.

Ram Lal and *another*—Defendants—Appellants.

v.

Mt. Sita Bai and *another*—Plaintiffs—Respondents.

First Appeal No. 51 of 1928, Decided on 28th March 1933, from decree of Senior Sub-Judge, Jhang, D/- 29-11-1927.

Registration Act (1908), S. 17—Family arrangement requires registration—If terms are acted upon, doctrine of part performance applies—Part performance—Family arrangement.

A family arrangement if it is in fact reduced to the form of a document requires registration; but when the settlement has been acted upon fully and full effect is given to what has been agreed to, then the doctrine of part performance applies and even though the document is not registered, there is conclusive proof of the partition: *AIR* 1928 *All* 641 (*F B*); *AIR* 1914 *P C* 27 and *AIR* 1924 *Mad* 271, *Ref.* [P 650 C 1]

J. N. Aggarwal and *S. L. Puri*—for Appellants.

Badri Das, *J. N. Khosla* and *Achhru Ram*—for Respondents.

Addison, J.— The plaintiff Mt. Sita Bai, who is the widow of Karam Chand, alleged that her husband's father Ram Lal, defendant 1, and his two brothers, Ladha Ram and Jai Chand, defendants 2 and 3, formed a joint Hindu family along with her deceased husband. This family possessed joint house property and land. On 24th September 1923 there was arrived at a family settlement whereby the house property was finally partitioned between the brothers, the father retaining a portion for his life which was to go to specified sons on his death. Karam Chand, her deceased husband, and Ladha Ram, defendant 2, got the northern and southern portions respectively of what is called the external house while Jai Chand got what is called the internal house. The father Ram Lal was to keep a certain portion of the house property in his possession as long as he lived. In order to adjust the differences in value Karam Chand and Ladha Ram had to pay Rs. 800 to Jai Chand and Ladha Ram had to pay Rs. 300 to Karam Chand. Further, each son had to pay to the father Rs. 10 a month, and if he did not do so, he was not to obtain any share in the movable property on the father's death.

It was further alleged in the plaint that the land had been equally divided between the three sons but it was alleged to remain in the possession of the father, Ram Lal. Accordingly, the sons took possession of their respective shares in the house property and paid the money specified above to each other to equalise the value of the portion awarded to each. The plaintiff's husband died in May 1924 and sometime in 1925 she alleges that the defendants took forcible possession of part of the house property allotted to her husband. Further, on 26th March 1925 defendant 1 executed another deed cancelling the deed which embodied the family settlement of 24th September 1923. The plaintiff accordingly prayed for possession of the portion of the property allotted to her husband of which the defendants had taken forcible possession, and further prayed for a declaration that she was the owner of the rest of the property allotted to her husband, including the portion which the father Ram Lal was allowed to retain during his lifetime. As regards the land, she also asked for a declaration that she was the owner of a one-third share in it. Ram Lal and Ladha Ram pleaded that they were all members of a joint Hindu family which still existed and that there was no family settlement arrived at on 24th September 1923 although Ram Ral then executed a will allotting different portions of the house property to his sons; but it was pleaded that this was merely done for convenience and did not represent a final partition of the house property.

The trial Judge held that there was a family settlement on 24th September 1923 so far as the house property was concerned, but that the document of the date mentioned was merely a will in so far as it stated that the land would be divided in equal shares between the three brothers on Ram Lal's death. He accordingly dismissed the suit with respect to the declaration prayed for regarding the land but decreed it as regards the house property. Against this decision Ram Lal, defendant 1, has appealed. Jai Chand, defendant 3, practically admitted the claim of the plaintiff and Ram Lal and Ladha Ram alone contested the suit. They gave evidence to the effect that what was embodied in the document of 24th September 1923 was abrogated the very next day and that the division of the house property was merely done for convenience in order to stop the quarrels of the females of the household. On the other hand, Nand Lal, a relative of the plaintiff, has given evidence to the effect that the partition of the house property was given effect to at once and that the property was partitioned, certain walls being erected and doors made, and the parties took possession of their respective shares. It has been proved that the sums mentioned as payable by one brother to the other were paid. Even as late as 10th November 1924, i. e., after the death of Karam Chand, Ladha Ram made an application to the Municipal Committee for permission to open a new door.

In that application he admitted that the house, which jointly belonged to him and his deceased brother Karam Chand, had been partitioned and that the building of the partition wall had necessitated the opening of a new door for which he applied for permission. There is no question therefore that up to that date it was recognized that the house property had been partitioned between the three brothers, and the only question is whether this was done merely for convenience or was intended to be a final partition of that portion of the property.

The document itself undoubtedly required registration. As held by a Full Bench in *Rameshwar Prasad* v. *Ghisiawan Prasad* (1) a family arrangement, if it is in fact reduced to the form of a document, requires registration if it affects property of the value of over Rs. 100 as it does in the present case. But the doctrine of part performance recognized by their Lordships of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (2) and by a Full Bench of the Madras High Court in *Vizagapatam Sugar Development Co.* v. *Muthu Rama Reddi* (3), applies to the present case. From 1923 upto 1925 although Karam Chand died in May 1924, the settlement as regards the house property was fully acted upon. Partition walls were put up where necessary; new doors were opened; an application was made to the Municipal Committee admitting partition between the brothers; and the brothers paid to each other the various sums fixed by their father in order to adjust the value of the shares allotted to each. These things not only prove that full effect was given to what had been agreed to but that this partition of the house property was meant to be a final partition thereof and was not done merely for the temporary convenience of the parties until a final partition should be later effected. If it had been merely a temporary partition for the convenience of the females of the family, there was no necessity for one brother to compensate the other brother because one brother had obtained a greater share than the other brother. This circumstance is conclusive as regards the final nature of the partition of the house property.

For the reasons given there can be no doubt that the judgment of the trial Court is correct and that there was a final partition of the house property in the lifetime of the plaintiff's husband. She is thus entitled to succeed to her husband. The suit as regards the house property was properly decreed and I would dismiss this appeal with costs.

Bhide, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 650

ADDISON, J.

Mt. Nandi—Plaintiff—Appellant.

v.

Pala Singh—Defendant—Respondent.

Second Appeal No 1951 of 1932, Decided on 26th April 1933, from decree of Addl. Dist. Judge, Ferozepore, D/- 29th August 1932.

Punjab Alienation of Land Act (13 of 1900), Ss. 14 and 6—Sale to non-agriculturist—Till sanction by Deputy Commissioner alienee is entitled to look upon himself as usufructuary mortgagee.

Until the sanction of the Deputy Commissioner is given to a permanent alienation, like a sale to a non-agriculturist, the alienation takes effect automatically as a usufructuary mortgage in form (a) permitted by S. 6 for such term not exceeding twenty years and on such conditions as the Deputy Commissioner considers reasonable. [P 651 C 1]

Jhanda Singh—for Appellant.

Lal Chand Mehra—for Respondent.

Judgment.—One Samand Singh obtained in 1906, from some Revenue Assistant, general permission to purchase land from agriculturists though he himself was a non-agriculturist. This general permission was of course valueless and of no effect. On 10th June 1919, Samand Singh purchased 2 kanals 19 marlas of land from a Jat agriculturist Pala Singh. He was able to get the sale-deed registered by showing the Sub-Registrar his useless certificate. Mutation was however refused by the Revenue Officials. Samand Singh then died and his widow, Mt. Nandi, brought the present suit against Pala Singh for possession under the sale-deed. The Courts below have concurred in dismissing the suit on the ground that such a sale required the sanction of the Deputy Commissioner which had not been accorded. Against this decision this second appeal has been preferred. The only point argued was that though Mt. Nandi was properly refused possession as owner under the sale-deed

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1. A I R 1928 All 641=116 I C 861=51 All 79 (F B).
2. A I R 1914 P C 27=28 I C 930=42 I A 1=42 Cal 801 (P C).
3. A I R 1924 Mad 271=76 I C 886=46 Mad 919 (F B).

[illegible] 1951 [illegible] 1983 [illegible]

[illegible] the management [illegible]

[illegible] as follows [illegible] others [illegible]

[illegible] 1982 [illegible]

[illegible] Commissioner [illegible]

[illegible] considers [illegible]

[illegible] Commissioner [illegible]

[illegible]

of the Privy Council that the right, title and interest of one cosharer in the joint family property may be sold in execution to satisfy a decree and that the purchaser at such a sale acquires merely the right to compel partition as against the other cosharers which the judgment-debtor possessed. The same principle would, in my opinion, apply to sale of the share of a coparcener in insolvency proceedings. The purchaser at the sale will be entitled to claim partition of the property; and when he does so, it will be a matter for consideration as to whether the mother would or would not be entitled to an equal share along with her sons. According to *Bilaso* v. *Dina Nath* (2) and *Amrita Lall* v. *Manick Lall* (3), it would seem prima facie that the mother would be entitled to a share, but it seems unnecessary for me to consider this question at this stage. The learned counsel for the appellant urged that he had produced evidence in support of the special custom that amongst Mahajans a mother is not entitled to an equal share along with her sons. The learned District Judge has given no decision on this point but as I am of opinion that only the undivided interest of the insolvent can be sold at this stage, it is unnecessary to go into this question also.

I accordingly accept this appeal and direct that the undivided share of the insolvent in the joint family property only should be sold and that the purchaser should be left to seek his remedy by partition afterwards if and when he wishes to do so. In view of all these circumstances I leave the parties to bear their own costs.

K.S. *Appeal accepted.*

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2. (1881) 3 All 88.
3. (1900) 27 Cal 551=4 C W N 764.

A. I. R. 1933 Lahore 652

TEK CHAND, J.

Mul Chand—Appellant.

v.

Allah Yar Khan and *another*—Respondents.

Second Appeal No. 294 of 1930, Decided on 29th March 1933, from decree of Dist. Judge, Attock, D/- 15th November 1929.

(a) Limitation Act (1908), S. 14—Objection to attachment dismissed—Suit filed in wrong Court—No objection taken by opposite party—Discovery of mistake by Court and return of plaint for presentation to proper Court—Time spent in former Court should be excluded.

On the dismissal of objection to an attachment, a suit was filed in a subordinate Judge's Court. The opposite party took no objection and after a year during which the trial was proceeding, the presiding Judge discovered that the Court had no jurisdiction as the value of the suit was beyond the pecuniary jurisdiction of his Court. The amended plaint was presented in the proper Court, more than a year had elapsed since the dismissal of the objection to the attachment:

Held: that the period spent in the former Court should be excluded in computing limitation: *A. I. R.* 1914 *Lah.* 337, *Dist.* [P 653 C 1]

(b) Custom (Punjab)—Common land—Abadi—Death of non-proprietor—Minor son going to another village to live with his uncle by itself is not proof of abandonment of right.

Where a non-proprietor died and his minor son went to another village to live with his maternal uncle:

Held: that this by itself did not lead to the inference that the minor had abandoned his rights. [P 653 C 2]

(c) Custom (Punjab)—Common land—Non-proprietary resident is entitled to sell materials.

In the absence of a well established custom to the contrary, a non-proprietary resident in a village is ordinarily entitled to sell the materials. [P 653 C 2]

Bhagwat Dayal—for Appellant.
M. Tufail—for Respondents.

Judgment.—In execution of a money decree of Rs. 370 obtained by the defendant-appellant against Ishar Das, defendant-respondent and realizable from the property of Bhagwan Singh, deceased, the decree-holder attached a house and two shops situated in the abadi of Mauza Akhori in the Attock district. Allah Yar Khan objected but his objection was rejected by the executing Court on 4th November 1926. On 26th November 1926, Allah Yar Khan brought a suit under O. 21, R. 63, for a declaration that the property in question was not liable to attachment and sale in execution of the decree. The suit was valued at Rupees 300 for purposes of jurisdiction and was instituted in the Court of the Subordinate Judge, Fourth Class. The proceedings continued in that Court for more than a year. After a large number of witnesses had been examined by both sides the Subordinate Judge, Fourth Class, passed an order on 5th December 1927, returning the plaint for presentation in the proper Court, on the ground that the value of the property attached was found to be more than Rs. 1,000 and the suit was beyond his pecuniary jurisdiction.

The plaintiff accordingly amended the plaint by raising the value for purposes of jurisdiction to Rs. 1,500 and presented the amended plaint in the Court of the Senior Subordinate Judge on 8th December 1927. No objection on the scope of the suit being beyond limitation was raised in that Court, and by consent of parties the evidence already recorded by the Subordinate Judge, Fourth Class, was considered as evidence in the case. After some further proceedings the Senior Subordinate Judge decreed the suit. On appeal the decree has been affirmed by the learned District Judge. The defendant decree-holder has lodged a second appeal in this Court, and the first objection raised on his behalf is that the proceedings in the Court of the Subordinate Judge, Fourth Class, were coram non judice, as the suit should be considered to have been properly filed on 8th December 1927, when the amended plaint was presented in the Court of the Senior Subordinate Judge, and as this was more than a year after 4th November 1926, when the objection of the plaintiff was disallowed by the executing Court, the suit was barred by time under Art. 11, Limitation Act. In my opinion, this contention is without force. As stated already, the suit was originally instituted in the Court of the Subordinate Judge, Fourth Class, within a few days of the dismissal of the plaintiff's objection by the executing Court The trial proceeded in that Court without objection for over a year when the presiding officer suo motu discovered that under certain Full Bench rulings of the Chief Court the value of the suit for the purposes of jurisdiction is not the amount of the decree, in execution of which the property had been attached, but the value of the property itself. The plaint was accordingly amended and was presented in the Court of the Senior Subordinate Judge, no additional court-fee having been demanded or paid, and the suit was tried in the Court of the Senior Subordinate Judge as if it was a continuation of the trial in the Court of the Subordinate Judge, Fourth Class. In my opinion, S. 14, Limitation Act, is applicable to the case and the time spent in the Court of the Subordinate Judge, Fourth Class, should be excluded. Mr. Bhagwat Dayal has referred me to the provision of O. 7, Rr. 6 and 11, Civil P. C., and has pointed out that this period should not be extended as no exemption from the law of limitation was asked for in the amended plaint. In this connexion he relies on *Govinda Mal* v. *Santa* (1). The facts of that case are clearly distinguishable as there the suit, when originally instituted was barred by limitation. In my opinion, the present suit is not barred by Art. 11 and the objection raised by the appellant for the first time in second appeal has no force and must be overruled.

On the merits, the finding that the site belongs to Allah Yar Khan is binding on both parties and therefore it must be held that the site is not liable to attachment and sale in execution of the decree against Bhagwan Singh's estate who was admittedly a non-proprietor. It has been found however that the malba belonged to Mohar Singh. He died several years ago and was succeeded by his son Bhagwan Singh who was a minor at that time. Bhagwan Singh went to live with his maternal uncle in another village and died therefore attaining majority. From these facts the learned District Judge has raised the inference that Bhagwan Singh must be taken to have abandoned his rights in the shops and house. In my opinion, this is an erroneous view of the law. As stated already, Bhagwan Singh was a minor, and an intention to abandon his rights in his father's interest in the buildings in question cannot be imputed to him from the mere fact of his having gone to live with his maternal uncle in another village due to his minority. I hold therefore that the superstructure of the shops and the house in question was a part of the estate of Bhagwan Singh at the time of his death.

It is laid down in para. 236 of the Rattigan's Digest of Customary Law, that in the absence of a well-established custom to the contrary, a non-proprietary resident in a village is ordinarily entitled to sell the materials. No custom to the contrary has been found to be proved in this village, and counsel for the respondent has not drawn my attention to any evidence on the record bearing on the point. It must therefore be held that Bhagwan Singh had a saleable interest in the materials and on his death his creditors were entitled to proceed against it to realise their dues. The fact that Ishar Das is related to Bhagwan Singh in the fourth degree, and would have had no right to succeed as a non-proprietor to his house and shops is immaterial for the purposes of this case, as the decree had not been passed against Ishar Das personally but was against the estate of Bhagwan Singh, which included the superstructure of the buildings.

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1. A I R 1914 Lah 337=26 I C 441=33 P R 1914.

I accordingly accept this appeal in part in lieu of the decree of the District Judge, grant the plaintiff-respondent a declaration to the effect that the site underneath the house and shops in dispute is not liable to attachment and sale in execution of the decree obtained by the defendant-appellant against the estate of Bhagwan Singh, but that the superstructure of the house and shops is so liable.

Having regard to all the circumstances, I leave the parties to bear their own costs throughout.

K.S. *Appeal partly accepted.*

A. I. R. 1933 Lahore 654

BHIDE, J.

Phagga Singh — Defendant — Appellant.

v.

Nanak—Plaintiff—Respondent.

Second Appeal No. 1228 of 1930, Decided on 19th April 1933, from decree of Dist. Judge, Ambala, D/- 9th April 1930.

Civil P. C. (1908), O. 1, R. 8 and O. 22, R. 1.—Suit by some landlords that certain tenancy had extinguished and for declaration that certain person has no occupancy right—Death of some plaintiffs pending suit—Legal representatives not brought on record—Suit is for benefit of all landlords and does not abate either wholly or in part.

Some of the landlords filed a suit that certain tenancy had extinguished and for a declaration that a certain person had no occupancy rights. Some of the plaintiffs died pending suit and their legal representatives were not brought on record:

Held: that although the procedure in O. 1, R. 8 was not followed, the relief claimed was for benefit of all the landords. The suit was a representative suit and consequently the death of some of the plaintiffs would not result in the abatement wholly or in part of the suit. *AIR* 1926 *Lah* 167, *Rel on*; *AIR* 1930 *Lah* 353 and *AIR* 1931 *Pat* 17, *Dist*; *AIR* 1930 *Lah* 515, *Ref*. [P 655 C 2]

J. N. Aggarwal and *S. L. Puri*—for Appellant.

J. L. Kapur and *Achhru Ram*—for Respondent.

Judgment.—Civil Appeals Nos. 1228 and 1263 of 1930 are connected and will be disposed of together. The material facts giving rise to these appeals are briefly as follows:-

One Munshi died without any issue, leaving some proprietary land as well as some land held on occupancy tenure. His widow Mt. Atma Devi held this land as a life tenant after his death for a time; but on her remarriage the land was mutated in favour of Phagga Singh, who claimed to be a collateral of Munshi. Thereupon two suits were instituted. One was by Mt. Shib Devi, who claimed to be a sister of the deceased Munshi. This suit related to the proprietary land only. The other suit was instituted with respect to the occupancy land by some of the landlords who claimed that the tenancy had become extinguished on account of the absence of any heir entitled to succeed under S. 59 of the Punjab Tenancy Act. During the pendency of the first suit Mt. Shib Devi died and the suit was continued by her husband Nanak as her legal representative. Eventually both the suits were decreed. Appeals were preferred by Phagga Singh to the District Court. The appeal in Mt. Shib Devi's case was dismissed by the learned District Judge while that in the case instituted by the landlords was accepted and the suit was dismissed on the ground that it had abated. From this decision second appeals have been preferred to this Court by Phagga Singh and the landlords respectively.

As regards the appeal in Mt. Shib Devi's case, one of the points raised before the learned District Judge was whether Nanak was entitled to continue the suit instituted by Mt. Shib Devi as her legal representative. The learned District Judge did not go into this question but upheld the decree of the trial Court on the ground that the defence of Phagga Singh broke down. This was obviously erroneous, as until the right of Nanak to prosecute the suit instituted by Mt. Shib Devi was established, no decree could be passed in his favour. The learned counsel for the respondent was compelled to concede that the learned District Judge had not discussed the evidence on this point or given any reasons for holding that Nanak was entitled to continue the suit as legal representative of Mt. Shib Devi. This was a mixed question of fact and custom and obviously required careful consideration. The learned District Judge's judgment cannot therefore be upheld and this suit must be remanded to him for re-decision after consideration of the question whether Nanak was entitled to prosecute the suit instituted by Mt. Shib Devi as her legal representative.

In the second appeal it is not disputed that some of the plaintiffs died during the pendency of the suit and their legal representatives were not brought on the record within time. The only question which requires consideration in this appeal therefore is whether the suit was properly held to have abated wholly. As to this point, it may be stated at the outset, that the plaintiffs claimed that the landlords were in possession and merely sued for a declaration that defendant Phagga Singh had no occupancy rights in the land in dispute and that it had been wrongly mutated in his name. The latter relief was merely of a consequential nature and the substantial relief which they really claimed was that defendant Phagga Singh had no occupancy rights in the land. The learned counsel for the landlords has contended that although some of the plaintiffs had died, the remaining plaintiffs were entitled to the declaratory relief prayed for as any one of them could have sued for such a relief. The learned counsel for Phagga Singh has, on the other had, challenged the correctness of this proposition and has relied upon *A. I. R.* 1930 *Lah.* 353 and *Kesheo Prasad Singh* v. *Mahomed Wahid* (1). But these cases are, I think, distinquishable. In *Kesheo Prasad Singh* v. *Mahomed Wahid* (1), the suit related to proprietary land. Some of the defendants who claimed the land died and their legal representatives were not brought on the record. It was also found that there was nothing on the record to show what area in the land was owned by the defendants who had died. In the circumstances it was held that the suits and appeals had abated wholly. In the second case a suit for possession was brought by a person who claimed occupancy rights in certain lands as against the defendant landlords. Some of the latter died during the pendency of the suit and their representatives were not brought on the record.

It was pointed out in the course of the judgment that a tenancy as between a tenant and a landlord is indivisible in its nature. As all the proprietors of the land jointly constitute one landlord whose rights qua the tenant are indivisible, it was not open to the tenant to claim relief against some of the landlords only. For, the tenancy being indivisible, the tenant could get possession of the whole or nothing. This view as to the nature of a tenancy, it may be pointed out here, is in accord with the view taken by a Full Bench of this Court in *A. I. R.* 1930 *Lah.* 515. As the plaintiff in that case (*A. I. R.* 1930 *Lah.* 353) could not get any relief against the legal representatives of those landlords who had died, it was held that the whole suit had abated. But in the present suit no such difficulty arises. For the plaintiffs are merely suing for a declaration that the defendant Phagga Singh has no occupancy rights in the land in dispute and there seems to be no good reason, why such a relief could not be claimed by any one of the landlords. As a matter of fact the suit had been instituted by some of the landlords only and the rest were joined as pro forma defendants. Although the procedure prescribed by O. 1, R. 8, Civil Procedure Code, had not been followed, the relief claimed, viz., that the defendant Phagga Singh had no occupancy rights was for the benefit of all the landlords. The suit was thus by its nature a representative suit and consequently according to the principle laid down in *Sunder Singh* v. *Ram Nath* (2), the death of some of the plaintiffs would not, in my opinion, result in its abatement either wholly or in part.

I accordingly accept both the appeals and remand the cases to the learned District Judge for re-decision of the appeals in the light of the above remarks. Costs to follow final decision.

K.S. *Appeals accepted.*

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1. A I R 1931 Pat 17=128 I C 119=9 Pat 698.
2. A I R 1926 Lah 167=93 I C 1013=7 Lah. 12.

A. I. R. 1933 Lahore 655

ABDUL QADIR, J.

Nasirud-Din and *others*— Judgment-debtors—Appellants.

v.

Dost Mohammad and *others* — Decree-holders—Respondents.

Misc. First Appeal No. 1186 of 1928, Decided on 4th May 1932, from order of Senior Sub-Judge, Lahore, D/- 3rd April 1928.

Civil P. C. (1908), O. 21, R. 15—Decree-holder omitting to state in his execution application names of all persons interested in decree does not invalidate execution proceedings—Court has discretion to give notice to other decree-holders—Judgment-debtor cannot object to execution being taken on this ground.

It is nowhere laid down that the omission on the part of a decree-holder to state in his application the names of all the persons who are interested in the decree, is such a defect as would invalidate execution proceedings, and it is in the discretion of the Court to give notice to the other decree-holder or to the judgment-debtor before making an order for execution, though it is not obligatory on the Court to issue such notice, and it is not for the judgment-debtor to raise an objection that sufficient steps have not been taken to safeguard the interests of the other decree-holders when they themselves have not made any complaint: *AIR* 1919 *Pat* 286, *not Appr*; *AIR* 1930 *All* 188, *Ref*; *AIR* 1931 *Lah* 600, *Foll.* [P 656 C 2]

Kishan Dayal—for Appellants.

J. N. Aggarwal and *Asa Ram* — for Respondents.

Judgment.—On 9th March 1915, a decree for Rs. 19,000, with costs was passed by compromise in favour of Dost Mohammad and the five sons of his brother, Fateh Mohammad; but the decree was not to be executed for one year after the said date. Applications for execution of this decree were made from time to time and the last one was dated the 27th April 1927. The judgment-debtors objected to the execution of the decree on the ground that the last application was not in accordance with law as laid down in O. 21, R. 15, Civil P. C., as it was made by Dost Mohammad and did not state that it was for the benefit of all the decree-holders and made no reference to the share of Mt. Janat Bibi, widow of of Fateh Mohammad. It was further objected that the application was barred by time, because the application made on 17th June 1925, which was relied on as a step-in-aid of execution to save the limitation of the application of the 27th April 1927, was itself defective, inasmuch as it was on behalf of the firm Dost Mohammad-Fateh Mohammad and not on behalf of Dost Mohammad himself, to whom rights under the decree had been transferred in his individual capacity. The Court of the Subordinate Judge first class disallowed these objections and ordered the execution to proceed. The judgment-debtors preferred an appeal to this Court against the order of the Subordinate Judge, First Class, and got the execution stayed pending the disposal of the appeal.

I have heard Mr. Kishen Dayal for the appellants and Mr. Jagan Nath Aggarwal for the respondent decree-holder, and find that there is no substance in this appeal and it must fail. Before discussing the value of the objections raised on behalf of the judgment-debtors, it may be mentioned that the suit between the parties in which the decree by compromise was given was by the firm of two brothers, known as Dost Mohammad Fateh Mohammad. Fateh Mohammad died leaving five sons, Din Mohammad, Abdul Majid, Abdul Hamid, Abdul Aziz and Abdul Rashid, and a widow Mt. Janat Bibi. When the decree was passed Dost Mohammad and the five sons of Fateh Mohammad were shown as decree-holders. Mt. Janat Bibi's name was not on the record at any stage of the case or in any application for the execution of the decree. One of the sons of Fateh Mohammad, namely, Abdul Rashid, died some time during the period between 1915, and 1923, and on 22nd December 1923, his four brothers assigned their interests in the decree to Dost Mohammad and this deed of assignment was registered on 20th June 1924. It was for this reason that when Dost Mohammad took out execution in 1925, he did so in his own name and again in 1927 when he filed the application under discussion he filed it in his own name.

The contention of the judgment-debtors is that, qua the share of Abdul Rashid, deceased, Mt. Janat Bibi had certain rights as his heir under the Mahomedan Law, and as she was not made a party to the application of 1927 and it was not stated therein that the application was for the benefit of all the decree-holders, including Mt. Janat Bibi, therefore, the application must be thrown out. Reliance was placed on a judgment of the Patna High Court in *A. J. Meik* v. *Midnapur Zemindary Co.*, (1), which held that an application for execution of a decree, which does not comply with the requirements of R. 15 of O. 21, Civil Procedure Code, cannot be allowed to be amended. The view taken however by the learned Judges of the Patna High Court in the above decision, does not appear to place the correct interpretation on O. 21, R. 15, according to some later authorities.

Mr. Jagan Nath refers to *Dharmadev Rai* v. *Jwala Prasad* (*A. I. R.* 1930 *All.* 188 at p. 190), and also to a Division Bench decision of this Court in *Ghanaya Lal* v. *Madho Parshad* (2). In the last case it is held that it is nowhere laid down that the omission on the part of a decree-holder to state in his application the names of all the persons who are interested in the decree, is such a defect as would invalidate execution proceedings. The same authority also makes it clear that it is in the discretion of the Court to give notice to the other decree-holder or to the judgment-debtor before making an order for execution, though it is not oligatory on the Court to issue such notice, and that is not for the judgment-debtor to raise an objection that sufficient steps have not been taken to safeguard the interests of the other

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1. AIR 1919 Pat 286=53 I C 803=4 P L J 575.
2. AIR 1931 Lah 600=135 I C207.

decree-holders when they themselves have not made any complaint. This ruling appears to me to be fully applicable to the case before me. Here, even if we assume that Mt. Jannat Bibi had any share or right in the decree in question, she has not come forward to be impleaded as a party to it, nor has she alleged that her husband's brother in executing the decree is trying to execute or to deprive her of her share. The position, as already explained, is that Dost Mohammad was, in his own right, entitled to one-half of the decree. His other brother's share which, after the death of that brother, belonged apparently to his five sons, had been signed on the death of one of them, i. e., Abdul Rashid, to Dost Mohammmad. The question whather Mt. Jannat Bibi was entitled to a share is a moot point, depending on the question whether the parties are governed by Mohammadan Law or custom. The trial Court has discussed this question but I do not think it was justified in going into it at the instance of the judgment-debtors. In any case the fact that there was no reference to the share of Mt. Jannat Bibi in the application of 1927, could not be a valid ground for the application not being allowed to proceed without Mt. Jannat Bibi being made a party. I think the execution should proceed subject to this safeguard that, if on any question being raised by Mt. Jannat Bibi it is found by any competent Court that she was entitled to a share in the decree as one of the heirs of Abdul Rashid, deceased, then any payment made by the judgment-debtors to Dost Mohammad would absolve the judgment-debtors of any responsibility towards Mt. Jannat Bibi, who would be entitled to take her share out of any money that Dost Mohammad may realise through this execution.

As to the second point, whether there was any defect in the application for execution made in 1925 and whether that defect was such as would not help in saving the limitation of the application of 1927, the issue, to my mind, is very simple. I have looked at the original application and I find that it is somewhat curiously worded. The applicant's name is given there as firm Dost Mohammad walad Pir Bakhsh. Now, it is obvious that there was never a firm called Dost Mohammad only. The firm, when it existed, was Dost Mohammad-Fateh Mohammad. The word "firm" used before the name of Dost Mohammad seems to be a mere surplusage and a mistake, inadvertently made, by the scribe. The very fact that the parentage of Dost Mohammad is mentioned shows that he meant to apply to his own individual capacity and not in the name of the firm. Therefore, the defect pointed out by Mr. Kishen Dayal in that application really disappears and I need not discuss the point of law on which counsel on both sides spent a good deal of time, i. e., whether a defective application can be taken to be a step-in-aid of execution. I hold that the application of 17th June 1925, was in order, and that therefore the application of 27th April, 1927, was within time. I, therefore, dismiss this appeal with costs and allow the execution of the decree to proceed.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 657

BHIDE, J.

Peoples' Bank, of Northern India Ltd., Lahore—Plaintiffs—Petitioners.

v.

Chanan Ram and *another*—Defendants—Opposite Parties.

Civil Revn. Petn. No. 743 of 1932, Decided on 10th April 1933.

Provincial Small Cause Courts Act (1887), Art. 42 — Suit for arrears of allotment and call money is small cause suit—Companies Act (1913), Ss. 21 and 59.

A suit by a Company for recovery of arrears of allotment money and call money due on shares allotted is cognizable by a Court of Small Causes: 97 *P R* 1881, *Dist.* [P 658 C 1]

H. C. Kumar—for Petitioner.

Dharm Bhushan—for Opposite Parties.

Judgment.—The sole point for decision in this case is whether a suit by a Company for recovery of arrears of allotment money and call money due on shares allotted to the defendant is cognizable by a Court of Small Causes. The learned Judge of the Small Cause Court Lahore relying on a ruling to which he has given no clear reference, has held it to be not cognizable by a Court of Small Causes and has returned the plaint for presentation to proper Court. The plaintiff company has filed a petition for revision of this order.

The learned counsel for the petitioner states that the ruling relied upon by the Court below is *Nand Kishore* v. *Kirkpatrick* (1), quoted at p. 13 of Rustomji's Provincial Small Cause Courts Act. That ruling, however, relates to a suit by a liquidator. S. 159 of the Indian Companies Act excepts such a suit during winding up proceedings from

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1. (1881) 97 P R 1881.

the cognizance of a Court of Small Cause. But there seems to be no provision to exclude from its cognizance an ordinary suit by a Company for money due on shares, of the present type. The learned counsel for the respondent referred to article 42 of the Provincial Small Cause Courts Act and S. 21 of the Indian Companies Act, but I am unable to see that these help him. I accept the petition with costs, and setting aside the order of the learned Judge of the Court of Small Causes direct that the suit be heard and disposed of by him according to law.

K.S. *Petition accepted.*

A. I. R. 1933 Lahore 658

BHIDE, J.

Chattar Singh and another—Plaintiffs—Appellants.

v.

Punjab & Sindh Bank, Ltd., and *another*—Defendants—Respondents.

Second Appeal No. 1122 of 1930, Decided on 4th April 1933, from decree of Dist. Judge, Amritsar, D/- 24th March 1930.

Vendor and Purchaser—Vendee paying part of vendor's mortgage-debt—Sale declared void under S. 53, Insolvency Act—Vendee is entitled to get amount of mortgage-debt only from vendor and not from mortgagee.

Defendant 2 sold a house to plaintiff, for Rupees 6,000 out of which Rs. 4,700 were left with him for payment to defendant 1, who was a prior mortgagee. Plaintiff paid Rs. 900 out of this amount to defendant 1. In the meantime the sale in plaintiff's fovour was declared void under S. 53 Insolvency Act, as the vendor was adjudged insolvent. Thereupon plaintiff sued for recovery of Rs. 900:

Held: that the plaintiff was entitled to relief only against defendant 2 and not against defendant 1. [P 658 C 2]

Iqbal Singh and *Nihal Singh*—for Appellants.

M. C. Mahajan—for Respondents.

Judgment.—The material facts of the case for the purpose of this second appeal may be stated as follows:—Mul Singh, defendant No. 2, sold a house to the plaintiffs for Rs. 9,000, out of which Rs. 4,700, were left with them for payment to the Punjab Bank (defendant No. 1) who held a prior mortgage thereof. The plaintiffs paid Rs. 900, out of this amount to the Bank. In the meantime, Mul Singh was adjudged insolvent and the sale in the plaintiffs' favour was declared void at the instance of the Receiver under S. 53, of the Provincial Insolvency. Act. Thereupon the plaintiffs sued for recovery of Rs. 900, paid by them to the Punjab and Sindh Bank, with interest thereon, claiming the amount as a charge on the house. The trial Court decreed the suit but, on appeal, the learned District Judge granted a personal decree for Rs. 1075, against Mul Singh, defendant No. 2, only. From this decision plaintiffs have appealed.

It has been urged on behalf of the plaintiffs that the learned District Judge's judgment is very brief and does not comply with the provisions of O. 41, R. 31, Civil Procedure Code, that the authorities relied upon by the trial Court were not discussed and no adequate grounds were given for upsetting the decision of the trial Court. I do not think there is much force in this contention. The learned District Judge has held that the sale having been set aside, plaintiffs could only seek their remedy against Mul Singh on whose behalf they made the payment. As regards the authorities relied upon before the trial Judge, it is not clear whether they were relied upon before the District Judge at all. In any case, they do not seem to affect the reasoning of the learned District Judge. The authorities in question refer to subrogation of mortgages. But the plaintiff had paid only a small portion of the mortgage and the mortgage had not been extinguished.

The learned counsel for the appellants next urged that both parties were under a mistake of fact and hence plaintiffs were entitled to recover Rs. 900 from defendant No. 1. In support of this argument. *A. I. R.* 1928 *P. C.* 261, was referred to, but the ruling seems to have no bearing on the facts of the case. Here there was no mistake of fact at all. The plaintiffs were bound to pay the mortgage money to defendant No. 1, according to the contract of sale and the hontract remained valid and binding until it was set aside at the instance of receiver. There was no privity of contract between the plaintiffs, and defendant No. 1. The money was paid to defendant No. 1, on the basis of the contract between plaintiffs and defendant No. 2, and that contract having been declared to be void, plaintiffs were in my opinion properly held to be entitled to relief against defendant No. 2 only. It is possible, as is alleged, that defendant No. 2 being insolvent, the plaintiffs are not likely to realise much out of their decree. But they have to take the consequences.

of entering into a transaction which was found to be fraudulent and has been set aside by the insolvency Court.

I dismiss the appeal but, in view of all the circumstances, I leave the parties to bear the costs of this appeal.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 659 (1)

ADDISON, J.

Fakir Chand—Appellant.

v.

Rulia and *others*—Respondents.

Misc. Second Appeal No. 1032 of 1932, Decided on 27th April 1933, from order of Senior Sub-Judge, Hoshiarpur, D/- 15th April 1932.

Civil P. C. (1908), O. 41, Rr. 23 and 25—Appellate Court framing new issues and remanding case to trial Court—Remand should be under O. 41, R. 25 and not under O. 41, R. 23.

Where an appellate Court stating that the trial Court had not framed certain issue, frames such issue and remands the case to the trial Court, the remand should be under O. 41, R. 25, and not under O. 41, R. 23, and the trial Court should proceed to try the issue and return the evidence together with its findings thereon and the reasons therefor to the appellate Court. [P 659 C 1, 2]

Fakir Chand—for Appellant.

Muhammad Munir—for Respondents.

Judgment. — The lower appellate Court stated that the trial Court had not framed any issue on the point whether the house in dispute belonged to Mt. Nathi. He then proceeded to frame that issue and certain other issues and, accepting the appeal, set aside the trial Court's judgment and remanded the case to the trial Court under O. 41, R. 23, of the Civil Procedure Code, for a fresh trial. Against this decision the defendant has preferred this second appeal. The only point argued was that the remand should have been under O. 41, R. 25, Civil Procedure Code, which runs as follows:

> "Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate Court essential to the right decision of the suit upon the merits, the appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues and shall return the evidence to the appellate Court together with its findings thereon and the reasons thereon."

It is clear that R. 25, does apply in terms and this was conceded by the opposing counsel. I accordingly accept the appeal to the extent that I order that the remand on the new issues will be under O. 41, R. 25, Civil Procedure Code. The trial Court shall proceed to try the issues and shall return the evidence to the lower appellate Court together with its finding thereon and the reasons therefor. The court-fee on the memo. of appeal in this Court will be refunded. Parties will bear their own costs in this Court.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 659 (2)

JAI LAL, J.

Bhan Singh and *another*—Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 593 of 1932, Decided on 7th September 1932, from order of Sess. Judge, Ludhiana, D/- 1st February 1932.

Excise Act (1914), S. 75—Trial after one year from commission of offence—Certificate subsequent to order of discharge—Trial is invalid—Criminal P. C. (1898), S. 188.

Petitioners who were arrested in the act of illicit distillation of liquor were sent up for trial but were discharged on the ground that there was no certificate under S. 188, Criminal P. C. Certificate was subsequently applied for and the case was actually presented more than one year from date of commission of offence:

Held: that the production of the certificate subsequently after the order of discharge did not amount to a revival or continuation of the original proceedings and the subsequent trial was without jurisdiction. [P 660 C 1]

Jhanda Singh—for Petitioners.

Judgment.—The petitioners in this case are alleged to have been arrested in the act of illicit distillation of liquor on 17th June 1930. They were sent up for trial on 3rd July 1930, but were discharged by a Magistrate on 25th July 1930, on the ground that the offence was committed in the Patiala State territory and the accused could not be tried without a certificate from the Agent to the Governor-General, Punjab States, under S. 188 of the Criminal Procedure Code. Such a certificate was then applied for and granted on 16th April 1931, but an order was not passed by the District Magistrate till the 30th July 1931, that the Magistrate concerned should proceed with the case, and the case was actually presented before the Magistrate on 4th August 1931. Even the order passed by the District Magistrate on 30th July 1931, was more than one year after the date of offence.

S. 75 of the Excise Act of 1914 provides that, except with the sanction of the Local Government, no Court shall take cognizance of an offence, like the present, after the expiry of one year from the date of the commission of the offence. In the present case no sanction of the Local Government has been obtained and the proceedings on which the petitioners have been convicted cannot be deemed to be the continuation of the original proceedings which resulted in their discharge. The production of the certificate subsequently after the order of discharge has been passed in this case does not, in my opinion, amount, to a revival or continuation of the original proceedings. The trial, therefore, in this case was without jurisdiction having been commenced after one year from the date of the commission of the offence and accepting the petition I set aside the conviction of the petitioners leaving it to the District Magistrate to take such further action as he may be advised.

K.S. *Petition accepted.*

A. I. R. 1933 Lahore 660

BHIDE, J.

Santa Singh Kamal—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1375 of 1932, Decided on 20th February 1933, from order of First Class Magistrate, Ferozepore, D/- 28th September 1932.

(a) Penal Code (1860), Ss. 302 and 117—Speech addressed to large audience inciting it to murder—Offence falls under Ss. 302 and 117.

Where a speech was addressed to a large audience wherein the speaker incited the audience to murder Englishmen and Government officials:

Held: that the more appropriate section to be charged with was S. 117 read with S. 302. [P 660 C 2]

(b) Penal Code (1860), S. 117—Scope.

Section 115 applies only when the abetment is not punishable under another provision of the Code. So, if S. 117 applies, the offence would not fall under S. 115. [P 660 C 2]

(c) Criminal P. C. (1898), S. 439—Enhancement of sentence in revision.

Each case has to be judged on its merits and moreover different considerations prevail when the question is one of enhancement of sentence on the revision side. [P 661 C 1]

Jiwan Lal Kapur—for Appellant.

Abdul Rashid—for the Crown.

Judgment.—The appellant Santa Singh Kamal alias Sant Ram was convicted in this case under S. 302, read with Ss. 115 and 117, Indian Penal Code, and sentenced to rigorous imprisonment for five years. The prosecution case was that the appellant made a violent speech at a "Diwan" held at village Bhullar in which he incited the audience to murder Englishmen and Government officials. The appellant denied having made the speech attributed to him and produced a number of witnesses who deposed that he was not even present at the Diwan. This defence evidence however was disbelieved by the learned Magistrate who tried the case. The prosecution produced a report of the speech based on shorthand notes taken on the spot and several witnesses were also produced who corroborated the report. The learned counsel for the appellant has not attempted to support the plea of the appellant that he did not make the speech attributed to him but has merely urged that even accepting the finding of the learned Magistrate that he did make the speech the offence does not properly fall under S. 302/115 of the Indian Penal Code and the sentence is in any case excessive.

As regards the first point, the learned Magistrate has convicted the appellant both under S. 302 read with S. 115, as well as S. 117, Indian Penal Code. S. 115, applies only when the abetment is not punishable under another provision of the Code. So if S. 117, applies the offence would not fall under S. 115, Indian Penal Code. S. 117 provides punishment for abetment of an offence by the public generally or by number of class of persons exceeding ten. In the present instance, the speech was addressed to a large audience and in this aspect of the question it might be said that S. 117, Indian Penal Code, is more appropriate. No direct authority is cited and the point is perhaps not free from doubt. The bulk of the speech would properly fall under S. 124-A, Indian Penal Code, but there are passages, which would fall at least under S. 117, Indian Penal Code, if not under S. 115, Indian Penal Code. The appellant was, however, not charged under S. 124-A, Indian Penal Code. I, therefore, hold the appellant to be liable either under S. 302/115, or 302/117, Indian Penal Code, in the alternative.

As regards punishment, the learned counsel referred to Criminal Revision No. 447 of 1932, in which Court refused to enhance a sentence of six months in a similar case. But each case has to be judged on its merits and moreover different considerations prevail when the question is one of enhancement of sentence on the revision side. In the present instance the speech was undoubtedly very violent. I reduce the sentence to rigorous imprisonment for three years, which is the maximum punishable under S. 117, Indian Penal Code.

V.S. *Sentence reduced.*

A. I. R. 1933 Lahore 661

DALIP SINGH AND ABDUL QADIR, JJ.

Mehdi and *others*—Convicts — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 875 of 1932, Decided on 11th April 1933, from order of Sess. Judge, Attock, D/- 7th June 1932.

(a) Criminal P. C. (1898), Ss. 423 and 439 —Scope.

Under the combined provisions of Ss. 423 and 439 High Court has power to alter a conviction under S. 326, Penal Code, to one under S. 302, Penal Code: *AIR* 1914 *Mad* 258 and *AIR* 1924 *Rang* 93, *Foll*; *AIR* 1928 *P C* 254, *Dist.* [P 664 C 1]

(b) Penal Code (1860), Ss. 302, 147, 148, 149, 325 and 326 — Charge on facts alleged stated—Criminal trial, charge.

There was enmity between one Mirza on one side and one Mehra on the other owing to dispute about daughter of Mirza, who was married to but who left Mehra's son *A*. As a result there were some criminal proceedings and two factions in the village. One night a small wall belonging to Nawab, lambardar of the village who sided with Mirza was demolished by some of the party of Mirza. Nawab remonstrated next day, upon which Mehra agreed to reconstruct the wall and the work was actually begun when *A* and *S*, another son of Mehra appeared and objected to their father's taking part in reconstruction. Mehra joined *A* and *S* and parties exchanged abuses and work of reconstruction was stopped. Thereafter Mehra, *A* and *S* left the spot, and while Nawab and some of his partisans were dispersing, 12 persons including Mehra, *A* and *S* appeared, five of the them with spears and rest with dangs and immediately attacked Nawab and his partisans. Amongst Nawab's partisans present were Mirza, *G*, Alif, *D* and *K*. Mirza was stabbed with one spear blow which went clean through his body cutting the liver and killed him, *G* received various minor injuries, as also a spear blow and blow on the skull which caused his death, the spear blow severing the big artery and vein on the right thigh and the blow on the skull fracturing the right temporal bone and separating the fronto parietal suture. Alif received a spear blow and some other injuries but death was due to the cutting of liver by the spear blow. *D* and *K* also received blows with cutting weapons:

Held: that on the facts alleged, the simple charge was that all the 12 persons formed unlawful assembly with the object of causing hurt to Nawab, Mirza and others and in the prosecution of that common object they killed Mirza, Alif and *G* and were therefore guilty under S. 302 read with S. 149: [P 664 C 1]

Held further: that subsidiary charges under Ss. 148, 147, 326 and 149 for grievous hurt to *D* and under Ss. 324 and 149 for injury to *K* might also have been framed. [P 663 C 1, 2]

L. Saunders—for Appellants.

D. R. Sawhney—for Opposite Party.

Dalip Singh, J.—On 18th January 1932, a serious riot occurred in village Dhok Gujri in the course of which three persons, namely, Mirza, Ghazan and Alif lost their lives, Khuda Dad was dangerously wounded with a stabbing weapon, Khan Alam also sustained simple injuries with a stabbing weapon and Mukhana, Mulk and Shahana also received simple injuries with a blunt weapon. On the other side Fazal Dad, Sulaiman, Gulab, Asir, Aurangzeb and Mehra received certain injuries described as abrasions with the exception of one injury of Fazal Dad, which is described as a contused wound. Twelve persons were challaned before the learned Sessions Judge. The Committing Magistrate had framed certain charges against them but these were amended by the learned Sessions Judge and finally five persons, namely, Mehra, Fazal Dad, Mehdi son of Sardara, Mehdi son of Alif and Ahmad Ali were charged under S. 148, the common object of the unlawfal assembly being described as murdering Alif, Mirza and Ghazan and preventing one Nawab from rebuilding a wall. Seven other persons, namely, Aurangzeb, Gulab, Sulaiman, Amir, Munir, Bahadur and Mir Alam were charged under S. 147, with the same common object. In addition there were charges under S. 302, Indian Penal Code, read with S. 149 of the same Code against all the twelve persons named above, the common object being specified in one head the murder of Alif, in a second head the murder of Mirza, in a third head the murder of Ghazan, in a fourth causing grievous hurt to Khuda Dad and in fifth head causing simple hurt to Khan Alam by a stabbing instrument, namely, a spear.

The learned Sessions Judge having framed these charges proceeded to the trial of these twelve persons and found on the evidence that it was not proved that there was any common intention to murder Alif or Ghazan or Mirza. He also found that the only common object of the assembly might be held to be that of causing grievous hurt to Mirza. In another part of the judgment he also agreed with the opinion of the assessors that there was a conspiracy on the part of all the accused to raise a dispute about a wall belonging to Nawab with the object that on the intervention of Mirza which was expected, Mirza might be murdered. He also entirely accepted the statements of two witnesses Lal Beg and Allah Dad. Having come to all these findings which are not always possible to reconcile, he convicted eleven persons under S. 326 read with S. 149 and sentenced them to five years' rigorous imprisonment each. Five persons who were charged under S. 148, were found guilty under that section and sentenced to 18th months' rigorous imprisonment each, the sentences running concurrently with those imposed under Ss. 326/149. Seven persons charged under S. 147 were found guilty under that section and sentenced to one year's rigorous imprisonment each the sentences running concurrently with the sentences imposed under Ss. 326/149.

As regards one person Mehdi son of Sardara in addition to the convictions mentioned above he found him guilty under S. 326, for grievously wounding Khuda Dad with a spear and sentenced him to five years' rigorous imprisonment. He also convicted him under S. 324 for causing simple hurt with a spear to Khan Alam and sentenced him to three years' rigorous imprisonment. These sentences, namely, under Ss. 326 and 324 were to run consecutively with the sentences inflicted on Mehdi son of Sardara under Ss. 326/149 and 148. The result, therefore, was that eleven persons were sentenced to undergo five years' rigorous imprisonment and one person was as a result of all these findings to undergo thirteen years' rigorous imprisonment for taking part in one riot in which three persons lost their lives, one person was dangerously wounded and four others received simple injuries. This remarkable result I will analyse a little later but not content with having received what can only be called a comparatively light punishment for so serious an offence on the findings of the learned Sessions Judge, all the persons convicted have appealed to this Court. Four persons, namely, Mehra son of Hayat, Ahmad Ali son of Hayat, Aurangzab son of Mehra aforesaid and Mehdi son of Sardara have appealed through counsel, namely, Mr. Saunders and the remaining eight persons have appealed through jail.

On the case coming before me in Single Bench I referred it to a Division Bench in an order dated the 10th January 1933, because it appears to me that on the findings of the learned Sessions Judge himself there should have been a conviction under S. 302/149 of all the appellants. Moreover the singling out of Mehdi son of Sardara for the peculiar sentences inflicted on him did not seem to me to secure the ends of justice. At the same time I issued notice to the accused to show cause why their convictions should not be altered to one under Ss. 302/149. The case has been now heard by a Division Bench. We have heard the learned counsel for the four appellants and have read the record. We have also heard a petition for enhancement of sentences by Mr. Mohsin Shah. We have heard the learned Public Prosecutor in reply. The case is essentially a very simple one and it was the curious way the charges were framed that probably led the learned Sessions Judge into what I can only describe as contradictory findings and a serious confusion as to the law.

The prosecution story is that there was enmity between Mirza deceased on one side and Mehra son of Hayat appellant on the other owing to Mt. Maryam, daughter of Mirza, having been married to Auranzab, son of Mehra, and having subsequently been obliged to leave him owing to dissentions with the step-mother of Aurangzeb and wife of Mehra. Thereupon the party of Mehra brought a complaint against this lady and other persons including the deceased Mirza because it was alleged that this woman had removed certain ornaments, etc. which did not belong to her but belonged to her husband's family. The police investigated the affair and took hold of the property but ultimately the complaint was found to be false and the property was returned to Mt. Maryam, etc. Mirza, deceased, accompainsed by others had gone shortly before the present occurrance and recovered this property. There were also other causes of enmity between the two factions and on the night preceding this occurrance it is alleged by the prosecution that a small wall belonging to Nawab, who had sided with Mirza in the dispute about Mt. Maryam and who is a lambardar of this village, was demolished by some of the party of the accused. The next day Nawab, accompanied by Lal Beg, Allah Dad and Nura went in a deputation to Mehra appellant to remonstrate about the destruction of the wall. Mehra agreed to reconstruct the wall and accordingly the deputation accompanied by Mehra came to the spot. One Gulab blacksmith a witness was sent to reconstruct the wall. While he was constructing the wall Aurangzeb and Suleman appellants arrived on the spot and objected to their father taking part in the reconstruction and indeed to any reconstruction of the wall. Mehra sided with Aurangzeb and refused to have anything furter to do with the reconstruction. Thereupon the parties exchaged abuse and it appears that some partizans of either side appeared on the spot though it is not very clear who exactly appeared.

The finding of the learned Sessions Judge is that Mirza deceased at any rate may certainly be held to have come to the spot. Thereafter Aurangzeb, Suleman and Mehra left, the building of the wall also stopped and the party of the complainants were dispersing when twelve persons, namely, all the appellants five of whom were armed with spears and the rest had dangs, appeared on the spot. On hearing the noise the party of the complainnants returned back to the spot. It appears then that they were immediately attacked by these twelve appellants. Mirza was stabbed one spear blow which went clean through his body cutting the liver and killed him. Ghazan received various minor injuries. He also received a spear blow and a blow on the skull which caused his death, the spear blow severing the big artery and vein on the right thigh and the blow on the skull fracturing the right temporal bone and separating the fronto-parietal suture. Alif received a spear blow and some other injuries but death was due to the cutting of the liver by the spear blow. Khuda Dad and Khan Alam also received blows with cutting weapons. Various persons appeared on the spot and were either silent and passive on account of fear or if they interfered were beaten and caused injuries by the twelve appellants.

Now, on the facts alleged by the prosecution the perfectly simple charge was that all the twelve appellants formed an unlawful assembly with the object of causing hurt to Nawab, Mirza and others and in the prosecution of that common object they killed Mirza, Alif and Ghazan and were, therefore, guilty under S. 302 read with S. 149. Subsidiary charges under Ss. 148, 147, 326/149 for the grievous hurt to Khuda Dad and under Ss. 324/149 for the injury to Khan Alam might have been framed also but the essence of the charge. should have been the unlawful assembly for the purpose of causing grievous hurt and the resultant deaths of three persons in the prosecution of the common object of that assembly or with the likelihood that such result might ensue in the prosecution of that common object. Had this simple view of the case been borne in mind confusion that resulted might have been avoided.

The learned Sessions Judge on the charges that he framed found that as Aurangzeb, Mehra and Sulaiman had left the spot before Alif and Ghazan arrived there was, therefore, no common object to murder Alif and Ghanzan. This finding might be correct but was wholly irrelevant and immaterial. He similarly found that it could not be inferred from the circumstances that there was an intention to murder Mirza. He forgot again that this finding only meant that such was not the common intention of the assembly. It did not do away with the provisions of S. 149, namely, that such a result was likely to ensue from what he did find was the common object of the assembly, namely, causing grievous hurt to Mirza. It is unnecessary to deal at length with the evidence for beyond reading it over to us practically no comments have been offered by the learned counsel for the appellants nor has he in any way attacked the findings of the learned Sessions Judge as to the credibility of Lal Beg and Allah Dad witnesses. These witnesses appear to be disinterested and I have no hesitation in agreeing with the learned Sessions Judge in accepting their evidence as giving a substantially correct and true account of what occurred.

Some argument was advanced by the learned counsel that the wall itself was not proved ever to have existed. There is a very bad plan on the record which the learned Sessions Judge comments on but I have again no hesitation in agreeing with the learned Sessions Judge that with whatever object it might be, the immediate cause of the dispute was this wall which undoubtedly existed at the spot alleged by the prosecution witnesses. It may be that appellants, as conjectured by the assessors, conspired to make the wall a casus belli. It may be that they had some other object to serve in removing the wall, but be that as it may, there seems little doubt that all the appellants assembled together and armed themselves five with spears and seven with dangs in order to take revenge for the dispute about the wall. Now, when twelve persons so arm themselves I think it is a fair and indeed the only inference that at the very least they intended to cause grievous hurt to certain persons. If in the course of prosecuting that common object they also killed certain persons it seems to me the only fair inference that they should have known that such a result was likely to ensue in the course of the endeavour to attain the common object. The way in which the spears were used is in itself strong proof of the intention of the persons using them and protracted nature of the attack shows that all the appellants had a common object in this unlawful assembly. I therefore consider that the appellants should have been convicted under S. 302 read with S. 149 and I would, therefore, alter all the convictions to one conviction of all the appellants under these sections and would under S. 439, alter the sentences of all the appellants to one sentence of tranportation for life.

It was somewhat feebly contended by the learned cousel for the appellants that the High Court had no power under the combined provisions of S. 423 of the Criminal Procedure Code, and S. 439 of the same Code to alter the conviction under S. 326 to one under S. 302. *In re Bali Reddi* (1) and *On Shwe* v. *Emperor* (2), are authorities against his contention and nothing has been advanced before us to show that those rulings are wrong. The only ruling referred to by the learned counsel for the appellants was *Kishan Singh* v. *Emperor* (3), but in that ruling their Lordships of the Privy Council expressly stated that they did not decide the point as to the combined powers of the High Court under the two sections decided in *In re Bali Reddi* (1). I would, therefore, repel this contention of the learned counsel for the appellants.

Abdul Qadir, J.—I agree.

V.B./R.K. *Order accordingly.*

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1. AIR 1914 Mad 258=22 I C 756=15 Cr L J 180=37 Mad 119.
2. AIR 1924 Rang 93=76 I C 711=25 Cr L J 247=1 Rang 436.
3. AIR 1928 P C 254=111 I C 332=55 I A 390=50 All 722 (PC).

A. I. R. 1933 Lahore 664

SHADI LAL, C. J. AND MONROE, J.

Wali—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1553 of 1932, Decided on 14th March 1933.

Penal Code (1860), Ss. 302 and 304 (2)—Son suddenly and in heat of passion striking his father and causing his death—Offence held committed under S. 304 (2), and not under S. 302.

There was a quarrel between the father and the son, and the latter suddenly got enraged, struck the former in the heat of passion and caused three or four injuries, one of which was fatal.

Held: that the offence was committed not under S. 302 but under S. 304 (2). [P 665 C 1]

Mohammad Amin—for Appellant.

R. C. Soni—for the Crown.

Shadi Lal, C. J. — The appellant, Wali, an Arain of Chak No. 482, G. B. in the District of Lyallpur, has been convicted of the murder of his father, Jhandu; and has been sentenced under S. 302, Penal Code, to transportation for life. There is ample evidence on the record that there were constant disputes between the prisoner and his father about the partition of the family property. The father owned a plot of land, which the prisoner asked him to partition; but he did not accede to the request.

The story for the prosecution is that, on the evening of 7th July 1932, Jhandu was beaten by Wali, while he was smoking in his field, and sustained several injuries to which he succumbed either on that evening or on the ensuing morning. It is however beyond dispute that, when the unfortunate man expired, the prisoner and his relatives tried to hush up the matter, and buried him in the village grave-yard. It was not until the 12th July when the zaildar, Umar Din, who had been absent from the village, returned to it, that the information was obtained that Jhandu's death was due to the injuries which had been inflicted upon him by his son Wali. The zaildar, thereupon, went to the police station and reported the affair. The investigating officer asked for permission for exhuming the corpse of Jhandu, which was disinterred on the 15th July and still showed marks of injuries. The medical witness was able to discover three injuries including one on the head, and expressed the opinion that the death might be due to a fracture of the skull. Four witnesses, namely, Dullah, (P. W. 3), Karim, (P. W. 4), Zaman Shah, (P. W. 5) and Ghulam Mohammad, (P. W. 6), state that they saw Wali striking his father with a lathi; and their evidence is confirmed by the confession which the prisoner himself made to the zaildar on the 12th July. He admitted that he had struck his father on the head, back, face and ribs; and there can be little doubt that the injuries inflicted by him resulted in the death of the victim. There is not an iota of evidence on the record that any threat or inducement was held out by the zaildar, and there is therefore, no valid ground for excluding the confession from consideration.

Indeed, the learned counsel for the appellant admits that on the evening in question there was a quarrel between the father and the son, and that the son struck the father with a lathi. He however contends that the circumstances of the case, including the relationship between the parties, point to the conclusion that there was no intention to cause death or to cause such bodily injury as was likely to cause death. There is no force in this contention. It appears that there was a quarrel between the father and the son, and that the latter suddenly got enraged, struck the former in the heat of passion and caused three or four injuries. There is no adequate ground for attributing to the assailant the intention contemplated by S. 304, part 1, Penal Code. I would accordingly accept the appeal so far as to alter the conviction to one under S. 304, part 2, Penal Code, and to reduce the sentence to rigorous imprisonment for ten years.

Monroe, J.—I agree.

R.K. *Order accordingly.*

A. I. R. 1933 Lahore 665

BHIDE AND CURRIE, JJ.

Fazal Hussain—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 510 of 1932, Decided on 28th June 1932, against order of Sess. Judge, Rawalpindi, D/- 4th March 1932.

(a) Criminal Trial—Confession, when sole basis for conviction, should be taken in its entirety.

Where the evidence adduced by the prosecution is wholly disbelieved and the conviction of the accused is solely based on his confession made in the Sessions Court, that confession must be taken in its entirety if it is to be the sole basis of a conviction. [P 666 C 2, P 667 C 1]

(b) Penal Code (1860), S. 100—Attack giving reasonable apprehension of death or serious injury—S. 100 applies.

Where according to the confession of the accused, which was the sole basis for conviction, the accused was way laid and attacked by two persons, who were armed with hatchets and he snatched the hatchet from one of them and hit one or both of them in order to save his life, he cannot be held guilty of any offence. The attack clearly gave him reasonable apprehension of death or grievous hurt and the case would be covered by S. 100. Nor can it be said that the accused exceeded his right by inflicting more harm than was necessary for being attacked with hatchets, his life was in danger every moment and he could not be expected in such circumstances to modulate his defence at every step or be able to gauge the precise force or number of blows which would have been just sufficient to save his life. [P 667 C 1]

Nazir Ahmad—for Appellant.

Abdul Rashid—for the Crown.

Bhide, J.—The appellant, Fazal Hussain, has been convicted in this case under S. 302, Penal Code, of the murder of one Din, and sentenced to transportation for life. The prosecution case was that the appellant had an intrigue with Mt. Lalan, a widowed sister-in-law of the deceased Din. The deceased remonstrated with the appellant upon which the appellant was offended and threatened to kill him. On the date of the occurrence Din had gone with his brother, Mohammad Din, and his son-in-law, Mohammad Afsar, to the threshing floor of Chandi to help him in gathering his moong crop. At about Rotiwela Din was going towards his house to have a drink when he was suddenly assaulted by the appellant and three other persons who were armed with hatchets.

The incident is said to have been seen by Badar Din Chaukidar who was on his way to his fields and also by Mohammad Gul and Mohammad Afsar who came to the spot while the deceased was being beaten. Mohammad Gul and Mohammad Afsar are said to have left the thrashing floor of Chandi soon after the deceased and were going to the house of Chandi to have a drink. Mohammed Gul remonstrated with the appellant upon which he was also given a hatchet blow. Chandi went to the spot on hearing the row and he was also attacked and injured with a stone by one of the culprits. The matter was reported to the police by Badar Din Choukidar. On the way to the police station he also informed Sher Jang Inam Khor as directed by the lambardar of the village. Sher Jang went to the spot and upon his inquiry the appellant, Fazal Hussain, is said to have confessed his guilt and produced the hatchet with which the offence was committed. Din died as a result of the injuries shortly after the arrival of Sher Jang.

The appellant pleaded not guilty. In the Court of the Committing Magistrate he made a statement to the effect that on his way from his dhok to the village he was attacked by the deceased Din and his brother Mohammad Gul, that a stone was thrown at him by Din and while he was grappling with Din

Mohammad Gul aimed a blow at him with a hatchet which struck Din by mistake. In the Sessions Court he made a different statement. He stated there that he was attacked by Din and Mohammad Gul and in trying to save himself he inflicted a blow with a hatchet on the head of the deceased. The learned Sessions Judge did not consider the evidence of the eye-witnesses to be satisfactory as it was not consistent with the probabilities of the case. He did not think it likely that the appellant and his companions would have been lying in wait, armed with hatchets, to murder Din as alleged by the prosecution as they could not have anticipated that Din would be passing that way at the time, and the place being populated it was not likely that it could have been chosen for the commission of such an offence. The learned Sessions Judge was of opinion that the fight took place between Fazal Hussain, appellant, and Din and it was doubtful whether any of the other accused took part in the affair. As regards the appellant's plea of self-defence, he did not consider it as established and held in view of the nature of the inquires on the head of the deceased that the offence fell under S. 302, Penal Code. He accordingly acquitted the accused with the exception of the appellant and sentenced him to transportation for life.

It has been urged on behalf of the appellant that the learned Sessions Judge has practically disbelieved the evidence of all the eye-witnesses, that he did not also attach importance to the "extra judicial" confession alleged to have been made by the appellant to Sher Jang and in the circumstances, the conviction of the appellant was not justifiable. It was contended that the so-called confession of the appellant in Court, if it was to be accepted, should have been accepted in its entirety and that according to that confession the appellant was clearly within his right of private defence. Lastly, it was urged that even if the appellant is held to have exceeded his right of private defence, he could at the most be convicted under S. 304, Penal Code, and that the sentence should be much less severe. As regards the first point, the learned Sessions Judge has definitely held that the alleged eye witnesses Mohammad Gul and Mohammad Afsar reached the spot after the attack on the deceased had ended. The learned Sessions Judge has given good reasons in support of this view and his finding in this respect was not challenged before us. The learned counsel who appeared for the Crown however contended that there is no good reason why the testimony of Badar Din Chaukidar should not be accepted. The learned Sessions Judge's finding in respect of this witness is not very clear. After considering the probabilities of the case and the evidence of the eye witnesses, he gives his conclusion as follow:

> "In any case the only safe conclusion to arrive at under the circumstances is that there was a fight between the deceased and the accused Fazal Hussain, during the course of which the latter inflicted injuries on the deceased with the hatchet that he had. As there is nothing very definite to connect the other three accused with the crime, they must under the circumstances of the case be given the benefit of doubt."

Now this conclusion is wholly inconsistent with the testimony of Badar Din, who definitely deposed that all the four accused persons were armed with hatchets and inflicted injuries on the deceased. It does not appear that Badar Din had any motive for falsely implicating any of the accused. There is therefore no good reason for accepting his testimony in respect of Fazal Hussain and rejecting it in respect of the other three accused. It seems to me that in the circumstances of the present case, the testimony of Badar Din must either be accepted or rejected as a whole. The most important point for determination in the present case therefore is whether the testimony of Badar Din can be safely accepted as reliable. (After considering the evidence, his Lordship proceeded). After carefully considering all the facts I do not think the testimony of Badar Din could be safely accepted as reliable enough for convicting the appellant. If then the testimony of Badar Din and the other eye-witnesses is excluded, as I think, it must be, we are only left with the "extra-judicial" confession alleged to have been made by the appellant to Sher Jang and his statement in the Sessions Court. The former cannot be attached much importance. All that is deposed is that the appellant said that he had committed a mistake, but he also stated at the same time that he had himself been attacked and injured. So the alleged confession cannot be said to be inconsistent with the plea of self-defence, which the appellant has put forward in the Sessions Court. All that is necessary therefore is to consider whether any conviction can be based on the statement made by the appellant himself in the Sessions Court. The contention of the learned counsel for the appellant that this statement must be taken in its entirety, if it is to be the sole basis of a conviction, is sound and its correctness was not disputed by the learned counsel for the Crown. According to the appellant's statement before the Sessions Court, he was attacked by the deceased and his brother Mohammad Gul, who were lying in wait. The deceased threw a stone on the appellant which hit him on the left shoulder. Then the appellant threw a stone at the decesed which hit him on one side of the head. Then the deceased and the appellant grappled with each other. In the meantime Mohammad Gul gave the appellant two blows with a hatchet on the left arm and on the head. The appellant snatched the hatchet from Din's hand and hit him on the head. The appellant gave Din another blow with the hatchet and then Din fell down.

The appellant has thus tried to make out that he inflicted the injuries on the deceased in the exercise of his right of private defence. There is nothing inherently improbable in the story put forward by the appellant that he was attacked by the deceased and Mohammad Gul. As I have said already, owing to the appellant's alleged intrigue with the deceased's sister-in-law, the deceased and his brother Mohammad Gul had a stronger motive for attacking the appellant than for the appellant to attack them. It is true that according to the appellant only three injuries were inflicted by him on the deceased while the medical evidence shows that the deceased had received five injuries. But even assuming that the five injuries were inflicted by the appellant, the question still remains whether he can be convicted of any offence on the basis of his statement alone. I am of opinion that he cannot be convicted on that basis. According to the appellant's statement he was waylaid and attacked by two persons, who were armed with hatchets and if he snatched the hatchet from one of them and hit one or both of them in order to save his life, he cannot be held guilty of any offence. The attack clearly gave him reasonable apprehension of death or grievous hurt and the case would be covered by S. 100, Penal Code. Nor can it be said that the appellant exceeded his right by inflicting more harm than was necessary for being attacked with hatchets. His life was in danger every moment and he could not be expected in such circumstances to modulate his defence at every step or be able to gauge the precise force or number of blows which would have been just sufficient to save his life.

I accordingly hold that the evidence on the record is not reliable enough to sustain the appellant's conviction and giving him the benefit of the doubt would acquit him.

Currie, J.—I concur.

K.N./R.K. *Accused acquitted.*

A. I. R. 1933 Lahore 667

SHADI LAL, C. J. AND AGHA HAIDAR, J.

Abbas Ali Shah—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 439 of 1932, Decided on 9th June 1932, from order of Sess. Judge, Jhelum, D/- 14th March 1932.

(a) Evidence Act (1872), S. 146 — Judge should control cross-examination.

If in a criminal case any questions are put by the defence counsel which contravene the ordinary rules of evidence, then it is the duty of the Sessions Judge to control the cross-examination in such a way as to disallow any question which he considers to be misleading or improper. [P 668 C 1, 2]

(b) Evidence Act (1872), S. 118 — Competency of children as witnesses stated.

Children are a most untrustworthy class of witnesses, for, when of a tender age they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, and are greatly influenced by fear of punishment, by hope of reward, and by desire of notoriety. When considering the evidence of child witnesses these observations should not be lost sight of, although each case would depend upon its particular facts and circumstances. [P 668 C 2]

Abdul Aziz—for Appellant.

Muhammad Monir—for the Crown.

Agha Haidar, J. — Two elderly women, namely, Mt. Gulab Bi and Mt. Hussain Bi, were murdered early in the afternoon on 23rd October 1931, while they were washing their clothes at Kallar Kassi, a stream running through the area of Miani Mohra in the District of Jhelum. Mt. Gulab Bi received four incised wounds on her neck and jaw, while Mt. Hussain Bi received five such wounds and three of her ribs were fractured.

Four persons, namely, Alam Shah, Abbas Ali Shah, Inayat Ali Shah and his servant Painda, were placed before the Sessions Judge, Jhelum, to take their trial on a charge of murder. The Sessions Judge has acquitted Alam Shah, Inayat Ali Shah and Painda, but has convicted Abbas Ali Shah and sentenced him under S. 302, Penal Code, to death. Abbas Ali Shah has appealed to this Court through his counsel, Mr. Abbul Aziz, and the record of the case is also before us under S. 374, Criminal P. C., for the confirmation of the capital sentence. (His Lordship referred to the evidence and continued): According to the learned Sessions Judge the case depends mainly upon the evidence of Mt. Fazlan, the little child. As already stated, she was near the two women at the time when they were murdered. This child has stated that she recognized Abbas Ali Shah alone among the four assailants and failed to recognize the remaining three as they were wearing mandasas. In cross-examination she has stated that neither of the assailants kicked Mt. Hussain Bi, nor anyone sat upon her or threw any stone at her. This evidence is contradicted by the medical evidence which clearly says that the 8th, 9th and 10th ribs of Mt. Hussain Bi were fractured, and that the injury to the spleen and overlying ribs may have been caused by someone kneeling on the body, probably just before the death. Mt. Fazlan has further stated that, although the Thanedar came to the village at night, her statement was taken down on the following morning. She also says that her brother Mehdi had gone with her when she appeared before the Thanedar and had told her that she should state before the police that she had identified Abbas ali Shah. She further says that her statement was recorded by the Deputy Sahib and Mehdi, who had come with her to the Court, had compelled her to mention the name of Abbas Ali Shah. Further on she says that she came to Jhelum to give evidence the day before and that at night her uncle was with her and the Thanedar was also present at the place where they were stopping. She says that the Thanedar also had told her that she should state that she had identified Abbas Ali Shah and that, as she was being escorted by the policemen to the Court, she was told that she should state that she had identified Abbas Ali Shah.

The Sessions Judge observes that, after the defence counsel had put to her "puzzling and leading questions," he took the child witness "in hand and entered into a dialogue with her." I do not understand what were the "puzzling" questions which the counsel for the defence was putting to the child. At any rate they do not appear on the record. If any questions were put by the defence counsel which contravened the ordinary rules of evidence, then it was the duty of the Sessions Judge to control the cross-examination in such a way as to disallow any question which he considered to be misleading or improper. Leading questions are permitted by the law of evidence in cross-examination and the Judge, if they are otherwise relevant and proper, cannot take any exception to them. Reading the evidence of Mt. Fazlan as a whole in my judgment it falls considerably short of that high standard of which ordinary prudence demands before a man can be convicted of the offence of murder. It may be that Mt. Fazlan was after all speaking the truth when she stated that Abbas Ali Shah was one of the four assailants of the deceased women but her evidence, as it stands, is not calculated to inspire confidence in my mind, and I do not consider that it would be safe to uphold the conviction of the appellant upon her evidence. In this connexion I would quote a passage from "The Outlines of Criminal Law," p. 386, by Dr. Kenny, Downing Professor of the Laws of England, Cambridge University:

> "Children are a most untrustworthy class of witnesses, for, when of a tender age, as our common experience teaches us, they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, and are greatly influenced by fear of punishment, by hope of reward, and by desire of notoriety."

When considering the evidence of child-witnesses these observations should not be lost sight of, although each case would depend upon its particular facts and circumstances. Having regard to what has been stated above, I would allow the appeal of Abbas Ali Shah and, setting aside his conviction and sentence under S. 302, Penal Code, order that he be released forthwith. There is an application for revision (No. 589 of 1932), filed by Sikandar Shah through Mr. Saunders against the order of the Sessions Judge, Jhelum, dated 14th March 1932, acquitting Alam Shah, Inayat Ali Shah and Painda. I notice that the District Magistrate, Jhelum, has refused to move the Local Government to file an appeal against the acquittal of the three persons. I do not see any reason why this Court should take the unusual course of revising the order passed by the Sessions Judge. I would accordingly dismiss this application.

Shadi Lal, C. J.—I concur.

V.S. *Order accordingly.*

A. I. R. 1933 Lahore 669

SHADI LAL, C. J. AND ABDUL QADIR, J.

Jagendar Singh—Defendant—Appellant.

v.

Mt. Nawab Bibi and *another*—Plaintiffs—Respondents.

Second Appeal No. 618 of 1928, Decided on 17th May 1933, from decree of Addl. Dist. Judge, Lyallpur, D/- 12th November 1927.

(a) Custom (Punjab) — Alienation—Ancestral property—Mortgage by sonless proprietor—Mortgagee must show not only necessity to borrow but also rate and terms—Transfer of Property Act (1882), S. 60.

It is incumbent on those who support a mortgage of the ancestral property by a sonless proprietor governed by the customary law, to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at such high rate and upon such terms as the mortgage deed contains; and if it is not shown that there was necessity to borrow at the rate and upon terms contained in the mortgage, that rate and those terms cannot stand: *AIR* 1919 *P C* 12; and *AIR* 1923 *P C* 37, *Foll* [P 669 C 2]

(b) Custom (Punjab)—Alienation—Sonless Jat of village Narang—Mortgage partly for necessary purpose and partly for improvements on property mortgaged—Produce of land secured in lieu of interest on consideration for necessary purposes and 12 per cent per annum interest agreed to be paid on rest—Further stipulation postponing redemption for 31 years—Stipulations were held not binding on reversioners.

One sonless Jat of village Narang granted a mortgage of 772 kanals and added land to serve as security for loan of Rs. 8,500. Of the principle amount borrowed Rs. 6,500 were for necessary purpose and Rs. 2,000 were borrowed for sinking new wells for irrigating a portion of the waste land conveyed by mortgage. The mortgage deed provided that the mortgagee should take produce of land in lieu of interest on Rs. 6,500 and that the mortgagor should pay interest at 12 per cent per annum on item of Rs. 2,000 borrowed for sinking wells. There was a further stipulation postponing redemption for 31 years:

Held: that the stipulations were unreasonable and that the reversioners were not bound by them. [P 670 C 1]

(c) Custom (Punjab)—Alienation—Ancestral property—Alienation of ancestral property by sonless proprietor.

A sonless proprietor governed by Customary law can make a gift of a plot of land for religious purposes of building a mosque and if the mosque is constructed it cannot be contended that mortgagor was not competent to spend that sum or that there was no necessity for it. [P 670 C 1]

Achhru Ram—for Appellant.

M. M. Aslam Khan and *Barkat Ali*—for Respondents.

Shadi Lal, C. J.—On 22nd March 1920, Jhanda, a Jat of the village, Narang, in the District of Sheikhupura, granted a mortgage of 772 kanals and 7 marlas of land to Sardar Harnam Singh, a Jat of the same District, to serve as a security for a loan of Rs. 8,500. The plaintiff Haveli, a collateral of the mortgagor in the fifth degree, has brought the present action to challenge the alienation on the usual ground of want of consideration and necessity. The Courts below have concurred in holding that the various items aggregating Rupees 6,500, were required for necessary purposes, and that Rs. 2,000, were borrowed for sinking new wells for irrigating a portion of the waste land conveyed by the mortgage. The mortgage-deed provided that the mortgagee should take the produce of the land in lieu of interest on Rs. 6,500, and that the mortgagor should pay interest at the rate of 12 per cent per annum on the item of Rs. 2,000 borrowed for sinking wells. The learned District Judge finds that the stipulation postponing redemption for 31 years and the covenant for the payment of interest mentioned above were unreasonable and onerous terms and could not bind the reversioner. He has accordingly granted the plaintiff a decree for the possession of the land on payment of Rs. 8,500.

On behalf of the mortgagee, who has brought the present second appeal, it is contended that of the area mortgaged to him, only 217 kanals and 4 marlas were irrigated by canal and 158 kanals and 15 marlas were chahi land, and that the balance amounting to nearly 400 kanals consisted of waste land. It is urged that in these circumstances the stipulations referred to above were not unreasonable. It cannot however be seriously disputed that these stipulations made it very difficult for the mortgagor or his reversioner to redeem the property. In *Nazir Begam* v. *Raghunath Singh* (1), their Lordships of the Privy Council made the following observations in connexion with a mortgage made by the manager of a joint Hindu family:

> "It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage, that rate and those terms cannot stand."

This principle, which has been affirmed by the Privy Council in *Ram Bujha-*

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1. A I R 1919 P C 12=50 I C 434=46 I A 145 =41 All 571 (P C).

wan Prosad Singh v. *Nathu Ram* (2), is applicable to an alienation of ancestral property made by a sonless proprietor governed by the Customary Law in this Province. It is to be observed that, while Rs. 2,000, may be considered as an improvement made by the mortgagee, it was not necessary for the mortgagor to borrow that sum and to promise to pay interest thereon while the increased produce due to the improvement was to be taken by the mortgagee. Having regard to all the circumstances I concur with the District Judge in holding that the stipulations were unreasonable and that the reversioner is not bound by them. This finding disposes of the second appeal. On behalf of the plaintiff cross-objections have been preferred challenging the necessity for three items, the payment of which has been established. It appears that a sum of Rs. 300 was paid before the Sub-Registrar to one Siraj Din, who was the Imam of a mosque, for the purpose of building a new mosque; and that a mosque was constructed in the village. There is no doubt that a sonless proprietor can make a gift of a plot of land for religious purposes; and the learned District Judge states that:

> "it was not contended that the mortgagor who was a sonless proprietor was not competent to spend a small sum of Rs. 300 for religious and charitable purposes."

As pointed out above, the mortgagor had no male issue, and at the time of the marriage of his daughter's daughter he had to make customary presents. Rs. 500 were borrowed by him for the purpose of making presents on the occasion of that marriage, and the learned District Judge holds that it was not unreasonable for the mortgagor, whose only issue was a daughter, and who owned a large area of land, to spend a sum of Rs. 500 for giving presents to his grand-daughter and her husband. The third item objected to by the respondent is a sum of Rs. 500 which was given to the daughter to pay her debts, and the Subordinate Judge observes that the necessity for this item was not seriously challenged before him. Nor was it contended before the District Judge that in the circumstances mentioned above:

> " the mortgagor was not competent to make this little gift to his daughter who was his only child."

There is therefore no force in the cross-objections preferred by the respondent. The result is that the appeal as well as the cross-objections are dismissed. The parties shall bear their own costs in this Court.

Abdul Qadir, J.—I agree.

V.B./R.K. *Order accordingly.*

A. I. R. 1933 Lahore 670

DALIP SINGH, J.

Gopi Nath—Appellant.

v.

Delhi Cloth and *General Mills Co. Ltd*., *Delhi* and *others*—Respondents.

Second Appeal No. 1061 of 1932, Decided on 19th May 1933, from decree of Dist. Judge, Delhi, D/- 9th May 1932.

Civil P. C. (1908), S. 92 — Public Trust—Misappropriation of trust property trustees and beneficiaries colluding—Suit by descendant of founder challenging misappropriation is maintainable and is not covered by S. 92.

The descendants of the founder of a trust have an interest in the trust over and above that which the public generally have or might have in a public trust and any one of them has a locus standi to sue the trustees and beneficiaries colluding to misappropriate trust property, if according to him provisions of the trust have not been carried out or have been rendered impossible of being carried out. The provisions of S. 92 do not cover a suit of this nature : *AIR* 1924 *P C* 221, *Rel on.* [P 671 C 1, 2]

Kishan Dayal—for Appellant.

Manohar Lal, *Raj Krishan* and *M. C. Mahajan*—for Respondents.

Judgment. — Plaintiff in this case brought a suit as the adopted son of the adopted son of one Jainti Das, who had executed a will on 7th April 1893, by which he left 20 shares in the Delhi Cloth and General Mills Company, Limited, Delhi, in charge of Rai Bahadur Sri Kishan Das, defendant 4, the income arrising from the same to be distributed over religious and educational purposes at the discretion of the said Rai Bahadur Kishan Das. The plaintiff further alleged that for some time the income arising from it was paid to the Hindu College, but subsequently in 1921 the shares, which up till then had stood in the name of the deceased Jainti Das, were entered in the name of the Hindu College by defendant 1, namely, the Delhi Cloth and General Mills Company, Limited, at the instance of Rai Bahadur, Sri Kishan Das, defendant 4, and that on the same day, or subsequently, on 28th March 1921, the Hindu College transferred these shares to the Commercial Education Trust of which the founder was Lala Madan Mohan Lal, the Secretary of the Delhi Cloth and General Mills Company, Limited, and defendant 2 in

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2. A I R 1923 P C 37=71 I C 933=50 I A 14=2 Pat 285 (P C).

this suit. The plaintiff claimed various reliefs in the suit as originally framed, but before me the plaintiff has abandoned all the reliefs claimed except two namely: (1) a declaration that the said 20 shares and the income and interest arising therefrom is wakf and that Rai Bahadur. Sri Kishan Das, is its trustee; (2) a declaration that the alienations made to the Hindu College and to the Commercial Educational Trust by whomsoever made are void. The defendants took up various pleas and the trial Court wrote a lengthy judgment and finally dismissed the suit on various grounds, inter alia holding that the plainitff had no locus standi to sue.

The plaintiff went in appeal before the learned District Judge and, at a preliminary hearing, the learned Judge dismissed the appeal, holding that, as the only position claimed by the plaintiff was that of the founder's kin, he was not entitled to bring the present suit either under the terms of the Trusts Act, 1882, or under the provisions of S. 92, Civil P. C., because so far as the latter was concerned he had not complied with its terms and, presumably so far as the former was concerned, because he was neither a trustee nor a beneficiary. He therefore held that the plaintiff had no locus standi and, as stated, dismissed the appeal. I am unable to agree with this decision. Various interesting and difficult points of law may arise in this case on the merits and the simple question of fact may arise as to whether this suit is bona fide or mala fide and on all those points I express no opinion or decision whatsoever, but I do decide that the plaintiff on the allegations made in the plaint has on the face of the plaint a locus standi to bring the present suit. How far any finding of fact or of law arrived at on the merits might prove that he had no locus standi as alleged by him is a different question which I do not decide. At present I merely set aside the judgment of the learned District Judge that, on the face of the plaint the plaintiff has not shown any locus standi. It is clear enough that the provisions of S. 92, do not cover a suit of this nature. It would be remarkable indeed if in an alleged trust the trustee and beneficiary could collude between themselves and nobody should be able to intervene in order to prevent a misappropriation of the trust property. I do not think that such is the law. *Vaidyanatha Ayyar* v. *Swaminatha Ayyar* (1) is a clear authority for holding that descendants of the founder of a trust have an interest in the said trust which is over and above that which the public generally have or might have in a public trust. It is therefore clear that the plaintiff, if his allegations are substantiated, has got an interest in the proper carrying out of the alleged trust and therefore has a locus standi to sue, if, according to him, the provisions of that trust have not been carried out or have been rendered impossible of being carried out.

I therefore accept the appeal and remand the case back to the learned District Judge for disposal on the merits. Respondents 1, 2 and 3 will pay the costs of this appeal. Stamp on appeal will be refunded and the remand is under O. 41, R. 23, Civil P. C.

V.B./R.K. *Case remanded.*

* A. I. R. 1933 Lahore 671

BHIDE, J.

Allahabad Bank, Ltd., Lahore—Plaintiff—Appellant.

v.

Raja Ram and *others* — Defendants—Respondents.

Misc. First Appeal No. 253 of 1933, Decided on 12th May 1933, from order of Senior Sub-Judge, Lahore, D/- 24th January 1933.

*** (a) Civil P. C. (1908), O. 40, R. 1—Receiver appointed by one Court to take charge of properties — Another receiver for same properties cannot be appointed by different Court.**

When a receiver is apppointed, his possession is that of the Court which appointed him and it cannot be disturbed without its leave. If any one whoever he may be disturbs the possession of the receiver he will be guilty of contempt of Court. It follows from this that when a receiver is appointed by one Court to take charge of any properties, another receiver cannot as a rule be appointed by a different Court to take possession of or exercise any control over the same properties without the leave of the former Court. To make any such appointment would be obviously inconsistent with the first appointment and result in a conflict of jurisdictions: *AIR* 1924 *Pat* 491, *Foll*; 9 *I C* 1027; 12 *I C* 165, *Expl*; *Nothad* v. *Proctor*, (1875) 1 *Ch D* 4; *Re* : *Connolly Brothers Ltd*, (1911) 1 *Ch* 731, *Dist.* [P 673 C 2]

*** (b) Civil P. C. (1908), O. 40, R. 1—Receiver appointed in collusive suit — Appointment so long as it lasts must be respected.**

Even if a suit is collusive, the appointment of a receiver by a Court in that suit cannot be ignored so long as it stands. It is not competent for any person to interfere with the possession of a receiver on the ground that his appointment should not have been made. Persons who feel aggrieved by the order of the Court may take proper course to question its validity but so long as

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1. AIR 1924 P C 221=82 I C 804=51 I A 282=47 Mad 884 (PC),

it lasts, it must be respected : *Russal* v. *East Anglican Co*, 3 *Mac & G* 117, *Foll*, [P 674 C 2]

(c) **Appeal—Practice—Two appeals awaiting disposal by same Bench—Application for withdrawal of one appeal made—High Court in second of appeals cannot go into question of appointment of receiver in former — Civil P. C.** (1908), **S. 151.**

Where two appeals are pending before the High Court awaiting disposal by the same Bench, in one of which the appellants have applied for withdrawal of the appeal, the High Court cannot on the application of the appellants in the second appeal, go into the question of the appointment of a receiver in the case from which the former appeal is preferred. This cannot be done even under S. 151, Civil P. C., where other remedies were open to the appellants in the latter appeal. [P 674 C 2; P 675 C 1]

(d) **Civil P. C.** (1908), **S. 24—Scope.**

High Court has ample jurisdiction to pass suo motu an order of transfer under S. 24. [P 675 C 1]

Norman Edmunds and *Anant Ram Khosla*—for Appellant.

Achhru Ram, *H. C. Kumar*, *Har Gopal*, *J. N. Aggarwal* and *S. L. Puri* — for Respondents.

Judgment.—Civil Appeals Nos. 253 and 288 of 1933 are connected appeals and can be disposed of together. They arise out of two suits by the Allahabad Bank, Ltd., and the Lakhshami Insurance Co., against Raja Ram and others, members of a joint Hindu family on the basis of mortgages of certain properties in their favour. In these suits applications were made by the plaintiffs mortgagees for appointment of a receiver to take charge of the properties of the debtors as the interest had fallen into arrears and the security was insufficent for the discharge of the amounts due to them. Similar applications were made by the Punjab National Bank in other suits of a similar character against the debtors, which were pending at the time. There were several other prior mortgages on the properties and the prior mortgagees were joined as pro forma defendants and supported the application of the above mortgagees. These applications were resisted by the debtors, but the learned Sub-Judge found that the appellants had proved their allegations and that there was a clear case for the appointment of a receiver. But shortly before the decision of the applications, which appears to have been very much delayed owing to the tactics employed by the debtors it was discovered that certain minor members of the joint family of the debtors, along with one Prem Shankar, who had lately attained majority, had filed a suit for partition of the family properties in a Court at Delhi in August 1932 and had succeeded in getting a receiver appointed by that Court to take charge of the properties on the ground that the properties were being mismanaged by the "karta" of the family. This order was obtained on 3rd October 1932, and S. Dilawar Singh, a Municpal Commissioner of Lahore, was appointed a receiver by the Delhi Court, as desired by the plaintiffs in that suit. This gentleman, it appears, is a friend of the family and was willing to act as a receiver without any remuneration. The appellants' contention was that this appointment was collusively obtained by the respondent-debtors merely to defeat applications made by the appellants in their suits at Lahore for the appointment of a receiver. It may be pointed out in this connexion that the Allahabad Bank had made its application as long ago as in October 1930; but the defendants evaded service for some time and various objections were raised later in connexion with the appointment of guardians and appeals were filed in this Court, with the result that the proceedings were delayed for about two years. Finding the appointment of a receiver by the Lahore Court imminent, the respondent are said to have got a collusive suit for partition instituted at *Delhi* and had a receiver of their choice appointed to take charge of the properties, in order to defeat the claim of the appellants.

The learned Sub-Judge found, as stated already that the appellants had made out a clear case for the appointment of a receiver on the allegations set forth in their applications; but the difficult point which required consideration was whether in the presence of the receiver appointed at Delhi he had any jurisdiction to appoint another receiver. The mortgagees contended that another receiver could be appointed and relied chiefly on ***Madeshwar Singh*** v. ***Mohamaya Singh*** (1) and ***Khubsurat Koer*** v. ***Sarada*** (2). The debtors on the other hand contended that such a course would be improper and result in conflict of jurisdictions and confusion. They chiefly relied on ***Sridhar Choudhury*** v. ***Mungi Ram Bangar*** (3), in support of this contention. The investigation of the question whether the Delhi suit was a bona fide one would have taken some time. To avoid further delay, the learned Sub-Judge assumed for the purposes of these applications that that suit was a bona fide one. He came to the

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1. (1911) 9 I C 1027.
2. (1911) 12 I C 165.
3. AIR 1924 Pat 491=78 I C 620=3 Pat 357.

conclusion that the Patna ruling which disapproved the appointment of a second receiver by a civil Court when another receiver had already been appointed by a different Court laid down sound law. He further pointed out that the mortgagees could approach the Delhi Court and get the appointment of the receiver which had been passed without impleading them and without taking into consideration the facts alleged in the present applications modified or discharged. He accordingly passed an order appointing Mr. Prakash Chandra Mahajan as a receiver, but subject to a condition that it would not take effect until the order passed by the Delhi Court was discharged so far as it affected the mortgaged properties. From this order the present appeals have been preferred by the mortgagees.

When these appeals were preferred, it had been discovered by the appellants that the defendants in the Delhi case had also filed an appeal from the appointment of a receiver by the Delhi Court and that the appeal was pending in this Court. They believed that appeal to be a mere dodge intended to prevent the appellants from seeking any remedies in the Delhi Court and expected that appeal to be withdrawn after the present appeals were instituted. They brought the fact to the notice of the Division Bench admitting the present appeals and that Bench directed that all these appeals should be heard and disposed of together. This order was passed on 20th February 1933. As was anticipated by the appellants, an application for withdrawal of the appeal in the Delhi case was made by the appellant in that case on 27th February 1933. This application is also to be disposed of along with these appeals. The learned Sub-Judge has given good reasons in support of his finding that the appellants had made out a good prima facie case for the appointment of a receiver. He has shown that the interest is heavily in arrears and the value of the securities is inadequate to cover the appellants' claim and I am in full agreement with these findings. The only question which really requires consideration is whether the conditional order passed by the learned Sub-Judge was proper or whether the receiver's appointment should take effect at once in spite of the prior appointment of another receiver by the Delhi Court as contended by the learned counsel for the appellants.

It is well settled that when a receiver is appointed, his possession is that of the Court which appointed him and it cannot be disturbed without its leave. If anyone whoever he may be disturbs the possession of the receiver he will be guilty of contempt of Court. When the receiver takes charge of the property it cannot be attached or subjected to possession of another Court without the leave of the Court: cf Woodroffe's Law Relating to Receivers, Edn. 4, pp. 63 and 64, Kerr on Receivers, Edn. 9, pp. 196 and 197. It would seem to follow from this that when a receiver is appointed by one Court to take charge of any properties, another receiver cannot as a rule be appointed by a different Court to take possession of or exercise any control over the same properties without the leave of the former Court: cf. Woodroffe's Law relating to Receivers, Edn. 4, p. 71. To make any such appointment would be obviously inconsistent with the first appointment and result in a conflict of jurisdiction. This was the view taken in *Sridhar Choudhury* v. *Mungi Ram Bangar* (3) on which the learned Senior Sub-Judge has relied. The two rulings of the Calcutta High Court on which the learned counsel for the appellants rely, viz., *Madeshwar Singh* v. *Mohamaya Singh* (1) and *Khubsurat Koer* v. *Sarada* (2), were cases of a special character, but do not really seem to go against the above principle. In *Madeshwar Singh* v. *Mahamaya Singh* (1), a "common manager" had been already appointed by the District Judge to take charge of certain properties under the Bengal Tenancy Act, and the question arose whether a Sub-Judge could appoint a receiver of the same properties. The position of a "common manager" does not appear to be identical to that of a receiver; for the learned Judges observed that they were not prepared to concede that the provisions of O. 40, R. 1, Civil P. C., were controlled by those of S. 95, Ben. Ten Act. They considered the object and scope of the two appointments to be different, and held that the appointment of second receiver may be necessary to protect the interests of the mortgagees. But even so, they did not hold that the possession of the common manager could be disturbed without the leave of the District Judge. All that they said in this connexion was as follows:

> "If therefore a receiver is appointed in respect of property which is already in the possession of a common manager, the possession of the common manager, need not necessarily be disturbed. The common manager under the direction of the District Judge may have to apply a certain portion

of the income for the benefit of one or more of the cosharers. If the interest of such cosharers in the joint estate is the subject-matter of the litigation in which the receiver is appointed the effect of the appointment of the receiver is to entitle him to obtain from the common manager whatever is payable to the co-sharers in question. Such sum, when paid to the receiver, would be paid by him into Court to the credit of the suit in which he has been appointed. Consequently, it is conceivable that a receiver may very well be appointed in respect of property which is already in the hands of a common manager and such appointment may be essential for the protection of persons who could not otherwise obtain any control for the protection of their own rights, over the assets in the hands of the common manager. We are unable to appreciate how there must be a conflict of interest or authority between the receiver so appointed and the common manager."

The facts of the present case are distinguishable as here there was already a receiver appointed under O. 40, R. 1, Civil P. C. It is true that he was appointed in a partition suit, but the Court had given him direction for setting aside a certain sum for payment to creditors, who would include the appellants. There is thus obviously likelihood of conflict of jurisdiction, if the two Courts come to different findings as regards the amounts due to the various creditors, priority amongst them and so forth. For the same reason even the appointment of the same person as a receiver in both Courts which was considered to be a suitable course in *Madeshwar Singh* v. *Mohamaya Singh* (1) would not meet the situation. The other ruling relied on, viz., *Khubsurat Koer* v. *Sarada* (2) is more or less on the same lines as that in *Madeshwar Singh* v. *Mohamaya Singh* (1). To appoint a receiver in the Lahore suits would be of little use, if he is merely to receive any amounts that may be set aside under the orders of the Delhi Court for payment to the appellants and this is not what the appellants desire. They want the receiver appointed by the Lahore Court to take charge of the properties at once, but I do not see how this can be done, as matters stand at present, without disturbing the possession of the receiver appointed by the Delhi Court.

The learned counsel for the appellants have referred to certain English decisions, but these also do not seem to be of much assistance. Out of them one, viz., *Nothad* v. *Proctor* (4) has been considered and distinguished in *Sridhar Choudhury* v. *Mungi Ram Bangar* (3), on which the learned Senior Sub-Judge has relied. In the second case, viz., *Connolly Brothers, Ltd., Re Wood* v. *Connolly Brothers, Ltd.* (5), while an action by a debenture-holder to enforce the debentures was pending against a company in the Chancery Division of the High Court, a motion for the appointment of a receiver was made. Before it came on for hearing the owner of an equitable charge on certain land, granted by the company after the issue of the debentures, commenced an action in the Lancashire Palatine Court with full knowledge of the High Court action to enforce his security and obtained an ex parte appointment of another receiver. In the circumstances the debenture-holder moved the High Court to restrain the owner of the equitable charge from taking further proceedings in the Palatine Court, he being added in the meantime as a defendant in the High Court action. This prayer was granted by the High Court. In the present instance however the appellants have never asked for any such injunction and the Delhi suit being of a different character, viz., one for partition of family property, such a course would scarcely be justifiable. In the third case cited for the appellants, viz., *Tichhorne* v. *Tichhorne* (6), an administrator pendente lite was appointed at the instance of a creditor, but only when it was ascertained that the receiver appointed by the Chancery Division would be discharged on such appointment and that there was no likelihood of any conflict of jurisdiction. This case is also thus clearly distinguishable. It will thus appear that these authorities do not support the contention of the learned counsel for the appellants that the learned Senior Sub-Judge should not have made his order conditional and should have directed the receiver appointed by him to take charge of the mortgaged properties at once, disregarding the prior appointment of a receiver by the Delhi Court.

The next contention of the learned counsel for the appellants was that the suit instituted at Delhi being collusive the receiver appointed by the Delhi Court should not be allowed to stand in their way. But even if that suit is collusive, the appointment of the receiver by the Delhi Court cannot be ignored so long as it stands. As held in *Russal* v. *East Anglican Co.* (7), it is not competent for any person to interfere with the possession of a receiver on the ground that his appointment should not have been made. Per-

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4. (1875) 1 Ch D 4=45 L J Ch 302=33 L T 709.
5. (1911) 1 Ch 731=80 L J Ch 409=104 L T 693.
6. 1 P & D 730.
7. 3 Mac & G 117.

sons who feel aggrieved by the order of the Court may take proper course to question its validity, but so long as it lasts it must be respected. The learned Sub-Judge had indicated in his judgment that it was open to the appellants to take appropriate proceedings in the Delhi Court to get the order of appointment of a receiver by that Court discharged as far as the mortgaged properties were concerned; but they have not done so. The reason given is that an appeal was filed in the Delhi case and the records came here. Even so, I think, the appellants would have been in a better position if they had taken necessary action in the matter at once. For during the period of about three months which has since elapsed, perhaps that Court might have been able to reconsider the position and pass a suitable order. The learned counsel for the appellants have suggested that I should myself pass such an order now in the appeal in the Delhi case which is before me. But as stated already the appellants in that case have applied for withdrawal of the appeal unconditionally and it cannot be disputed that they have a right to do so. In the circumstances I do not see how I can go into the question of the appointment of a receiver in that case. No authority was cited supporting the adoption of such a course. The learned counsel mainly relied in this respect upon S. 151, Civil P. C., and the inherent powers of this Court. But it is not disputed that other remedies were open to the appellants (viz., by taking appropriate proceedings in the Delhi Court) and in the circumstances I do not think resort to inherent powers of the Court would be legally justifiable.

At the same time in view of the facts in connexion with the Delhi suit which have been brought to light, it seems desirable in the interest of justice to take steps to prevent that case being abused for the purpose of delaying or defeating the claim of the appellants. Prima facie there are good grounds to believe that the suit at Delhi is not a bona fide one and has been instituted merely to defeat the claim of the appellants. The suit is by sons in a joint Hindu family to enforce a partition of the family property against their fathers. Such a suit is not ordinarily maintainable under the Hindu law as it prevails in this Province: cf. *Harikishan* v. *Chundu Lal* (8). The whole of the family property is situated at Lahore with the exception of a small house at Delhi. All the parties reside in Lahore with the exception of Prem Shankar who is said to be lately married and to be residing with his father-in-law at Delhi. The learned counsel for the respondents who was questioned by me on the point did not dispute the above facts but stated that the suit was instituted at Delhi because: (i) the plaintiffs wished to rely upon a special custom as to partition prevailing in Delhi and also because: (ii) Prem Shankar was being helped in the suit by his father-in-law who is a resident of Delhi. As regards the special custom, there is no mention of it in the plaint in the Delhi suit and no objection was raised by the defendants that the suit for partition was not maintainable in the absence of such custom. While service of the defendants in the Lahore Court took months, they promptly appeared in the Delhi Court and the appointment of a receiver was obtained within a couple of months without any serious objection. These facts speak for themselves. The suit for partition, if it were genuine, would have been instituted in the ordinary course at Lahore, as the bulk of the properties is situated at Lahore and all the parties excepting Prem Shankar admittedly reside at Lahore. The allegation that this suit was instituted at Delhi merely because Prem Shankar is residing at Delhi and his father-in-law is helping him hardly needs any serious notice. There is thus every reason to believe that the partition suit was instituted at Delhi merely to keep the appellants in the dark and obtain the order as to a receiver behind their back so as to defeat their applications for the appointment of a receiver at Lahore, which is pending for a long time.

In view of the above facts and to avoid conflict of jurisdiction it seems to me desirable that the suit pending at Delhi should be transferred to the Court of the Senior Sub-Judge at Lahore in which the appellant's suits are pending. This Court has ample jurisdiction to pass suo motu such an order under S. 24, Civil P. C., and this seems to be an eminently fit case for the exercise of that power in the interests of justice. I heard the learned counsel for the respondents on this point and they were unable to show any cogent reasons against the adoption of such a course. If the partition suit at Delhi is transferred to the Court of the Senior Sub-Judge at Lahore, the Senior Sub-Judge would then be able to deal with the question of the appointment of a receiver in both the cases without any

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8. (1917) 105 P R 1917=48 I C 667 (FB).

difficulty. It will be for him then to consider whether the receiver appointed at Delhi should be merely discharged so far as the mortgaged properties are concerned or whether the same person should be appointed a receiver in both the cases and if so, who would be the most suitable person for the purposes of both the suits. I have no doubt that he will decide the question on its merits after taking into consideration the interests of all the parties concerned and after hearing them on the point.

After considering all the arguments advanced, I have come to the conclusion that the order passed by the learned Senior Sub-Judge was proper in the circumstances and that it would not be possible for me to pass any orders as regards the appointment of a receiver in the appeal in the Delhi case, as it is being withdrawn. The only order which, I think, can be passed in the latter appeal is that of its dismissal on account of non-prosecution. I accordingly dismiss all the three appeals. But for reasons given above an order for the transfer of the Delhi case is passed separately. The records of that case should be sent to the Senior Sub-Judge, Lahore, and the Sub-Judge at Delhi informed about the transfer of the suit. The counsel for all the parties are directed to ask their clients to appear personally or through counsel before the Senior Sub-Judge, Lahore, on the 16th instance for further proceedings in all these cases. In view of all the circumstances, I leave the parties to bear their costs in the appeals.

V.S. *Order accordingly.*

A. I. R. 1933 Lahore 676

ADDISON AND BHIDE, JJ.

Mahesha Mal and *another* — Plaintiffs —Appellants.

v.

Natha Mal and *another* — Defendants —Respondents.

First Appeal No. 901 of 1929, Decided on 29th March 1933, from decree of Senior Sub-Judge, Ferozepore, D/- 10th January 1929.

(a) Mortgage — Assignment of mortgagee rights is governed by Regulation 17 of 1806.

Mortgagee rights fall within the definitions of immovable property that is land. Hence Regulation 17 of 1806 is applicable to an assignment of mortgagee rights: 53 *P R* 1916; *AIR* 1921 *Lah* 137 and 11 *P R* 1904, *Ref.* [P 677 C 2]

(b) Civil P. C. (1908), O. 6, R. 17 —Amendment giving rise to fresh and intricate questions should not be allowed at appellate stage.

An amendment of plaint at the time of hearing of an appeal should not be allowed specially when such amendment gives rise to a de novo trial of many fresh and intricate questions. [P 677 C 2]

J. L. Kapur—for Appellants.

Jagan Nath Aggarwal and *Asa Ram Aggarwal*—for Respondents.

Addison, J.—The two plaintiffs have brought this suit against Natha Mal, defendant 1, and Tara Chand, defendant 2. On 22nd May 1914, Natha Mal, executed a simple mortgage-deed for Rs. 7,000 with respect to certain house property in favour of Tara Chand. Interest was fixed at 6 per cent per annum, but was to be compounded monthly in case of defualt. On 19th December 1914, Tara Chand mortgaged his mortgagee rights in the property with possession to the plaintiffs for Rs. 4,000 by way of conditional sale. The rent realizable by the plaintiffs was to take the place of interest which was not otherwise fixed. It is not explained in this document (nor was it explained at the trial) how this mortgage purported to be with possession, Tara Chand's own mortgage being a simple mortgage. Under Regn. 17 of 1806 the plaintiffs gave notice to Tara Chand through the Court of the District Judge that they intended to foreclose their sub-mortgage. Notice issued on 6th March 1923, and was served on 27th March 1923. On the 4th April the District Judge consigned the proceedings to the record room as being complete. Thereupon, on 5th June 1928, the plaintiffs instituted this suit. It is headed as a claim for recovery of Rs. 8,000, principal and interest, on the basis of the first mortgage in favour of Tara Chand by Natha Mal, dated 22nd May 1914, as well as on the sub-mortgage of 19th December 1914. The relief asked for was that the property in question should be sold for recovery of the sum named which was arrived at as follows:

		Rs.
Principal mortgage money as given in the original mortgage		7,000
Interest till date of suit		5,600
Total ...		12,600
Deduct:		
	Rs.	
Money received towards interest	1,600	
Interest remitted	3,000	4,600
Nett Balance		8,000

Reference was then made to the foreclosure proceedings in connexion with the sub-mortgage and it was claimed that by reason thereof the plaintiffs had become full owners of the mortgagee rights of Tara Chand and entitled to sue on his original mortgage-deed. This is the sole cause of action stated and it was claimed that a decree for Rupees 8,000 be given and if it was not paid the property should be sold to satisfy the claim of the plaintiffs. Natha Mal denied that the plaintiffs had acquired the status of being owners of the mortgagee rights of Tara Chand. He further pleaded that he had paid Rupees 3,000 to Tara Chand. This may explain why the plaintiffs remitted the sum of Rs. 3,000. Tara Chand pleaded that the plaintiffs had never made any demand from him and that the foreclosure proceedings were irregular and illegal. The trial Judge held that no notice of demand was given by the plaintiffs to Tara Chand prior to the notice under the regulation, that there was no reference to S. 7 in the notice which the Court issued in the proceedings for foreclosure and that the exact sum was also not mentioned in that notice. He accordingly held that the foreclosure proceedings were irregular, illegal and of no avail. It was conceded before us that this finding is correct and must stand.

It was then contended before the trial Judge on behalf of the plaintiffs that mortgagee rights in property were incorporeal rights and that Regn. 17 of 1806 did not apply. The Judge pointed out that the position was inconsistent with the plaint and he has refused to listen to it on the ground that a party should not be allowed to change his position arbitrarily. Finally, he held that as plaintiffs had failed to establish that they stood in the shoes of the original mortgagee and as there was no privity of contract between them and defendant 1, a suit for sale of the property could not be brought and he therefore dismissed it, leaving the parties to bear their own costs. Against this decision the plaintiffs have appealed. It was held in *Mela Mal* v. *Mela Mal* (1) that the assignment of a mortgage did not come within the regulation in question as such an assignment was of incorporeal rights. This seems to me to be wrong. In the Punjab General Clauses Act 1 of 1898 "immovable property" is defined as including land, benefits to arise out of land, and things attached to the earth, or permanetly fastened to anything attached to the earth. In S. 58, T. P. Act, a mortgage is defined as the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan. It was not however till the Full Bench case, *Attah Allah Ditta* v. *Nazar Din* (2), that this definition of a mortgage was accepted in the Punjab. Since then mortgagee rights in land have been held to fall within the definition of immovable property that is, land: see *Phullo* v. *Mt. Dakhan* (3). Even in 1904 it was held: see *Gahna* v. *Sohan Lal* (4), that the werd "land," as defined in the Punjab Alienation of Land Act included occupancy rights in land, that is, occupancy rights were considered to be an interest in land. In fact the so-called proprietor and the occupancy tenant together are the owners of the land just as the mortgagor and the mortgagee together are the owners of the land. It follows that Regn. 17 of 1806 is applicable and that as the foreclosure proceedings under the regulation were defective the plaintiffs have not acquired the rights of the original mortgagee Tara Chand.

Thus the suit must fail as it was brought on this basis alone and was for the sale of the immovable property to satisfy the original mortgage. Counsel for the plaintiffs-appellants however asked that he should be allowed to amend his plaint even at this stage so as to sue on his sub-mortgage. There is no prayer in the grounds of appeal to this effect and, in my judgment, not only it is too late in the day to allow this amendment, but the amendment must be refused on the ground that the cause of action would be totally different. The new cause of action would be on the sub-mortgage of 19th December 1914. That purports to be a sub-mortgage with possession. Ordinarily speaking therefore if the plaintiffs are without possession, as they appear to be their suit should be for possession of the mortgagee rights of Tara Chand, though he only holds a simple mortgage. Or it may be that they can sue for the sale of Tara Chand's mortgagee rights. Again, no interest is provided for in the mortgage-deed as possession is to counterbalance interest. There would thus have to be a trial de novo if the amendment were allowed as many fresh and intricate questions would arise. Further, in such a suit Natha Mal would not be a necessary party: see *Ram Shankar*

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1. (1888) 58 P R 1888.
2. (1916) 53 P R 1916=33 I C 474 (F B).
3. A I R 1921 Lah 187=63 I C 787=7 Lah 278.
4. (1904) 11 P R 1904=44 P L R 1904.

Lal v. *Ganesh Parshad* (5). No other point was argued. For the reasons given I would dismiss the appeal with costs.

Bhide, J.—I agree.

K.S. *Appeal dismissed.*

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5. (1907) 29 All 385=1907 A W N 97=4 A L J 273 (F B).

A. I. R. 1933 Lahore 678 (1)

BHIDE, J.

Kanshi Ram and *another*—Appellants.

v.

Emperor—Opposite Party.

Misc. First Appeal No. 1125 of 1932, Decided on 20th April 1933, from order of Dist. Judge, Rawalpindi, D/- 17th June 1932.

Guardian and Ward—Surety bonds executed for production of minor in District Court by accused in criminal case — Discharge of accused — Subsequent application under Guardians and Wards Act for custody of minor — Action cannot be taken on surety bonds—Criminal P. C. (1898), S. 514.

In criminal proceedings accused was asked to furnish security for production of a minor before the District Court in his custody and surety bonds were executed by two persons. The accused was discharged and subsequently an application was made by the minor's guardian for the custody of the minor under the Guardians and Wards Act and the bonds were sought to be enforced:

Held: that the sureties could not be held liable on the bonds taken by the criminal Court because the Court had no jurisdiction to take any bond for production of the minor before the District Judge:

Held further: that the District Court could not take any action on the bonds as the bonds had not been executed in favour of that Court. [P 678 C 2]

Nand Lal—for Appellants.

Judgment.—In a criminal case under S. 368, Penal Code, the accused, who is believed to have in his custody a minor, named Dina Nath, was ordered to furnish security to the effect that he would produce the minor before the Court, or the Court of the District Judge, if and when required to do so. The criminal proceedings eventually ended in the discharge of the accused. Subsequently an application was made to the District Judge by the father of the minor, who had become a convert to Islam, for his custody, under the Guardians and Wards Act. The District Judge ordered Kanshi Ram and Karam Chand, who had given security in the criminal case referred to above, to produce the minor. The sureties denied their liability on the bonds and also stated that the minor was not in their custody. The learned District Judge however did not accept this contention and forfeited the amount of the bonds. From this decision the present appeal has been preferred. The appeal was heard ex parte as no one appeared on behalf of the Crown to contest it, although notice was duly issued.

The learned counsel for the appellants contended that the appellants could not be held liable on the bonds taken by the criminal Court, because the Court had no jurisdiction to take any bond for the production of the minor before the District Judge and, secondly, that the District Court could not take any action on the bonds as the bonds had not been executed in favour of that Court. Both these contentions appear to me to be sound. The criminal Court was concerned only with the production of the minor for the purpose of evidence in that case. I do not find any authority to justify the action of the criminal Court in requiring the accused to give a bond for the production of the minor before the District Judge. Secondly, according to the provisions of S. 514, Criminal P. C., it would appear that it was only the Court which had taken the bond that could enforce it. In these circumstances it seems to me that the action taken by the learned District Judge was without jurisdiction. I therefore accept the appeal and set aside the order of the District Judge confiscating the security bonds.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 678 (2)

JAI LAL AND ABDUL RASHID, JJ.

Zafar Ali Shah and *others* — Appellants.

v.

Amir Shah and *others*—Respondents.

First Appeal No. 2787 of 1927, Decided on 18th May 1933, from decree of First Class Sub-Judge, Lahore, D/- 12th July 1927.

(a) Court-fees Act (1870), Art. 17 (vi) — Prayer in appeal to expunge certain unnecessary findings from lower Court judgment or to declare them as obiter dicta—Appellant is entitled to invoke aid of High Court without paying court-fee stamps.

The prayer in an appeal was that certain findings in the lower Court judgment should be expunged from the judgment or that they may be declared to be obiter dicta and consequently not binding on the parties. The appellants did not pay court-fee stamps on this part of the appeal and on a preliminary objection being raised:

Held: that the appellants were entitled to invoke the aid of the High Court without paying court-fee stamps and that as the relief claimed by them was not capable of being estimated in money value a court-fee stamp of Rs. 10 under Art. 17 (vi) should be paid. [P 680 C 1]

(b) Practice—Prayer in appeal to expunge unnecessary findings in lower Court's judgment—High Court has no power to do so but can only declare that such findings are not binding on parties—Appeal.

A Subordinate Judge held that he had no jurisdiction to entertain the suit but gave certain findings on the merits of the dispute. In appeal it was prayed that these findings be expunged from the judgment or at least declared to be obiter dicta not binding on parties:

Held: that there was no provision under which on an appeal those findings could be expunged but that the High Court could merely declare that those findings were not binding on the parties having been made by a Court which had no jurisdiction to entertain the suit. [P 680 C 1, 2]

M. C. Mahajan and *Abdul Aziz* — for Appellants.

Barkat Ali, *Mohammad Munier*, *Muhammad Aslam Khan* and *Fayaz Hassan Shah*—for Respondents.

Judgment.—The amended plaint is to be found at p. 10 of the printed paper-book and on the same page is the pedigree of the parties. The suit out of which this appeal has arisen was instituted by Sayed Amir Ali Shah: (1) for possession by partition of a ¼th share in a house situated in Kucha Kothidaran, Kashmiri Bazar, Lahore; (2) for a declaration that the plaintiff is the proprietor in possession of a ¼th share of land measuring 72 kanals 3 marlas siutated in Mauza Mozang in the Lahore District, and (3) for possession of a ¼th share in land measuring 956 kanals and 10 marlas in Mauza Norriwala Chak No. 13, in the District of Shahpur. This suit was contested by some of the defendants, while others supported the plaintiff partially. The main contest between the parties with regard to the house in the Kashmiri Bazar was that some of the defendants, the sons of Sayed Walayat Ali Shah, claimed that they were entitled to a share in this house by virtue of a gift in their favour made by Sayed Hakim Shah. The legal position is this: they would not have got any share in this house under the Mahomedan law, because their father Sayed Walayat Ali Shah, had died in the lifetime of Sayed Hakim Shah, and the latter had left two other sons. The plaintiff's case was that these defendants were not entitled to any share in the house. The Senior Subordinate Judge has held that the gift by Sayed Hakim Shah in favour of the sons of Walayat Ali Shah has not been proved and he has consequently decided this issue in favour of the plaintiff.

With regard to the land measuring 72 kanals and 3 marlas situated in Mozang the defence by the sons of Walayat Ali Shah was that the land was impartible, as it was wakf and that one of them was the Sajjadanashin of the Khanqah to which this land was dedicated. The Subordinate Judge has held that part of this land is occupied by a graveyard and as such is not partible, but that the rest is partible. With regard to the land situated in Mauza Nooriwala in the District of Shahpur the defence of Sayed Ihsan Ali Shah was that this land had been granted originally, or rather was intended to be granted, to Sayed Bahadur Ali Shah who by means of a will, had made a bequest thereof in his favour and that, in any case, the grant was not actually made to Sayed Bahadur Ali Shah, but to him, that is, Sayed Ihsan Ali Shah, and therefore he was the sole owner of this land and the other members of the family were not entitled to claim a partition thereof. At the end of the trial he also raised an objection to the jurisdiction of the trial Court to entertain this suit so far as it related to this particular piece of land. The trial Court has held that it had no jurisdiction to try the suit or the issues relating to this land, but as a matter of precaution has given findings on the merits of the dispute about this land, which are in favour of Sayed Ihsan Ali Shah.

This appeal has consequently been presented on behalf of the sons of Sayed Walayat Ali Shah and we have heard Mr. Mehr Chand Mahajan on their behalf and Mr. Barkat Ali on behalf of Sayed Ihsan Ali Shah. Mr. Fayaz Hassan Shah has addressed us on behalf of Abbas Ali Shah. The plaintiff Sayed Amir Ali Shah has appeared before us, but has not engaged any counsel nor has he addressed us on the merits of this appeal. Before dealing with the merits of the appeal it is necessary to note that two preliminary objections were taken by Mr. Barkat Ali. One was that the appeal was barred by time. We overruled this objection because we were satisfied that the allegation of the appellants, that they got the copy of the judgment on 25th July 1927, which is supported by an affidavit is true. The contention of Mr. Barkat Ali was that the copy of the judgment was ready for delivery to the appellants on the 23rd July and that it was their own fault that they did not take delivery of it till the 25th. It is common ground that if it be held that the appellants are entitled to deduct the period up to the 25th July, their appeal would be within time, otherwise it would be out of time by one day. We have examined the copy and from a note thereon we are satisfied that, as a matter of fact, it was not ready for delivery till the 25th July, and the allegation of the appellants is therefore true.

The second preliminary objection taken by Mr. Barkat Ali was that in the grounds of appeal the appellants have attacked the findings of the Court below on the merits of the dispute about the land of Nooriwala. The contention of the appellants is that after the learned Subordinate Judge has held that he had no jurisdiction to entertain the suit so far as this land is concerned he should not have given any findings as on the merits of the dispute, and that any findings given by him are mere obiter dicta and are not binding on the parties. The prayer of the appellants therefore is that either these findings be expunged from the judgment of the Subordinate Judge or they may be declared to be obiter dicta and consequently not binding on the parties. Mr. Barkat Ali contended that the appellants should have paid court-fee stamps on this part of the appeal. Mr. Mehr Chand, on the other hand, urged that the opinion or the conclusion of the Subordinate Judge being void, it was not necessary for him to pay any court-fee stamp on the relief he claims in respect thereof. We were of opinion that under the peculiar circumstances of this case the appellants were entitled to invoke our aid without paying court-fee stamps and as the relief claimed by them was not capable of being estimated in money value we held that a court-fee stamp of Rs. 10 under Art. 17 (vi) of the Schedule to the Court-fees Act, must be paid. We directed the appellants accordingly and on their undertaking to pay the requisite court-fee stamp before the close of the day we heard the appellant's counsel on the merits of the case. We note that the court-fee stamp has been paid.

Now with regard to the merits of the appeal, it is obvious that the learned Subordinate Judge having held that he had no jurisdiction to entertain the suit with regard to the land in village Nooriwala, any findings given by him on the merits of the dispute between the parties are obviously obiter dicta and are not binding on the parties. There is no provision under which on an appeal we can expunge such remarks. We can merely declare that they are not binding, having been made by a Court which had no jurisdiction and we direct accordingly. (After discussing the other questions of fact, the judgment concluded). The result is that this appeal is accepted to this extent only that the decree of the trial Court with regard to 72 kanals and 3 marlas of land is set aside and it is declared in respect of this land that it is wakf property and is therefore not liable to partition. The decree of the trial Court with regard to the house in the Kashmiri Bazar is maintained, and it is declared that with the exception of his decision on the question of jurisdiction the conclusions of the trial Judge with regard to the land in Nooriwala village are obiter dicta and not binding on the parties. In the circumstances of the case we leave the parties to bear their costs in this Court.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 680

HARRISON AND ADDISON, JJ.

Mohamda—**Defendant—Appellant.**

v.

Mt. Khetan **and** *another*—**Plaintiffs—Respondents.**

Second Appeal No. 484 of 1927, Decided on 19th April 1933, from decree of Addl. Dist. Judge, Lahore, D/- 16th December 1926.

Custom (Punjab) — Alienation of non-ancestral immovable property cannot be contested on ground that it is contrary to custom —Alienation includes testamentary disposition—Punjab Custom (Power to Contest) Act (2 of 1920), Cls 2 and 7.

According to Cls. 2 and 7 of Punjab Act 2 of 1920 no person shall contest any alienation of immovable non-ancestral property on the ground that such alienation is contrary to custom. The term "alienation" includes a testamentary disposition of property. [P 681 C 1]

Mehr Chand Mahajan—**for Appellant.**

Badri Das—**for Respondents.**

Judgment.—One Nathe Khan bequeathed his self-acquired property by will, dated the 24th September 1923, in favour of his wife for her life with reversion to his two daughters. He died in 1924 and the self-acquired property was mutated in favour of his widow. She accelerated the bequest in favour of her daughters by giving up her life estate. She then died. Thereupon the revenue authorities mutated the land in favour of a fourth degree collateral. Accordingly the plaintiffs, who are the daughters, have brought the present suit for a declaration that the land is theirs. Their claim was decreed by the Subordinate Judge, First Class, and the appeal was dismissed by the Additional District Judge. Against this decision this second appeal has been preferred by the defendant, Mohamda.

The certificate under S. 41, Punjab Courts Act, is with respect to the existence of a custom: (a) whether among Mahomedan Rajputs of Lahore District, a sonless male proprietor has the power to make a gift or will in favour of his daughter in respect of his self-acquired property; and (b) whether among Mahomedan Rajputs of Lahore District the daughters of a sonless proprietor inherit the self-acquired property of their father in preference to his collaterals. It was pointed out by the learned counsel appearing for the respondents that according to Cls. (2) and (7), Punjab Act, 2 of 1920, no person shall contest any alienation of non-ancestral immovable property on the ground that such alienation is contrary to custom, the term "alienation" including a testamentary disposition of property. This means that the will of the father in favour of his daughters in respect of his self-acquired property cannot be contested. It has been held that the will has been proved. This ends the question at issue between the parties and it must be held that the daughters are entitled to the declaration they seek. This appeal is therefore dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 681

HARRISON AND ADDISON, JJ.

Kanhaya Lal Sardha Ram — Appellant.

v.

Baldeo Das and *others* — Respondents.

First Appeal No. 1505 of 1930, Decided on 7th April 1933, from decree of his Britannic Majesty's Consul-General and Dist. Judge, Kashgar, D/- 2nd December 1929.

(a) Limitation — Appeal from decree of Consul-General passed under jurisdiction tested by King's Order-in-Council—Consul-General's duty is only to transmit appeal to High Court and not to consider question whether appeal to High Court is barred by time.

Where an appeal from the decree of the Consul-General is presented his duty is only to take the memorandum of appeal when it is presented to him and transmit the same together with other papers to the High Court. He cannot decide whether the appeal is barred by time. It is only when the appeal comes on for hearing that the question of limitation can be taken. [P 682 C 1]

(b) Limitation Act (1908), S. 5—Appeal filed beyond time—Appellant has to show sufficient cause for delay.

Where an appeal is filed beyond the time, it is for the appellant to show sufficient cause for extending the time; and for this he has to justify every day taken beyond time. [P 682 C 1]

Badri Das and *J. L. Kapur*—for Appellants.

M. C. Mahajan and *Chiranjiv Lal*—for Respondents.

Judgment.—This is an appeal from a decree dated 2nd December 1929, of the Consul-General at Kashgar, passed under jurisdiction vested in him by His Majesty the King's Order-in-Council, dated 11th March 1920, published in the Gazette of India under Notification No. 2058-G, dated 4th October 1920. A preliminary objection has been taken that the appeal is barred by time. Under S. 8 (2) of the Order-in-Council referred to the enactments mentioned in Sch. 1 to the order are made applicable within the limits of the order as from the commencement thereof. One of these enactments is the Limitation Act, 1908, so far as it applies to appeals and applications. The procedure for presentation of appeals is given in Ss. 38 to 41. The person wishing to appeal must present his memorandum of appeal to the Court, that is His Majesty the King's Consul-General, who is then charged with the duty of transmitting it to the High Court. As already mentioned, the decree is dated 2nd December 1929. Copies of the judgment and decree were applied for the next day, that is 3rd December 1929, and were supplied on 19th December 1929. The limitation for an appeal is 90 days excluding the time taken in obtaining copies, so that the appellants had time up to 20th March 1930. He sent his appeal by post to the Consul-General and it was not received by the Consul-General till 17th April 1930. Assuming for the time being that sending an appeal by post amounts to presentation (which is doubtful) it cannot be said that there was any presentation of the appeal till it reached the Consul-General, that is, till 17th April 1930, when the appeal was nearly time-barred by one month.

It was contended by the learned counsel appearing on behalf of the appellant that this delay should be excused, as the appellant is a resident of Hoshiarpur District and considerable time must have taken in getting the copies by post. No affidavit has been filed by the appellant so that it is not known when the copies reached him. Letters take about a month each way between the Punjab and Kashgar, so that the appellant could have presented his appeal within time. He had nearly a whole month in which he could consider the matter, make up his mind and yet present the appeal in time. Further, he had an agent in Kashgar, who conducted the proceedings for him before the Consul-General. It would have been easy to have sent this agent information by radio to the effect that an appeal should be instituted by him. It follows that no sufficient cause has been made out for extending the time and especially is this so, as the appellant has made no attempt to place before the Court the cause of the delay. It was for him to justify every day taken beyond the time and this he has failed to do.

Another contention raised on behalf of the appellant was that it was the duty of the District Judge, that is the Consul-General, to decide whether the appeal was time-barred or not, and that this Court could not go into the question after he had transmitted the appeal to it. It is clear however from S. 38 that the only duty of the Consul-General in connexion with appeals is to take the memorandum of appeal when it is presented to him, and transmit the same together with other papers mentioned to this Court. It is only when the appeal comes on for hearing that the question of limitation can be taken. For the reasons given, the appeal must be dismissed as time-barred with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 682

COLDSTREAM AND JAI LAL, JJ.

Bulaqi Mal and *another*—Plaintiffs—Appellants.

v.

Abdul Karim and *others*—Defendants—Respondents.

First Appeal No. 2969 of 1925, Decided on 27th April 1933, from decree of Senior Sub-Judge, Rawalpindi, D/- 8th June 1925.

(a) Contract Act (1872), S. 16—Transaction unconscionable—Presumption of undue influence does not arise.

Even if a transaction of mortgage be unconscionable, that fact alone is not sufficient to shift the burden of proof to the mortgagees by raising a presumption of undue influence. [P 684 C 1]

(b) Interest—Amount of.

A mortgagee is entitled to the full amount of principal and interest according to the conditions mentioned in the mortgage deed: *A I R* 1924 *P C* 60 and *A I R* 1918 *P C* 48 and 249, *Rel. on.* [P 684 C 2]

(c) Civil P. C. (1908), O. 22, R. 4 and O. 1, R. 8—Some defendants appointed under O. 1, R. 8 to represent others—Death of represented defendant—Appeal as against him does not abate.

Where a transferee of one of the properties against which a mortgage decree for sale is claimed dies and his legal representatives are not brought on the record within the prescribed time the appeal as against him abates. But if the defendant who is dead was represented by other defendants who were appointed to defend the suit on behalf of the others under O. 1, R. 8 then the death of the former does not result in the abatement of the appeal as against him: *A I R* 1926 *Lah* 499, *Rel on.* [P 684 C 2]

(d) Civil P. C. (1908), O. 41, R. 33—Party entitled but not filing appeal or cross-objection—Appellate Court would not interfere except for very cogent reason.

Where a party has a right to invoke the assistance of the Court either by filing an appeal or cross-objections and has failed to avail himself of such right, the Court will very rarely and then only for very cogent reasons interfere with the decree of the trial Court which is attacked by the opposite party by means of an appeal: *A I R* 1927 *Mad* 801; *A I R* 1928 *All* 746 and *A I R* 1926 *Cal* 1042, *Rel on*; *A I R* 1927 *All* 453, *Ref.* [P 685 C 1]

(e) Partition — Mortgage by joint owner prior to partition — Share on partition is liable even in hands of his transferee.

When a son mortgages joint property belonging to him and his father and then there is a partition, the property which falls to the share of the son is liable even in the hands of the transferees from the son: 2 *P R* 1906 and *A I R* 1929 *Lah* 684, *Rel on.* [P 685 C 2]

J. G. Sethi and *Madan Lal Sethi*—for Appellants.

M. Monier, *Govind Das*, *Basant Krishen* and *Shamair Chand*—for Respondents.

Jai Lal, J.—This appeal is by Bulaqi Mal and Ram Das, plaintiffs. On 16th February 1920, they instituted a suit for the recovery of Rs. 70,000, on the basis of a mortgage-deed which, they alleged, had been executed in their favour on the 10th of September 1908, by Abdul Karim, defendant 1. By virtue of this mortgage-deed certain immovable property was mortgaged without possession for Rs. 10,000 and interest at 24 per cent per annum with monthly rests was agreed to be paid. The property originally mortgaged is described in the plaint and it is alleged that on 22nd April 1909, the mortgagor Abdul Karim effected a partition of the property which he held jointly with his father Nabi Bakhsh and that by virtue of this partition the property which is mentioned in para. 11 of the plaint came to the share of the mortgagor, the property originally mortgaged being described in para. 1. It is further alleged that after the partition the mortgagor Abdul Karim made certain alienations of the whole of the property which fell to his share of the partition and that he was subsequently adjudicated an insolvent. Abdul Karim, the Official Receiver and the alienees from the former and also from Nabi Bakhsh were made defendants in the case and the usual decree for sale of the mortgaged property was claimed either with respect to the property originally mortgaged or, in the alternative, of the property which fell to the share of Abdul Karim after the partition. It is further claimed that if the amount due to the plaintiff be not recovered by the sale of the property then a personal decree be passed against the defendants. According to calculation made of the amount due to the plaintiffs according to the conditions of the mortgage-deed Rs. 1,14,000 odd is alleged to be due, but the plaintiffs profess to relinquish their claim for about Rs. 44,000 and pray for a decree for Rs. 70,000 only.

It may be mentioned that a good deal of the property which fell to the share of Abdul Karim after the partition was gifted by him to his wife Mt. Zohra Jan who also appears to have alienated some of it and is in possession of the rest. She also is a defendant in the suit. This suit was defended by all the defendants on various grounds, the principal of which so far as they are relevant to this appeal would appear in the course of this judgment. Generally speaking the alienees from Abdul Karim denied any knowledge of the mortgage and claimed to be alienees in good faith and for consideration. After some preliminary objections had been disposed of by the trial Court, pleadings were filed on behalf of Mt. Zohra Jan and Abdul Karim. The main defence of Mt. Zohra Jan was that Abdul Karim was not a co-owner with his father Nabi Bakhsh of the property originally mortgaged by him and therefore there was no partition between the father and the son, but that Nabi Bakhsh made a gift of a portion of his property in favour of Abdul Karim and therefore the latter was not entitled to mortgage the property orginally and that the plaintiff's lien did not and could not extend or attach to the property which was so given to him by his father and therefore it was not liable to be sold in satisfaction of the alleged mortgage. She also claimed that the gift in her favour by Abdul Karim was in lieu of the dower due to her.

Abdul Karim admitted that he had executed the mortgage in favour of the plaintiffs, but denied that he was the owner of the property which he mortgaged, on the other hand, he alleged that, his father, Nabi Bakhsh, was the owner. He stated that he was addicted to extravagance and debauchery and the plaintiffs took advantage of his weakness and secured the mortgage from him by undue influence. He further pleaded that out of Rs. 10,000 the mortgage money, he had received only Rs. 2,300 which had been borrowed by him from mortgagees previously and that they had forced him to execute a mortgage-deed for Rs. 10,000 in satisfaction of that debt. He also averred that interest at 24 per cent per annum as mentioned in the mortgage-deed was not agreed to, but the real agreement was for the payment of interest at 6 per cent per annum. He also supported the plea of his wife Mt. Zohra Jan that he was not joint with his father nor was there any partition of the property, but that his father gave him the property some of which he subsequently transferred in favour of his wife and the rest he sold to pay off the debts. He admitted liability for Rs. 11,482 as a debt due from him personally. It is not necessary specifically to mention the pleadings of those defendants who are the transferees of the property which was originally mortgaged to the plaintiffs and which by virtue of the alleged partition had remained with the father and has been alienated by him to them.

On these pleadings issues were framed and finally the Senior Subordinate Judge came to the conclusion that Abdul Karim was owner of half the property with his father and that he was thus entitled to mortgage his share in it. He found that a sum of Rs. 2,500 had been proved to have been paid as consideration on the mortgage-deed which he found had been obtained by undue influence. He considered that the rate of interest was heavy and that the plaintiffs should be allowed simple interest at the stipulated rate of 24 per cent per annum which according to his calculations came to Rs. 7,200. He consequently granted a decree to the plaintiffs for Rs. 9,700 to be realized by the sale of the property mentioned in para. 11 of the plaint, that is to say, the property which had fallen to the share of Abdul Karim in the partition between him and his father. A preliminary decrée for sale of the mortgaged property was consequently passed.

From this decree the plaintiffs being dissatisfied have presented this appeal and the ground urged on their behalf is that the findings of the Court below that only Rs. 2,500 was paid as consideration on the mortgage-deed and that it was obtained by undue influence are wrong and that they are entitled to a decree for the full amount of their claim, i. e., Rs. 70,000. In view therefore of the findings of the Senior Subordinate Judge and the fact that the plaintiffs alone are the appellants before us it is not necessary to mention or to consider the other points raised by the issues.

Issue 1 was whether Abdul Karim executed a mortgage-deed and whether it was executed under undue influence and was without full consideration. The burden of proving the second part of this issue was placed and rightly so on the defendants. Abdul Karim had admitted the execution of the deeds, its execution has been proved by the evidence of witnesses produced by the plaintiffs, and the learned trial Judge also has held it proved. (His Lordship then discussed evidence and concluded). In my opinion, therefore the finding of the learned Senior Subordinate Judge on this part of the case is wrong and I would hold that the defendant has failed to discharge the burden which was rightly placed on him and the mortgage-deed must be deemed to have been executed by Abdul Karim voluntarily and on full receipt of full consideration as mentioned therein. It may be mentioned that at the time of the execution of the deed Abdul Karim was of 21 or 22 years of age as he was described by his father to be 23 years of age in April 1909, when the document evidencing the alleged partition was executed. It also appears that the first dealing between the parties started early in 1908 in the form of a promissory note by the defendant Abdul Karim in favour of the plaintiffs which pronote was subsequently incorporated in another mortgage-deed Ex. P-8, dated 25th February 1908. That deed also was registered on the same date on which the document in suit was registered. The transaction between the parties cannot be styled as unconscionable, and even if it were unconscionable, that fact alone is not sufficient to shift the burden of proof to the mortgagees plaintiffs by raising a presumption of undue influence.

With regard to the contention of the defendants that interest at the stipulated rate should not be awarded to the plaintiffs, reference may be made to *Balla Mal* v. *Ahad Shah* (1), *Aziz Khan* v. *Duni Chand* (2) and *Raghunath Prasad* v. *Sarju Prasad* (3) all judgments of their Lordships of the Privy Council. The Senior Subordinate Judge awarded simple interest at the stipulated rate on the principal amount found by him to be due to the plaintiffs and has refused to award compound interest. Having regard to the dicta of their Lordships of the Privy Council in the cases cited above the plaintiffs would appear to be entitled to the full amount of principal and interest according to the conditions mentioned in the mortgage-deed, but as I have already stated they have voluntarily relinquished about Rs. 44,000, and have claimed a decree for Rs. 70,000 only. This amount in my opinion they were legally entitled to recover and the Senior Subordinate Judge should have decreed their suit accordingly. It may here be mentioned that Hari Chand, one of the defendants in the suit, who was a transferee of one of the properties against which the decree was claimed had died and his legal representatives not having been brought on the record within the prescribed time the appeal as against him was held by us at the hearing to have abated. Uttam Chand, one of the defendants, also has died, but he was represented by other defendants who were appointed to defend the suit on behalf of the other respondents under O. 1, R. 8, Civil P. C. Following *Maharaja of Faridkot* v. *Anant Ram* (4) we hold that the death of Uttam Chand did not under the circumstances result in the abatement of the appeal as against him.

On behalf of the respondents an attempt was made to attack the decree of the Senior Subordinate Judge on the ground that the view of the learned Judge that there had been a partition between Nabi Bakhsh and Abdul Karim and therefore that the property which fell to the share of Abdul Karim as a result of the partition is liable to be sold for the amount due to the plaintiffs in the hands of its transferees is erroneous, but the appellants' counsel objected to the right of the respondents to address us on this aspect of the case on the ground that they had filed no cross-objections under O. 41, R. 22, Civil P. C. The respondents' counsel

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1. A I R 1918 P C 249=48 I C 1=124 P R 1918 (P C).
2. A I R 1918 P C 48=48 I C 933 (P C).
3. A I R 1924 P C 60=82 I C 817=51 I A 101=3 Pat 279 (P C).
4. A I R 1926 Lah 499=87 I C 338=8 Lah 161.

however relied upon O. 41, R. 33 and cited *Mahomed Hasan* v. *Laute Ram* (5) which seems to support his contention that O. 41, R. 33, confers a very wide power on the appellate Court to pass such orders as it thinks proper in the ends of justice even in the absence of cross-objections in cases like the present. The matter however is left to the discretion of the Court and, in my opinion, where a party has a right to invoke the assistance of the Court either by filing an appeal or cross-objections and has failed to avail himself of such right the Court will rarely and then only for very cogent reasons interfere with the decree of the trial Court which is attacked by the opposite party by means of an appeal: *Sri Ranga Thathachariar* v. *Srinivas Thathachariar* (6) and *Rukia* v. *Mewa Lal* (7). The respondents in this case if they were dissatisfied with the decree and the conclusions of the Senior Subordinate Judge could have appealed to this Court or at least could have filed cross-objections, and not having done so I do not think this is a fit case in which we should exercise our powers under O. 41, R. 33 so as to deprive the plaintiffs of the benefit of their decree by making a pronouncement against the plaintiffs at the instance of the defendants considering that it is the plaintiffs alone who have presented this appeal with a view to get the amount awarded to them enhanced. They have given no reasons for not moving this Court in the ordinary way. This view receives support from *A. I. R.* 1926 *Cal.* 1042 also.

On the merits of their objections the respondents' counsel contended that Nabi Bakhsh and Abdul Karim were not the joint owners of the property, that though the sale-deeds were in their joint names the consideration moved from the father alone as the son was a minor at the time of the purchases and had no private means that therefore he must be deemed to be a benami purchaser on behalf of the father. The sale-deeds however being both in favour of the father and the son no question of benami purchase arises. Moreover it is not proved that the son had no private property or money out of which he could pay or his father could have paid on his behalf the consideration for the sale in his favour. It must be remembered that the business was carried on by the father and the son in the names of both and both used to work in the shop as appears from the evidence given by the witnesses for the defendant himself. There is ample authority that under the circumstances the property which fell to the share of Abdul Karim is liable even in the hands of the transferees from Abdul Karim, as, for instance, *Allah Bakhsh* v. *Gobind Ram* (8) and *A. I. R.* 1929 *Lah.* 684. But in view of my conclusion that this is not a case in which we should interfere with the decree of the Senior Subordinate Judge in favour of the respondents in the absence of an appeal or cross-objections by them, it is not necessary to consider whether particular properties which have been held by the Senior Subordinate Judge liable to be sold in satisfaction of the debt due to the plaintiffs are so liable.

The only question on this appeal relates to the amount which is recoverable by the plaintiffs on the basis of their mortgage and on this question I have held that the plaintiffs are entitled to the full amount claimed by them. I would therefore accept this appeal and increase the amount decreed by the trial Court in favour of the plaintiffs to Rs. 70,000, and fix three months from today for the payment of the amount by the defendants. The usual preliminary decree for sale of mortgaged property shall be drawn up in this office as was done in the trial Court, but interest on the amount decreed in favour of the plaintiffs shall run from the date of the institution of the suit till realization at 6 per cent per annum only and the parties shall bear their costs throughout.

Coldstream, J.—I agree.

R.K. *Appeal accepted.*

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5. A I R 1927 All 453=97 I C 65=49 All 224.

6. A I R 1927 Mad 801=104 I C 472=50 Mad 866.

7. A I R 1928 All 746=111 I C 751=51 All 68.

8. (1906) 2 P R 1906=10 P L R 1906.

A. I. R. 1933 Lahore 685

SHADI LAL, C. J. AND BROADWAY, J.

Mewa Singh—Appellant.

v.

Tara Singh and *others*—Respondents.

Letters Patent Appeal No. 36 of 1932, Decided on 15th February 1933, from order of Johnstone, J., D/- 7th June 1928.

(a) Mortgage — Preliminary decree — Part payment of amount under decree by mortgagor does not stop interest from running.

A mortgagee decree-holder is not bound to accept a part payment of the amount under the decree and hence interest does not cease to run by reason of deposit of such amount in Court. [P 686 C 1]

(b) Appeal — Letters Patent appeal—New point cannot be raised—Practice.

A new point cannot be raised in an appeal under the Letters Patent. [P 686 C 1]

Mehr Chand (Dewan)—for Appellant.

M. L. Batra—for Respondents.

Judgment.—On 15th July 1926, a preliminary decree was passed for the recovery of Rs. 5,500 with interest at the rate of Rs. 41-4-0 per mensem, and also for Rs. 1,175-10-0. The decree made the mortgagor, Mewa Singh, liable for the payment of the latter sum, and the puisne mortgagees for the payment of Rs. 5,500. It is not clear which of these two sets of defendants was to pay the interest. It appears that while Rs. 5,500 was paid within the period prescribed by the decree, there was a default in payment of the interest thereon, with the result that a final decree for sale was made on 5th January 1927. The question for determination in this appeal is whether the mortgagor is liable for the payment of Rs. 711-9-0 which represents interest from the date of the institution of the suit until realization. It is contended on his behalf that no interest should have been awarded after 30th August 1926, when the principal amount was deposited in Court. The simple answer to this contention is, as pointed out by the learned Single Judge, that there was only a part payment of the amount payable under the decree, and that the decree-holder was consequently not bound to accept that part-payment. The interest did not therefore cease to run.

The learned counsel for the appellant has raised also the contention that the mortgagor was not personally liable for the payment of the above sum, but a perusal of the judgment appealed against shows that this point was not argued before the learned Judge against whose judgment this appeal has been preferred. It is therefore not open to the appellant to raise in an appeal under the Letters Patent, a new point. The appeal is accordingly dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 686

BHIDE, J.

Ahmad and *others*—Plaintiffs—Appellants.

v.

Mt. Allah Bibi and *others*—Defendants—Respondents.

Second Appeal No. 1892 of 1927, Decided on 31st January 1933, from decree of Dist. Judge, Jhelum, D/-1-6-1927.

Punjab Limitation (Custom) Act (1 of 1920), Art. 1—Alienation includes testamentary disposition of property—Suit to set aside must be brought within six years for alienation if deed is registerad.

An alienation includes a testamentary disposition of property and therefore a suit for a declaration that an alienation of ancestral immovable property shall not be binding on the plaintiff after the death of the alienor must be instituted within six years of the date of the registration when the alienation is made by a registered deed. The contention that such a suit is not governed by Art. 1, inasmuch as the suit was instituted after the death of the alienor, has no force : *AIR* 1931 *Lah* 702, *Ref.* [P 687 C 1]

Dev Raj Sawhney—for Appellants.

Shamair Chand—for Respondents.

Judgment.—This second appeal arises out of a suit for a declaration that the bequest of certain landed property by one Ahmad, a Kingra Jat of Sadhowal in the Jhelum district, shall not affect the reversionary rights of the plaintiffs. The bequest was made by Ahmad in favour of his daughters by virtue of a registered deed dated the 13th November 1918. The defendants pleaded inter alia that the suit was time-barred and that Ahmad was competent to make a bequest in favour of his daughters according to the custom governing the parties. The trial Court decreed the suit, but on appeal the learned District Judge has held that the suit was time-barred and also that Ahmad was competent to make a valid bequest in favour of his daughters. The appeal was accordingly accepted and the suit dismissed. From this decision the plaintiffs have preferred an appeal supported by a certificate on the point of custom under S. 41, Punjab Courts Act.

The first point urged before me was that of limitation. The learned District Judge has held that the suit was governed by Art. 120 of the Indian Limitation Act, and that the period of limitation having commenced to run from the date of the will, namely, the 13th November 1918, the present suit, which was instituted on 9th October 1926, was barred by time. The learned counsel for the appellants urged that the will could not take effect till the death of the testator, which occured in 1924, and, therefore, the view taken by the learned District Judge was not correct. The learned counsel for the respondents did not accept the view taken by the learned District Judge but urged that the suit was really governed by Art. 1 of the Schedule to Punjab Act 1 of 1920 and was time-barred according to that article. According to Punjab Act 1 of 1920 an alienation included a testamentary disposition of property and Art. 1, in the Schedule of the same Act lays down that a suit for a declaration that an alienation of ancestral immovable property shall not be binding on the plaintiff after the death of the alienor must be instituted within six years of the date of registration when the alienation is made by a registered deed. The learned counsel for the appellants urged that the present suit is not governed by that article inasmuch as the suit was instituted after the death of the alienor. This contention appears to me to have no force. The facts of the case are practically on all fours with those of *Harnaman* v. *Tabi* (1), a Division Bench ruling of this Court and the suit appears to be clearly time-barred in accordance with thē view taken by the Division Bench in that case. In the circumstances it is unnecessary to go into the question of cusotm raised by the plaintiffs.

I, therefore, confirm the decree of the learned District Judge and dismiss this appeal. In view of all the circumstances, however, I leave the parties to bear their costs in this Court.

V.S. *Appeal dismissed.*

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1. AIR 1931 Lah 702=134 I C 1040=13 Lah 22.

A. I. R. 1933 Lahore 687

BROADWAY, J.

Girdhari Lal—Judgment-debtor—Appellant.

v.

Pars Ram and *another*—Decree-holders—Respondents.

Misc. First Appeal No. 1931 of 1932, Decided on 28th March 1933, from order of Senior Sub-Judge, Multan, D/- 3rd December 1932.

(a) Execution—Jurisdiction—Mortgage decree — Property beyond jurisdiction can be proceeded against by Court passing decree.

Primarily a Court having jurisdiction to try a suit has jurisdiction to execute the decree granted by it, and in the execution of a mortgage decree the executing Court has power to order the sale of the property mortgaged, even though the property may be situated beyond the local limits of its jurisdiction: 14 *Cal* 661; 21 *Cal* 639; 15 *Cal* 667; *AIR* 1926 *Mad* 421 and *AIR* 1925 *Pat* 130, *Rel on.* [P 687 C 2]

(b) Civil P. C. (1908), O. 34, R. 3—Receiver cannot be appointed to carry out sale —Civil P. C. (1908), O. 40, R. 1.

Order 34 was specifically brought into the Code with a view to dealing with mortgage decrees and that order was meant to be self-contained and to provide for all matters to which it referred. Therefore since it is not so provided the appointment of receiver to carry the sale being a costly procedure should not be ordered; *AIR* 1927 *All* 419 and *AIR* 1925 *Lah* 590, *Ref.* [P 688 C 1]

Nawal Kishore—for Appellant.

R. C. Manchanda—for Respondents.

Judgment.—One Paras Ram obtained a decree against Lala Girdhari Lall on a mortgage. The preliminary decree was passed on 19th April 1932, and this was made final on 4th October 1932. On 12th November 1932, the decree-holder took out execution of the decree and sought to bring the mortgaged property to sale. This property consisted of a factory in the Sheikhupura district and also some immovable property in Multan. The suit had been tried and the decree had been passed by the Senior Subordinate Judge of Multan and the execution proceedings were instituted in the same Court.

At the instance of the decree-holder the executing Court (holding that it had jurisdiction to execute the decree against property situate without its territorial jurisdiction) appointed a receiver of the factory and directed him to take possession thereof and sell the same. Against this order an appeal has been preferred by the judgment-debtor through Mr. Nawal Kishore who has pressed two matters before me.

Firstly he has urged that the executing Court had not jurisdiction to direct the sale of the factory which was situate at Sangla Hill, and secondly, that no Receiver could or should have been appointed.

It seems to me that the first matter has been concluded by authority and Mr. Nawal Kishore admitted that the Calcutta view was against him. Primarily a Court having jurisdiction to try a suit has jurisdiction to execute the decree granted by it, and it has been held by the Calcutta High Court that in the execution of a mortgage decree the executing Court has power to order the sale of the property mortgaged, even though the property may be situated beyond the local limits of its jurisdiction: see *Maseyk* v. *Steel & Co.* (1), *Tincowrie Debya* v. *Shib Chandra* (2), *Kartick Nath Pandey* v. *Tilukdhari Lal* (3). The last of these decisions was followed in *Rajagopala* v. *Tirupathia Pillai* (4), by the Madras High Court, it being held that a Court can execute a mortgage decree passed by itself, although the property to be sold is wholly or partly outside its jurisdiction.

A similar view was taken by a Division Bench of the Patna High Court in

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1. (1887) 14 Cal 661.
2. (1894) 21 Cal 639.
3. (1888) 15 Cal 667.
4. A I R 1926 Mad 421=95 I C 12=49 Mad 746.

Abdul Hadi v. *Mt. Kabultun-nisa* (*A. I. R.* 1925 *Patna* 139).

In view of these authorities I must hold that the Multan Court that had passed the decree in the suit could execute the same and order the sale of the factory mortgaged even though the factory was situate outside its territorial jurisdiction.

For the second point Mr. Nawal Kishore relied on *Makhan Lal* v. *Mushtaq Ali* (*A. I. R.* 1927 *All.* 419), where it was held by Allahabad High Court that a receiver could not be appointed in proceedings in execution which fell within the purview of O. 34, Civil Procedure Code, the provisions of which did not allow of the application of the procedure provided by O. 40, Civil Procedure Code. Mr. Manchanda referred me to *Promothanath Maha* v. *H. V. Low and Co.* (*A. I. R.* 1930 *Cal.* 502), and *Paras Ram* v. *Puran Mal Ditta Mal* (*A. I. R.* 1925 *Lah.* 590), and urged that a receiver could be appointed in execution of a mortgage decree. I am unable to find anything to support this contention in the Calcutta case, but the Lahore case is undoubtedly in point. It seems to me, however, that the Allahabad view has a great deal of force. O. 34, Civil Procedure Code, was specifically brought into the Procedure Code with a view to dealing with mortgage decrees and, as at present advised, I can see no reason for thinking that that order was not meant to be self-contained and to provide for all matters to which it referred. All that the executing Court can do in the execution of a mortgage decree is to direct the sale of the property mortgaged and it seems to me that it merely increases the cost of the proceedings to appoint a receiver to carry out such a sale.

In the present case it appears to have already been a costly step and I have not been shown any real justification for the appointment. While therefore I hold that the Multan Court has jurisdiction to direct the sale of the factory I hold that it erred in appointing a Receiver and, accepting this appeal to this extent, I set aside the appointment. Parties to bear their own costs.

M.N. *Order accordingly.*

** A. I. R. 1933 Lahore 688

ADDISON AND BHIDE, JJ.

Nizam—Insolvent—Appellant.

v.

Babu Ram and *others*—Respondents.

Misc. First Appeal No. 150 of 1931, Decided on 7th April 1933, from order of Dist. Judge, Hissar, D/- 4th December 1930.

** **Provincial Insolvency Act (1920), Ss. 28 (7) and 34—Debt barred by time on date of adjudication but subsisting on date of presentation of application can be proved.**

Section 34 is governed by sub-S. (7), S. 28. Hence, if the right to recover a debt has become barred by time on the date when the order of adjudication is made but the right subsists on the date of the presentation of the application or on the date when the application is admitted, the creditor is entitled to prove his debt as the statute of limitation does not affect debts which are within time on the date of the petition: *A I R* 1924 *Mad* 163; *A I R* 1924 *Oudh* 351 and *A I R* 1926 *Oudh* 621, *Dist.*; *Case law discussed.* [P 689 C 2]

Khurshaid Zaman—for Appellant.

N. C. Pandit—for Respondents.

Bhide, J.—In the course of insolvency proceedings on a petition by a creditor, it was found that certain debts due to him which were within time on the date of the petition, had become barred by limitation by the date on which the adjudication order was passed. An objection was taken on behalf of the insolvent, relying on the wording of S. 34, Provincial Insolvency Act, 1920, that these debts could not be proved in the course of the insolvency proceedings as the debtor was not subject to these debts " when the debtor was adjudged insolvent." The learned District Judge has held that, by virtue of Sub-S. (7), S. 28 of the Act, the adjudication order related back to the date of the petition and hence the debts were provable. He has accordingly disallowed the objection. From this decision the present appeal has been preferred.

No authority directly in point has been cited on either side. The learned counsel for the appellant referred to *Sivasubramania Pillai* v. *Theethiappa Pillai* (1), *Ijaz Husain* v. *Lachman Das* (2) and *Damodar Das* v. *Hamid Rahman* (3), but these were all cases in which the debts were within time on the date of the adjudication and the only question which arose for decision therein was whether they could be proved on a later date in the course

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1. A I R 1924 Mad 163=75 I C 572=47 Mad 120.
2. A I R 1924 Oudh 351=75 I C 590.
3. A I R 1926 Oudh 621=98 I C 74.

of the proceedings, when they had become barred by time. It was held that they could be so proved but these decisions are clearly not in point as there was no occasion for the Court in these cases to consider the question whether debts which are within time on the date of the petition but are barred on the date of the adjudication can be proved.

The main contention of the learned counsel for the appellant was that Sub-S. (7), S. 28, Provincial Insolvency Act, on which the learned District Judge has relied does not govern S. 34 of the Act and, in support of this contention, he has referred to certain observations of Tek Chand, J., in the Full Bench ruling reported as *Hem Raj* v. *Krishan Lal* (4) at p. 125 (of 10 *Lah.*)to the effect that S. 28 could not be taken to control all other provisions of the Act and certainly not S. 53, which applied only if the transferor is adjudged insolvent within two years after the date of the transfer. These remarks were obviously made with special reference to S. 23 and the decision of the Full Bench was based mainly on a comparison of the wording of S. 53, and certain other allied sections. There was no occasion in that case to consider S. 34 and the observations referred to above must be treated as obiter so far as that section is concerned. It may be mentioned further that after the decision of the Full Bench referred to above S. 53 has been amended and it has been made clear that transfers made within two years before the presentation of the petition are voidable under S. 53 of the Act. This amendment indicates that the intention was that S. 28 (7) should be read with S. 53, as was held by the High Courts of Calcutta, Madras and Allahabad before the amendment: *Rakhal Chandra* v. *Sudhindra Nath* (5), *R. Rangiah* v. *Appaji Rao* (6) and *Sheo Nath Singh* v. *Munshi Ram* (7).

The learned counsel for the respondent rightly pointed out that the contention put forward by the learned counsel for the appellant, if correct, would reduce the whole position to absurdity. For instance, a creditor's petition may become wholly infructuous, if the debtor succeeds in delaying the proceedings sufficiently long so that his debts become time-barred before the date of adjudication. When a creditor files a petition, he has to enter all his debts therein, and the question whether the debts are due and the debtor is able to pay them becomes "sub-judice" between the parties. Again, even according to the argument of the learned counsel for the appellant, Sub-S. (7), S. 28, at least governs the whole of that section. Now, Sub-S. (2) of that section lays down that, on the making of an order of adjudication the property of the insolvent vests in the Court or the receiver and no creditor has any remedy against the property or can institute any suit or take other legal proceedings except with the leave of the Court during the pendency of the proceedings. By virtue of Sub-S. (7), this vesting of the property and the consequent disability of the creditor to sue would seem to take effect from the date of the petition in cases wherein an adjudication order is granted. Consequently, even according to the argument of the learned counsel, it would seem logical to hold that the statute of limitation does not affect in such cases those debts which are within time on the date of the petition. This view would seem to receive support from the reasoning adopted in *Baranashi Koer* v. *Bhabadeb Chatterjee* (8).

It may be mentioned here that in England it has been held that the statute of limitation ceases to run from the commencement of bankruptcy proceedings. It was remarked in *Ex parte Ross in the matter of Coles* (9) that in bankruptcy a debt does not become barred by time if it was not so barred at the commencement of the bankruptcy, and the rule was recognised in several later cases in England. The application was accepted as correct so far as proof of debts in bankruptcy proceedings is concerned by Channel, J., in *Re Benzon Bower* v. *Chetwynd* (10). The application of the rule in Sub-S. (7), S. 28 to S. 34, would thus seem to be in conformity with equity as well as the above English decisions, and, in the absence of any cogent reason to the contrary, I would hold that S. 34 is governed by that sub-section and dismiss the present appeal. In view of all the circumstances however I would leave the parties to bear their costs of the appeal.

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4. A I R 1928 Lah 861=111 I C 8=10 Lah 106 (F B).
5. A I R 1920 Cal 557=52 I C 747=46 Cal 991.
6. A I R 1927 Mad 163=99 I C 241=50 Mad 800.
7. A I R 1920 All 158=55 I C 941=42 All 433.
8. A I R 1921 Cal 456=66 I C 758.
9. (1825) 2 G & J 46 & 330.
10. (1914) 2 Ch 68=83 L J Ch 658=110 L T 926=30 T L R 435=58 S J 430.

Addison, J.—I agree, and have nothing to add.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 690

ADDISON AND AGHA HAIDAR, JJ.

Chuni Lal Tulsi Ram—Plaintiff—Appellant.

v.

Amin Chand and *others*—Defendants—Respondents.

Civil Misc. Petn. No. 16 of 1933, Decided on 3rd March 1933.

(a) Civil P. C. (1908), S. 109 (a)—Death of one of respondents during pendency of appeal in High Court — Dismissal of whole appeal on ground that appeal abated is final order passed on appeal within meaning of S. 109 (a) affirming decision of lower Court.

During the pendency of an appeal in the High Court one of the respondents died. An application to bring on record was objected to and the whole appeal was dismissed as it was held that the decree was an indivisible one and the appeal had abated. In an application for leave to appeal to the Privy Council :

Held : that the order of the High Court was a final order passed on appeal within the meaning of S. 109 (a) dealing judicially with the matter before the Court, and that it was a final order affirming the decision of the Court below :

Held further : that no substantial question of law was involved in the case and as such leave should not be granted: *AIR* 1914 *P C* 66, *Dist* ; *AIR* 1933 *P C* 68, *Rel on* [P 691 C 1]

(b) Civil P. C. (1908), S 109 (a)—"Decision" means merely decision of suit and not judgment.

The word "decision" in S. 109 (a) means merely the decision of the suit by the Court and not judgment. Hence in order to affirm the decision of the Court below within the meaning of S. 109 (a) it is sufficient for the appellate Court to affirm the decree. It need not also affirm the grounds of fact upon which the judgment was passed : 25 *All* 109 (*P C*), *Foll.* [P 691 C 2]

(c) Civil P. C. (1908), S. 109 (a)—Substantial question of law.

It is sufficient that there should be a substantial question of law not of general importance but as between the parties. [P 692 C 1]

Mehar Chand Mahajan — for Petitioner.

Kishen Dayal—for Respondents.

Addison, J.—This is an application for leave to appeal to His Majesty in Council. In 1925 the firm Chunni Lal Tulsi Ram sued two individuals, namely, Amin Chand and his father Mast Ram, for accounts. It was found that the parties carried on business in partnership and ultimately on 31st January 1928, the two defendants, Amin Chand and Mast Ram, obtained, after accounts were taken, a final decree for Rs. 16,835 against the firm Chuni Lal Tulsi Ram. The firm appealed to this Court on 9th October 1928. During the pendency of the appeal Mast Ram died on 13th June 1929. It was not till 11th March 1931, that an application was made to bring on the record the other legal representatives of Mast Ram, namely, three other sons as well as grandsons. The respondent Amin Chand objected to the other legal representatives of Mast Ram being brought on the record and claimed that as the appeal had abated so far as Mast Ram was concerned and as it was a joint and indivisible decree, therefore the appeal could not proceed against Amin Chand also. It was asked that it should be held that the whole appeal had abated and was liable to dismissal. This Court held that the appeal had abated as regards Mast Ram and there was no sufficient ground for setting aside this abatement. Certain other contentions to the effect that the appeal could proceed against Amin Chand only were rejected. Finally the whole appeal was dismissed as it was held that it could not proceed against Amin Chand alone as the decree in favour of him and Mast Ram was one indivisible decree. It is against this decision that leave is asked to appeal to His Majesty in Council.

It was argued on behalf of the petitioners that the order of this Court fell within S. 109 (a) and the first two paragraphs of S. 110, Civil P. C. It was claimed however that the last clause of S. 110 "and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law" did not apply as the appellate order to this Court could not be held to have affirmed the order of the Court below. As however the order was a final order passed on appeal and involved the question of more than Rs. 10,000 it was claimed that an appeal lay as of right to His Majesty in Council.

Reliance was principally placed on *Chandri Abdul Majid* v. *Jawahir Lal* (1), by the learned counsel appearing for the petitioners. In that case an order of His Majesty in Council dismissing an appeal for want of prosecution was held not to deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised au-

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1. AIR 1914 P C 66=23 I C 649=36 All 350 (PC).

thoritatively that the appellant had not complied with the conditions under which the appeal was open to him and that therefore he was in the same position as if he had not appealed at all. The question involved in that case was whether the order in question was a final order of the appellate Court within the meaning of Art. 179, Cl. (2), Sch. 2, Limitation Act, 1877, which corresponds with Art. 182, Cl. (2), Sch. 1, Limitation Act, 1908. Strictly speaking therefore this authority is not on all fours with the present case. Further this authority has been reviewed by their Lordships of the Privy Council in *Abdulla Asghar Ali* v. *Ganesh Das* (2). It was held in the latter case that an order such as has been passed by us in the present case was the final order of the appellate Court and that it did deal judicially with the matters before it inasmuch as the Judicial Commissioner considered the judgment-debtor's contention that the appeal had not abated and held that it had. He considered the prayer for revival of the arbitration and refused it. He rejected the application and set aside the abatement. Whether the order made was right or wrong was immaterial; there was no appeal against it and it was in the circumstances clearly final. Their Lordships of the Privy Council thought that when an order was judicially made by an appellate Court which had the effect of finally disposing of the appeal such an order gave a new starting point for the period of limitation prescribed by Art. 182 (2) of the Act of 1908.

It follows from the latest decision on this question by their Lordships of the Privy Council that the order passed by us was a final order passed on appeal within the meaning of S. 109 (a), Civil P. C. It was also an order dealing judicially with the matters before the Court and the effect of it was that the appeal as a whole was dismissed by us. In these circumstances it seems to me that there is no escape from the conclusion that the order passed by us was a final order affirming the decision of the Court below. This means that the appeal must involve a substantial question of law before leave to appeal to His Majesty in Council can be given.

In *Tasaduq Rasul Khan* v. *Manik Chand* (3), it was laid down by their Lordships of the Privy Council that the word "decision" in the clause in question means merely the decision of the suit by the Court, and cannot like the word "judgment" be defined as meaning the statement of grounds upon which the Court proceeds to make the decree. In order to affirm the decision of the Court below within the meaning of the section therefore it was sufficient for the appellate Court to affirm the decree; it need not also affirm the grounds of fact upon which the judgment was passed. On similar reasoning it was held by a Division Bench of the Allahabad High Court in *Bhagwan Das* v. *Mahadev Prasad* (4) that an order dismissing an appeal for the appellant's failure to furnish security for costs under the provisions of O. 41, R. 10, Civil P. C., was an order which had the effect of affirming the decision of the Court below, the words used in S. 110 being "affirms the decision of the Court" and not "affirm the decision of the Court on merits." It was further said that the words "final order passed on appeal" in S. 109 (a), Civil P. C., should be construed broadly so as to include an order directing the dismissal of the appeal consequent upon the failure of the appellant to furnish security for the costs of the respondent. In this respect such decisions as *Radha Kisen* v. *Jamma Prasad* (5), were not approved. It was held by a Division Bench of this Court in *Mt. Satto* v. *Amar Singh* (6) that when the High Court dismissed appeals as being insufficiently stamped and declined to exercise its discretion under S. 149, Civil P. C., such judgments must be considered as affirming the decisions of the Courts below.

I would therefore hold that there was a decree or final order passed on appeal by this Court which affirmed the decision of the Court immediately below and that therefore the appeal must involve some substantial question of law. It seems to me impossible to hold that there is any substantial question of law involved in this case. The application to bring the legal representatives of the deceased Mast Ram was obviously belated and there was no sufficient cause to allow them to be brought on the record. As the suit was brought against Mast Ram and Amin Chand as individuals it could not be suddenly turned into a suit against a joint Hindu family when all the evidence had been finished before

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2. AIR 1933 P C 68=142 I C 326=60 I A 83=60 Cal 662 (PC).
3. (1903) 25 All 109=30 I A 35 (PC).
4. AIR 1923 All 298=71 I C 959=45 All 390.
5. (1910) 13 O C 59=5 I C 940.
6. AIR 1919 Lah 65=54 I C 400=1 Lah 220.

the hearing of the appeal. Amin Chand and Mast Ram were not sued as a firm and the provisions of O. 30 clearly could not apply. These were the only questions which were claimed to raise substantial questions of law and it seems to me that they do not do so. It is of course sufficient that there should be a substantial question of law, not of general importance, but as between the parties. It cannot however be said that there is a substantial question of law between the parties.

Nor do I think that this is a case which is otherwise fit for appeal to His Majesty in Council within the provisions of S. 109 (c), Civil P. C. It is an ordinary case for which this special provision was not intended. With these remarks I would dismiss the application for leave to appeal to His Majesty in Council with costs.

Agha Haidar, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 692

ADDISON AND BHIDE, JJ.

Ram Sarup—Defendant — Petitioner.

v.

Mohan Lal and *others*—Plaintiffs—Opposite Parties.

Civil Revn Petn. No. 636 of 1931, Decided on 29th March 1933, from decree of Second Class Sub-Judge, Delhi, D/- 13th August 1931.

(a) **Civil P. C. (1908), S. 115 and Sch. 2, Para. 16 (2)—Neither appeal nor revision is competent from order refusing objection—Punjab Courts Act (1918), S. 44.**

No appeal is competent from the order of the Court refusing the objections to an award nor does revision lie from such an order as it is an interlocutory order and does not constitute a case within S. 44, Punjab Courts Act, or S. 115, Civil P. C.; *Case law reviewed.* [P 692 C 2]

(b) **Punjab Courts Act (1918), S. 44—"Case" — Meaning explained — Civil P. C. (1908), S. 115.**

The word "case" is used in S. 44 as something wider than a suit, so as to include proceedings other than suits, such as proceedings under the Provincial Insolvency Act, etc. But where a case in which the revisional jurisdiction of the High Court is invoked happens to be a suit, then the "suit" is also a "case" referred to in S. 115, Civil P. C, which requires to be decided before the records are called for. [P 693 C 1; P 694 C 1]

(c) **Civil P. C. (1908), Sch. 2, Paras. 15 and 16—Order setting aside award and order refusing objections are interlocutory.**

There is no difference between the setting aside of an award and directing the suit to proceed under para. 15, Sch. 2, and refusing of an application to set aside the award under para. 16. In neither case has the suit ended and in both cases further action is necessary and as such both are interlocutory orders and not open to revision. [P 693 C 1]

Mehar Chand Mahajan, Jiwan Lal Kapur and *A. N. Chona*—for Petitioner.

Kishan Dial—for Opposite Parties.

Addison, J.—The matter in dispute in the suit was referred to arbitration and an award was given by the arbitrators. The petitioner preferred certain objections to the award. These were rejected and the Court thereupon proceeded under the provision, 16 of Sch. 2, Civil P. C., to pronounce judgment according to the award. No appeal is competent from the order of the Court refusing the objections, while under para. 16 (2) an appeal is only competent from the decree in so far as it is in excess of or not in accordance with the award. The petitioner has however moved this Court on the revision side against the order refusing his objections on the ground that the Judge did not properly appreciate the evidence in coming to his decision.

A preliminary objection was taken that a petition for revision did not lie, the order in question being of an interlocutory nature. It seems to me that this objection must be sustained and my reasons are as follows: A Full Bench of this Court in *Lal Chand Mangal Sein* v. *Behari Lal Mehr Chand* (1), held that the Court has no jurisdiction to entertain an application for revision in the case of an interlocutory order as it does not constitute a "case" within the meaning of S. 44, Punjab Courts Act, corresponding to S. 115, Civil P. C. In that case the Munsif of Batala overruled the defendants' objection that he had no jurisdiction to hear the suit and a petition in revision was preferred against that order. The leading judgment of the learned Chief Justice contains the following significant words:

> "It is beyond question that 'case' is not synonymous with 'suit.' While every suit is a case, it cannot be said that every case is a suit. The word 'case' is a more comprehensive expression and includes not only a suit but other proceedings which cannot be described as a suit, e. g., proceedings under the Guardians and Wards Act, Probate and Administration Act, Succession Certificate Act, Provincial Insolvency Act, etc. But can a branch of a suit be regarded as a case within the meaning of the section? I would answer the question in the negative."

The reasoning here is that a suit as a whole is a case and that the various branches or portions into which it can be broken up are not cases.

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1. A I R 1924 Lah 425=84 I C 259=5 Lah 288 (F B).

The word "case" is used in the section as something wider than a suit, not narrrower, that is, so as to include proceedings other than suits, such as proceedings under the Provincial Insolvency Act, etc. This Court has only power to call for the record of a case which has been decided and to exercise its powers in revision with respect thereto. It follows that if the refusing by the Court below of the application of the petitioner did not end a case, that order is incapable of being revised. There is no difference between the setting aside of an award and directing the suit to proceed under para. 15, Sch. 2 and the refusing of an application to set the award under para. 16. If under para. 15 the award is set aside, the suit must be proceeded with. If the award is not set aside but the application to do so is refused, then under para. 16 the Court has to proceed to pronounce judgment according to the award. In neither case has the suit ended and in both cases further action is necessary. Thus, both are interlocutory orders. It was sought to argue that the arbitration proceedings in the suit were proceedings independent of the suit and that while they were pending, the suit was in suspense. When therefore they were finished it was claimed that a case had been decided. It seems to me that this argument is fallacious. The first decision of this Court on the question was by a Single Judge in *A. I. R.* 1926 *Lah.* 191. He held that arbitration proceedings entered upon by the parties in the course of the trial of a suit are proceedings in that suit and do not constitute a separate case within S. 115, Civil P. C. Thus an order of the lower Court setting aside an award and directing the suit to proceed is not open to revision. It seems to me that this decision lays down the correct law. Para. 1, Sch. 2, Civil P. C., which deals with arbitration, begins: "Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration." S. 89, Civil P. C., which also deals with arbitration, contains the words: "All references to arbitration whether by an order in a suit or otherwise." The case before us is a case of arbitration by an order in a suit. Cl. (2), para. 3, Sch. 2, runs:

> "Where a matter is referred to arbitration the Court shall not, save in the manner provided in this schedule, deal with such matter in the same suit."

It is clear from the words quoted from these various sections that these arbitration proceedings form an integral part of the suit and are merely a portion or a branch of a suit as comtemplated by the learned Judges who decided the Full Bench case. They are not in themselves separate cases decided outside the scope of the suit.

A Single Judge of this Court in *A. I. R.* 1929 *Lah.* 369 came to the conclusion that a revision lay from an order refusing to set aside an award. What he said was that the proceedings relating to the setting aside of an award constituted a case, and that the order passed by the Court refusing to set aside the award closed one independent branch of the inquiry by the trial Judge. With great respect it seems that this is merely to dissent from the Full Bench decision in *Lal Chand Mangal Sein* v. *Behari Lal Mehr Chand* (1) where it was laid down quite clearly that a branch of a suit could not be regarded as a case. We were also referred to a decision of a Bench of this Court: *A. I. R.* 1929 *Lah.* 257, where it was held that the question as to whether a particular person should or should not be the next friend of a minor was ancillary to the suit itself and it was a case finally decided qua that particular proceedings. It seems unnecessary for me to discuss this decision as it is obviously not on all fours with the present case. In *A. I. R.* 1929 *Lah.* 688, I sitting alone took the view that in a case like the present a revision was not competent.

Another Judge of this Court in *A. I. R.* 1931 *Lah.* 318, held that a revision was competent in a case like the present. He did not discuss the Lahore cases but followed *Bhola Nath* v. *Raghunath Das Mithan Lal* (2), to which Sir Shah Muhammad Sulaiman, J., was a party. Another Bench however in which he was again a party took the opposite view and held that no revision lay against such an order as the present. This case is *Risal Singh* v. *Faqira Singh* (3). The Allahabad Court is therefore now in favour of the view that no revision lies against such an order as the present as it is interlocutory. See also *Rudru Prasad* v. *Mathura Prasad* (4) and *Mahomed Fakhruddin* v. *Rahimullah* (5).

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2. A I R 1929 All 743=122 I C 695=51 All 1010.
3. A I R 1932 All 452=136 I C 568=58 All 1006.
4. A I R 1925 All 566=89 I C 173=47 All 916.
5. A I R 1925 All 458=85 I C 502=47 All 121.

The Full Bench case of the Allahabad High Court corresponding to *Lal Chand Mangal Sen* v. *Behani Lal Mehr Chand* (6), is *Budhu Lal* v. *Mewa Ram* (7). This is discussed in *Shah Mahomed* v. *Fakhruddin* (5). It is pointed out there that the language which was used by Piggott, J., in the Full Bench case leaves no room for doubt on the point. He said that:

> "If this view is correct it follows, that whereas all 'cases' are not 'suits' every suit is at least a case.' From this I would go on to conclude that whree a case in which the revisional jurisdiction of the High Court is invoked happened to be a suit, then the 'suit' is also a 'case' referred to in S. 115, Civil P. C., which requires to be decided before the record is called for."

With great respect I am in agreement with this view and I hold that it is impossible for a case to be part of a suit, the suit being the unit for the purpose of S. 115.

A Division Bench of the Oudh Chief Court held in *A. I. R.* 1929 *Oudh* 493 that where a Court passes an order setting aside an arbitrator's award and resumes the hearing of a suit, no application for revision can lie in respect of such an order as there has been no decision of a case and the order is clearly an interlocutory one. The Bombay High Court has taken the same view. It was held by a Division Bench in *Chimanbhai Kalyanbhai* v. *Keshav Lal Bulkhi* (8), that no application lay under S. 115, Civil P. C., against an order setting aside an award and directing the suit to proceed on the ground that such an order was interlocutory. Another Division Bench of the same Court came to the same conclusion in *A. I. R.* 1932 *Bom.* 232.

A Division Bench of the Madras High Court in *Batcha Sahib* v. *Abdul Gunny* (9) held that no appeal lay from a decree which is in accordance with the award except upon grounds mentioned in para. 16 (2), Sch. 2, Civil P. C., and that a revision petition to set aside an award was more objectionable than an appeal. This question came before their Lordships of the Privy Council in *Ghulam Jilani* v. *Mahomed Hussain* (10), where their Lordships said at p. 101 of the report as follows:

> "Their Lordships were inclined to agree with the view of Clark, J., in *Jhangi Ram* v. *Mt. Rudho Bai* (11), that in the case of an award revision would be more objectionable than an appeal. If an application in revision were admissible in a case like the present, the finality of any award would be open to question. Their Lordships were however of opinion, that such an application is incompetent."

Following this decision a Full Bench of the Punjab Chief Court held in *Shankar Mal* v. *Nathu Mal* (12), that no appeal lay from an order under S. 526, old Civil P. C., directing the filing of an award made between the parties without the intervention of of a Court except in so far as the decree was not in accordance with the award and equally such an order was not subject to revision on the points on which an appeal would not be allowed. It was again held by the Punjab Chief Court in *Mayawanti* v. *Tulsi Das* (13), that a decree passed in accordance with an award was final and could not be interfered with in revision. Lastly, a Single Judge of the Punjab Chief Court in *Safdar Jang* v. *Shankar Singh* (14), held that a decree in a suit for recovery of possession under S. 9, Specific Relief Act, was not open to revision by the Chief Court on the ground that the Court below had misapprehended and misrepresented the evidence, oral and documentary, on the record where, on the allegations contained in in the plaint, the plaintiff had a cause of action and the Court had jurisdiction to entertain and decide the suit and the errors attributed by the petitioner to the Court below were intrinsic to the enquiry and decision. This decision is only helpful by analogy, there being no right of appeal from decrees in suits to recover possession under S. 9, Specific Relief Act.

For the reasons given it seems to me that the preliminary objection must prevail that this revision is incompetent as the prayer is for the revision of an interlocutory order. It is unnecessary to decide the other points arising and I would dismiss the petition with costs.

Bhide, J.—I agree.

K.S. *Petition dismissed.*

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6. A I R 1924 Lah 425=84 I C 259=5 Lah 288 (F B).
7. A I R 1921 All 1=63 I C 15=43 All 564 (F B).
8. A I R 1923 Bom 402=73 I C 464=47 Bom 721.
9. A I R 1914 Mad 675=21 I C 308=38 Mad 256.
10. (1902) 25 P R 1902 (P C).
11. (1901) 84 P R 1901=112 P L R 1901.
12. (1908) 1 P R 1908=58 P W R 1907 (F B).
13. A I R 1919 Lah 349=49 I C 979.
14. (1903) 13 P R 1903=57 P L R 1903.

* A. I. R. 1933 Lahore 695

BHIDE, J.

Maghi Mal—Plaintiff—Appellant.

v.

Darbara Singh and *another*—Defendants—Respondents.

Second Appeal No. 1498 of 1929, Decided on 24th April 1933, from decree of Addl. Dist. Judge, Ferozepore, D/- 16th March 1929.

*** Contract—Enforcibility—Non-party cannot enforce stipulation to pay money to him.**

A person, who is no party to an agreement between a transferor and a transferee has no right to enforce against the transferee a stipulation for payment of money to him, contained in the deed of transfer: *AIR* 1932 *Lah* 566 and *AIR* 1933 *Lah* 178; *Expl* and *not Foll*; 32 *All* 410 (*P C*), *Expl* and *Dist*. *Case law discussed*. [P 696 C 2]

Asa Ram Aggarwal and *Fakir Chand*—for Appellant.

Gobind Ram Khanna—for Respondents.

Judgment.—The material facts of the case giving rise to this second appeal were briefly as follows:

On 3rd February 1923, one Bagga Singh mortgaged his land in favour of Darbara Singh for Rs. 1,200. A sum of Rs. 1,150, out of the consideration was left with Darabara Singh for payment to the plaintiff Maghi Mal who was a creditor of Bagga Singh. This sum having been paid according to the contract, Maghi Mal instituted the present suit for recovery of the amount with interest at one per cent per mensem. The suit was resisted by the defendant Dabara Singh mainly on the ground that the plaintiff was not a party to the contract on which he based his claim and had therefore no locus standi to sue. The trial Court held that there was an assignment in favour of the plaintiff and decreed the suit. On appeal, however, the learned District Judge came to a contrary conclusion, relying chiefly on *Mahomed Sadiq* v. *Mt. Sahib Bibi* (1), *Chetkaur* v. *Gurmukh Singh* (2) and *Kherode Behari* v. *Narendra Lal* (3). The appeal was accordingly accepted and the plaintiff's suit dismissed.

The learned counsel for the plaintiff-appellant has urged in this second appeal that the learned District Judge's view is erroneous and in support of this contention has relied chiefly on a recent Division Bench judgment of this Court reported as *Torabaz Khan* v. *Nanak Chand* (4). This judgment was followed in a Single Bench judgment reported as *Guarishankar* v. *Mangal* (5), the facts of which were practically on all fours with the present case.

It may be conceded at once that there are observations in the judgment of Agha Haidar, J., in *Torabaz Khan* v. *Nanak* (4), which support the contention of the learned counsel for the appellant, but it may be pointed out that the learned Judge had held in the first part of the judgment, in view of the signature of Gopi Chand on the lease in question and other evidence on the record, that there was a tripartite agreement and Gopi Chand was a party to the transaction for all practical purposes. In view of the finding the further remarks on which reliance is placed by the appellant before me, appear to be rather in the nature of obiter dicta. I further note the other learned Judge who sat on the Bench (Tek Chand, J.), merely agreed in his conclusions, indicating (apparently) that he was not prepared to adopt the entire line of reasoning of his learned colleague. The Single Bench decision in *Guarishankar* v. *Mangal* (5), merely follows *Torabaz Khan* v. *Nanak* (4). The decision of the question raised before me would appear to depend largely on a correct interpretation of the decision of their Lordships of the Privy Council in *Mahomed Khan* v. *Husaini Begum* (6). In that case there was a contract between *A* and *B* at the time of the marriage of the former's son with the latter's daughter (both of whom were then minors), that *A* would pay Rs. 500 per mensem to the bride as "kharch pandan" and certain property was also charged for the purpose. Some years after the marriage, differences arose between the husband and the wife and the latter sued *A*, her father-in-law, for recovery of "kharch pandan". One of the points taken up on behalf of *A* was that the plaintiff not being a party to the contract the question was not entitled to maintain the suit. Their Lordships however held that she was entitled to do so. The reasons given by their Lordships in support of their view were as follows:

"First, it is contended, on the authority of *Tweedle* v. *Atkinson* (7) that as the plaintiff was no party to the agreement, she cannot take ad-

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1. (1902) 54 P R 1902.
2. A I R 1928 Lah 459=75 I C 940.
3. A I R 1920 Cal 901=55 I C 810.
4. A I R 1932 Lah 566=138 I C 263.
5. A I R 1933 Lah 178=141 I C 490.
6. (1910) 32 All 410=7 I C 837=37 I A 152 (P C).
7. (1861) 1 B & S 393=8 Jur (n s) 332=30 L J Q B 265=9 W R 781=4 L T 468.

> vantage of its provisions. With reference to this it is enough to say that the case relied on was an action of assumpsit, and the rule of Common law on the basis of which it was dismissed is not, in their Lordships' opinion, applicable to the facts and circumstances of the present case. Here the agreement executed by the defendant specifically charges immovable property for the allowance which he binds himself to pay to the plaintiff; she is the only person beneficially entitled under it. In their Lordships' judgment, although no party to the document, she is clearly entitled to proceed in equity to enforce her claim."
>
> "Their Lordships desire to observe that in India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the Common law doctrine was applied to agreement or arrangements entered into in connexion with such contracts."

It would appear from the above quotation that their Lordships' decision was limited to the facts and circumstances of the case before them. A somewhat wide interpretation appears to have been placed on the above ruling by the Calcutta High Court in *Deb Narain Dutt* v. *Chuni Lal* (8) and *Dwarka Nath* v. *Priya Nath* (9), but this view does not appear to have been followed in later rulings of the same Court: cf. *Kherode Behari* v. *Narendra Lal* (3); *Jiban Krishna* v. *Nirupama Gupta* (10), *Krishna Lal Sadhu* v. *Pramila Bala Dasi* (11). It was also not adopted in *Chetkaur* v. *Gurmukh Singh* (2), a Single Bench decision of this Court.

The English cases bearing on the point were considered by Page, J., in *Jiban Krishna* v. *Nirupama Gupta* (10). It was pointed out therein that the remarks of Lord Hatherley in *Touche* v. *Metropolitan Railway Warehousing Co.* (12), on which reliance was placed in *Deb Narayan Dutt* v. *Chuni Lal* (8), must be read with the facts of that case, which show that the plaintiff there, was treated as a person in whose favour a trust was created. It was further held that the true equitable principle as regards the right of a third person to sue on a contract to which he is no party is to be found in *Gandy* v. *Gandy* (13), where Cotton, L. J., observed as follows:

> "Now, of course, as a general rule, a contract cannot be enforced except by a party to the contract, and either of two persons contracting together can sue the other, if the other is guilty of a breach or does not perform the obligations of that contract. But a third person, a person who is not a party to the contract, cannot do so. That rule however is subject to this exception; if the contract, although in form it is with *A*, is intended to secure a benefit to *B*, so that *B* is entitled to say he has a beneficial right as cestui que trust under that contract; then *B* would, in a Court of equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated."

In *Achuta Ram* v. *Jainandan Tewari* (14) reliance is placed by Bucknill, J., on two rulings of the Privy Council, *Jamna Das* v. *Ram Autar* (15) and *Nanku Prasad Singh* v. *Kamta Prasad Singh* (16), which show that a person who is not a party to a contract has no locus standi in a case of the present type to sue for the amount left by his debtor with an alinee for payment to him. These rulings seem to be practically conclusive on this point. The weight of authority seems to be in favour of the view that the principle laid down in *Mahomed Khan* v. *Husaini Begum* (6), should be confined to special cases, where e. g. by virtue of the contract in question, a trust is created in favour of a third party (cf. *Iswaram Pillai* v. *Taragan* (17). It was pointed out in *Iswaram Pillai* v. *Taragan* (17), that in a case of the present type, a "trust" cannot be said to be created in respect of the money left with the alienee. A similar view was taken by the Punjab Chief Court in *Mahomed Sadiq* v. *Mt. Sahib Bibi* (1). The whole case law on the subject was recently considered by a Full Bench of the Madras High Court in *Subbu Chetti* v. *Arunachalam Chettiar* (18), and it was held therein that a person who is no party to an agreement between a transferor and a transferee has no right to enforce against the transferee a stipulation for payment of money to him, contained in the deed of transfer and that the mere fact that the transferor is also made a party to the suit makes no difference in this respect.

In view of the above authorities (which were apparently not brought to the notice of the Division Bench which decided *Torabaz Khan* v. *Nanak Chand* (4), the respondent in that case being unrepresented by counsel), I uphold the decree of the learned District Judge and dismiss the appeal. In view of all

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8. A I R 1914 Cal 129=20 I C 630=41 Cal 137.
9. (1916) 36 I C 792.
10. A I R 1926 Cal 1009=96 I C 846=53 Cal 922.
11. A I R 1928 Cal 518=114 I C 658=55 Cal 1315.
12. (1871) 6 Ch. A 671.
13. (1885) 30 Ch. D 57=54 L J Ch 1154=33 W R 803=53 L T 306.
14. A I R 1926 Pat 474=96 I C 287=5 Pat 463.
15. (1912) 34 All 63=13 I C 304=39 I A 7 (P C).
16. A I R 1923 P C 54=95 I C 970.
17. A I R 1914 Mad 701=23 I C 951=38 Mad 753.
18. A I R 1930 Mad 382=124 I C 55=53 Mad 270 (F B).

the circumstances, however, I leave the parties to bear their costs.

R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 697 (1)

SHADI LAL, C. J. AND ABDUL QADIR, J.

Mt. Melo and *another*—Defendants—Appellants.

v.

Jaimal and *another*—Plaintiffs—Respondents.

Second Appeal No. 393 of 1928, Decided on 30th May 1933, from decree of Dist. Judge, Montgomery, D/- 10th November 1927.

Custom (Punjab)—Alienation of non-ancestral property is valid—Kamboh of Dipalpur tahsil, Montgomery District—Punjab Custom (Power to Contest) Act (2 of 1920), S. 7.

Among the Kambohs of Dipalpur Tahsil, Montgomery District, a proprietor is entitled to alienate his self-acquired property and the collaterals cannot impeach the alienation. Further by S. 7, Punjab Custom Act, 1920, an alienation of non-ancestral immovable property cannot be contested on the ground that it is contrary to custom: 107 *P R* 1887, *Ref.* [P 697 C 2]

Murari Lal Batra—for Appellants.

Oertal—for Respondents.

Shadi Lal, C. J.—On 30th January 1926, Sabu, a Kamboh of the Dipalpur Tahsil of the Montgomery District, made a gift of the land in dispute to his son-in-law. The plaintiffs, who are the collaterals of the donor, seek to impeach the gift, and have obtained a decree on the ground that a Kamboh of the Montgomery District is not entitled to make an alienation of even his self-acquired property. It is common ground between the parties that the land in dispute was acquired by the donor himself, but it is contended on behalf of the plaintiffs that according to the custom prevailing among the Kambohs of the Dipalpur Tahsil a proprietor can gift only movable property to his son-in-law. The answer to question 119 of the Customary law of the district compiled in 1921-22, which has been relied upon by plaintiffs, is a cryptic one; but it cannot be seriously suggested that a person cannot alienate his own property in which no other person has any interest, reversionary or otherwise. The judgment of the Full Bench in *Gujar* v. *Sham Das* (1), sets out the general principles which place a restraint upon the power of a proprietor to alienate ancestral immovable property, and points out that the power of controlling alienation vests in the male descendants of the common ancestor, whom custom regards as being by community of descent sufficiently interested to be entitled to interpose. Our attention has not been invited to any judgment delivered after 1887 in which it was laid down that a proprietor is not entitled to alinate his self-acquired property in which no collateral could possibly have any right of reversion.

It is, however, unnecessary to dilate upon the question, because S. 7 of the Punjab Custom (Power to Contest) Act 2 of 1920, expressly enacts, that, notwithstanding anything to the contrary contained in S. 5 of the Punjab Laws Act, no person shall contest any alienation of non-ancestral immovable property on the ground that such alienation is contrary to custom. This statutory provision furnishes a complete answer to the suit brought by the plaintiffs. I would accordingly allow the appeal and dismiss the suit with costs throughout.

Abdul Qadir, J.—I agree.

K.S. *Appeal allowed.*

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1. (1887) 107 P R 1887.

A. I. R. 1933 Lahore 697 (2)

JAI LAL AND AGHA HAIDAR, JJ.

Madan Gopal and *others*—Appellants.

v.

Jaswant Rai and *others*—Respondents.

Misc. First Appeal No. 1165 of 1931, Decided on 10th April 1933, from order of Senior Sub-Judge, Gurdaspur, D/- 3rd July 1931.

Civil P. C. (1908), S. 11—Execution—Question decided by necessary implication operates as res judicata.

If a question is decided by necessary implication it operates as res judicata in subsequent proceedings. [P 701 C 1]

Where an assignee of a decree attempts to execute the decree and notice is given to the other parties and in the absence of any objection by them the execution is allowed to proceed at the instance of the assignee, subsequent objections by such persons who have been notified previously are barred by res judicata: *Case law referred.* [P 701 C 1, 2]

J. N. Aggarwal—for Appellants.

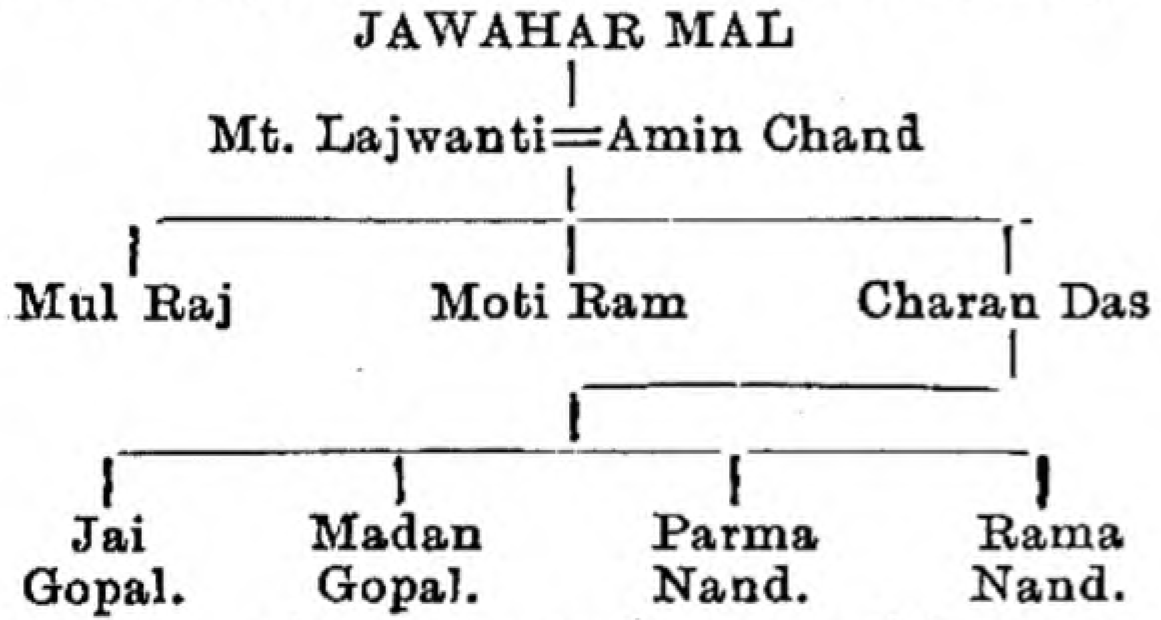
R. L. Anand II, *J. L. Kapur* and *Dharam Bhushan*—for Respondents.

Jai Lal, J.—The facts of this case are instructive. They are these: One Jawahar Mal died in the year 1868, leaving three widows behind, the last of whom died in 1910. On the death of this last widow there was a dispute between the daughter of Jawahar Mal, Mt. Lajwanti and his collaterals as to the right, to succeed to his estate and Mt. Lajwanti instituted a suit to establish her right and finally succeeded therein. It appears that Mt. Lajwanti had not the funds to prosecute her suit and consequently the respondent Jaswant Rai and others agreed to finance her in the litigation, provided she gave them, inter alia, a 2/5th share in the estate of her father if she ultimately succeeded. Jaswant and others were impleaded by Mt. Lajwanti as parties to her suit and the latter was finally granted a decree by their Lordships of the Privy Council on 29th January 1924. Thereafter some dispute arose as to the status of Jaswant Rai and others in that litigation, and their Lordships on being moved held that the decree was in favour of Mt. Lajwanti alone and that any dispute between Jaswant Rai, etc. and Mt. Lajwanti was not before them and they declined to express any opinion about it. Mt. Lajwanti then applied for the execution of the decree and apparently she declined to recognise Jaswant Rai and others' rights either to execute the decree or to a share in the estate of her father. Jaswant Rai thereupon instituted a suit against Mt. Lajwanti for a declaration that he was, along with others, who were also impleaded as parties to the suit, entitled inter alia to a 2/5th share in the estate of Jawahar Mal by virtue of the arrangement made by him with the lady. This suit was compromised on 6th February 1926 and the document executed by the parties reciting the terms of the compromise was duly registered and was attested by the presiding officer of the Court in which the declaratory suit was pending. That suit was accordingly decreed and by virtue of the compromise and the decree Jaswant Rai and others were declared to be entitled to a 2/5th share in the estate of Jawahar Mal and the whole of the land in village Patti Khan.

In consequence of this compromise and the decree Jaswant Rai and Mt. Lajwanti then jointly applied to execute the decree; but during the pendency of this application Mt. Lajwanti stated in Court that she did not wish to proceed with the execution of the decree. To this course Jaswant Rai naturally raised an objection and claimed that he was alone entitled to execute the decree so far as his share in the estate of Jawahar Mal was concerned, but by his order passed on 27th August 1926 the Senior Subordinate Judge declined to execute the decree at the instance of Jaswant Rai. Against this order Jaswant Rai presented an appeal in this Court which was heard by Zaffar Ali, J., on 10th December 1927, in the absence of the respondents who in spite of service did not appear to oppose the appeal. The learned Judge held that Jaswant Rai was entitled to execute the decree to the extent of his interest therein as mentioned in the compromise and the subsequent decree thereon. A Letters Patent appeal was filed by the other party against this judgment, but it was dismissed on 27th April 1931. In the meantime on 21st January 1928, Mt. Lajwanti had presented an application in the Court of the Senior Subordinate Judge stating that the decree had been satisfied and she did not wish to proceed with its execution. Jaswant Rai again objected to the action of Mt. Lajwanti and on 25th January 1928 the Senior Subordinate Judge held that Jaswant Rai was competent to execute the decree and that Mt. Lajwanti was not entitled to enter up satisfaction of the decree with regard to his interest therein, wherefrom on 26th January 1928, Jaswant Rai presented an application for execution of the decree in respect of his interest therein by virtue of the compromise and the subsequent decree, and on 4th February 1928, the Senior Subordinate Judge passed a formal order that symbolical possession of the share of Jaswant Rai in the estate in dispute be awarded to him.

Previous to this however Mt. Lajwanti had presented an appeal against the decree which was passed against her as a result of the compromise entered into on 6th February 1926 declaring the right of Jaswant Rai in the estate of her father. This appeal was accepted by the District Judge; the decree was set aside and the case was remanded for further hearing and is still pending in the trial Court. In the course of the hearing of this appeal one Bal Mokand had applied to the District Judge for a finding that the decree could in any case not have been passed against him. This question however was left undecided by the District Judge and presumably left it for decision by the trial Court. The next important date is 12th March 1929, when Jaswant Rai applied for the execution of the decree in respect of his share in it and when this application was still pending Mt. Lajwanti also made an application on 6th July 1929, to execute the entire decree, but before any step could be taken on this application, she died on 12th July 1929, and on 5th October 1929, Rama

Nand, a grandson of Mt. Lajwanti made an application that he, his three uncles, the sons of Mt. Lajwanti, and their sons be substituted as her legal representatives and the execution or the decree be proceeded with. The Senior Subordinate Judge made an order that all the persons mentioned be brought on the record as legal representatives. Subsequent to this on 23rd October 1929, one Mul Raj, a son of Mt. Lajwanti, made a similar application and also contended that the decree could not be executed at the instance of Jaswant Rai; and in the presence of the parties issues were framed by the Senior Subordinate Judge in which the question of the right of Jaswant Rai to claim as an assignee of a part of the decree and his right to execute the same in that capacity was expressly raised. The pedigree of the descendants of Jawahar Mal is as follows:



From the above it would appear that at the end of the year 1929 two applications were pending in the Court of the Senior Subordinate Judge: one was by Jaswant Rai to execute the decree in respect of his share; the other was by Mt. Lajwanti to execute the whole of the decree in her own name, and that Mt. Lajwanti having died her legal representatives, who had been brought on the record, objected to the right of Jaswant Rai to execute the decree as an assignee and an issue was framed on that question. Some evidence was recorded in these proceedings and Rama Nand was ordered to be examined as a witness and 8th March 1930 was fixed as the date of the hearing on which it was expected that the evidence would be closed. On that day however all the legal representatives of Mt. Lajwanti absented themselves and consequently the Senior Subordinate Judge dismissed their petitions and decided to proceed with the execution of the decree at the instance of Jaswant Rai to the extent of his share in it as would appear from the order passed by him on the same day directing Jaswant Rai to file a list of the property of which he wanted possession. On 22nd March 1930, an application was made by Rama Nand, Mul Raj not having been made party to it, but Lakhmi Chand, the original judgment-debtor in the decree obtained by Mr. Lajwanti, was joined as an applicant. The principal prayer in this application was to stay the execution proceedings taken at the instance of Jaswant Rai. It also was incidentally prayed that the Court be pleased to decide the objecton of Rama Nand which had been previously made. The Senior Subordinate Judge declined to stay the execution proceedings but ordered the applicant to obtain an order for stay from the High Court within a month as the Letters Patent appeal was pending there. No other action was taken by the Court on the application of 22nd March 1930, nor did Rama Nand move the Court to take any other action thereon. On a petition by Rama Nand the execution of the decree was stayed by the High Court on account of the pendency of the Letters Patent appeal from the judgment of Zafar Ali, J., but this appeal was dismissed on 27th April 1931, and the order staying execution of the decree was discharged. Thereupon on 1st May 1931, Jaswant Rai made an application to the Senior Subordinate Judge that the execution proceedings may be proceeded with; but to this application the legal representatives of Mt. Lajwanti raised objections that Jaswant Rai could not execute the decree as an assignee. The Senior Subordinate Judge by his order of 3rd July 1931, has held that Jaswant Rai is entitled to enforce the execution of the decree to the extent of his share according to the registered assignment thereof in his favour which was executed by Mt. Lajwanti, as a result of the compromise arrived at on 6th February 1926, and that it was not open to the legal representatives of Mt. Lajwanti to object to this right of Jaswant Rai as they were barred by the rule of res judicata for raising the objection. Some of the legal representatives have presented this appeal against the order of the Senior Subordinate Judge.

From what I have stated above it would be observed that in spite of the fact that in February 1926, the right of Jaswant Rai and others as assignees of the decree on the extent of a 2/5th share therein and the whole of the land in Patti Khan was recognised. Mt. Lajwanti and after her death her legal representatives have adopted all possible recourses to obstruct the execution of the decree by him, and the judgment-debtors have adopted all sorts of devices to assist in this and further that Mt. Lajwanti has been consistent in her conduct. She appears to have acted at the instance of and in the interest of whichever party has for the time being obtained influence on her. On the present appeal Bal Mokand has made an application to be impleaded as a party. His counsel however has not been able to define before us his locus standi to intervene in the present proceedings and as I have already said, the declaratory suit of Jaswant Rai is still pending in the trial Court and the District Judge has left the question of Bal Mokand's right to be impleaded in the suit undecided. I am therefore unable to see that he is entitled under the circumstances to ask us to take any action in the manner suggested. It will be open to him to take what steps he is advised to take in the declaratory suit if it is proceeded with.

The right of Jaswant Rai to execute the decree as an assignee (assuming that he is an assignee) to the extent of his own share has been judicially determined by Zafar Ali, J., and a Letters Patent appeal against his judgment has already been dismissed. It is not therefore open to any of the parties to this dispute to urge that Jaswant Rai is not entitled to execute the decree to the extent of interest therein. It may be that there are others interested jointly with Jaswant Rai as assignees, a matter on which I express no opinion, as it was not argued before us, but it is clear that Jaswant Rai is entitled to execute the decree for himself and for those, if any, who are jointly interested with him, and in this respect it is within the power of the executing Court to take steps to safeguard their interests, but as between the judgment-debtors, Jaswant Rai and the legal representatives of Mt. Lajwanti, no objection can now be taken to the right of Jaswant Rai to execute the decree. All this however is subject to Jaswant Rai establishing his status as an asssignee of the decree and this is practically the only point which was agitated before us.

On behalf of the appellants it was contended that the declaratory decree passed on the compromise of 26th February 1926, having been set aside, Jaswant Rai no longer could claim to be the assignee of the original decree and thus entitled to execute it. Jaswant Rai, on the other hand, contended that he was an assignee of the decree independently of the declaratory decree which merely gave effect to a compromise and that the compromise executed by Mt. Lajwanti was duly registered and, apart from the declaratory decree, recognised his right as an assignee. It was further contended that it was no longer open to the legal representatives of Mt. Lajwanti to contest the right of Jaswant Rai to execute the decree as an assignee as the matter was res-judicata by virtue of the order passed by the Senior Subordinate Judge on 8th March 1930, the day on which the application of the legal representatives was dismissed in default of their appearance and the Senior Subordinate Judge proceeded to execute the decree at the instance of Jaswant Rai. It may be observed that in the application for execution made by Jaswant Rai on which the order of 8th March 1930, was passed, a right to execute the decree was claimed alternatively on the basis of the declaratory decree and the registered compromise. After giving my careful consideration to what has been urged before us on both sides I am of opinion that the view taken by the Senior Subordinate Judge is correct and there is no force in this appeal.

The first point taken before us on behalf of the appellants was that as Mul Raj and Rama Nand alone had by means of the two applications of 5th October, and 23rd October 1929, applied for being brought on the record as legal representatives of Mt. Lajwanti, the other legal representatives are not bound by the proceedings taken on those applications; but as I have already stated, applications, though made by Rama Nand and Mul Raj alone, were for the substitution of all the legal representatives in place of Mt. Lajwanti and those legal representatives were mentioned in the applications and an order was passed by the Senior Subordinate Judge bringing them on the record. Therefore they were parties to the proceedings which were taken before the Senior Subordinate Judge on both the applications and the Senior Subordinate Judge proceeded to adjudicate on them; therefore these proceedings bind all the legal representatives in the same manner as they would bind Rama Nand and Mul Raj. In the alternative if, for argument's sake, it be assumed that the legal representatives other than

Rama Nand and Mul Raj were not properly on the record, then they are not entitled to be heard in these proceedings because they have not applied to be brought on the record within the prescribed time and cannot be recognised as the legal representatives of Mt. Lajwanti. From both aspects of the case therefore there is no force in this contention of the appellants.

The other point raised on their behalf was that the order of 8th March 1930 having been passed on default of the appellants' appearance in the Court could not be deemed to have been passed on the merits and could not therefore operate as res judicata. *Chand Koer* v. *Partab Singh* (1), *Delhi and London Bank* v. *Orchard* (2), *A. I. R.* 1929 *Bom.* 217, and *Hurrosoondary Dassee* v. *Jugobondhoo Dutt* (3) were cited as authorities in support of this proposition. These cases are however distinguishable from the facts of the present case. On the other side *Jago Mahton* v. *Khirodhar Ram* (4) was relied on. In that case it was held that where a judgment-debtor objects to the execution of a decree on the ground that the application is barred by limitation and the objection is dismissed for default of the judgment-debtor, the latter is not entitled when a subsequent application for execution is made, to object that the previous application was barred by time. In a subsequent judgment of the same Court (*A. I. R.* 1928 *Pat.* 417), *I. L. R.* 2 *Pat.* 759 was distinguished, but it was expressly mentioned that the judgment was undoubtedly correct on its own facts. In the course of the discussion on the applicability of rule of res judicata it was remarked that in order to apply this rule there must be an adjudication on material placed before the Court or in the absence of material. In *Dip Prakash* v. *Dwarka Prakash* (5) and *Gadigappa* v. *Shidappa* (6), it was held that if a question is decided by necessary implication, it operates as res judicata in subsequent proceedings. *Tej Singh* v. *Jagan Lal* (7) was also a case of assignment. The assignee attempted to execute the decree and notice was given to the other parties and in the absence of any objection by them the execution was allowed to proceed at the instance of the assignee. It was held that this operated as a bar to subsequent objections, by the persons who had previously been notified, that the decree could not be executed at the instance of the assignee. In *A. I. R.* 1933 *Lah.* 3 a learned Judge in Chambers of this Court applied the rule of res judicata under circumstances which are analogous to the present case. *Raghubar Singh* v. *Gokaran* (8), *Daw Ohn Bwin* v. *U Bu* (9) and *Banu Mal* v. *Parasram* (10) (a judgment of this Court) all support the view of the learned Senior Subordinate Judge as to the applicability of res judicata to the objections now raised by the appellants. I would therefore hold that the view of the Senior Subordinate Judge on this aspect of the case is correct.

As the last resort, the appellants' counsel contended that their applications which were dismissed on 8th March 1930, should not be now deemed to have been finally decided because on 22nd March 1930 they made an application to set aside the order of dismissal of their applications in default and further that no order has so far been passed on such applications. I have however already indicated that this application was not intended to be an application to set aside the dismissals in default. The main object of this application, on the other hand, was to secure a stay of the execution till the decision of the Letters Patent appeal in this Court and this prayer was refused by the Senior Subordinate Judge. No further action was taken by the appellants to prosecute this applications and if they intended it to be an application to set aside the dismissals in default, they would have moved the Court accordingly. An examination of the application shows that there was no prayer to set aside any dismissal for default, nor was it supported by an affidavit. The order of 8th March 1930 therefore still stands and no application to set it aside has been made, nor is such an application pending. This argument of the learned counsel therefore was merely an after thought.

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1. (1889) 16 Cal 98=15 I A 156=5 Sar 243 (PC).
2. (1878) 3 Cal 47=4 I A 127=7 P R 1878 (PC).
3. (1881) 6 Cal 203=7 C L R 61.
4. A I R 1924 Pat 122=74 I C 180=2 Pat 759.
5. A I R 1926 All 71=90 I C 83=48 All 201.
6. A I R 1924 Bom 495=83 I C 154=48 Bom 638.
7. (1916) 38 All 289=33 I C 234.
8. A I R 1926 Oudh 291=93 I C 833=1 Luck 171.
9. A I R 1930 Rang 213=127 I C 375=8 Rang 302.
10. A I R 1925 Lah 640=92 I C 254.

In my opinion therefore this appeal should be dismissed with costs and the Senior Subordinate Judge should be directed to proceed with the execution of the decree at the instance of the respondent, Jaswant Rai, in terms of the compromise of February 1926, with all possible expedition.

Agha Haidar, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 702

JAI LAL AND ABDUL RASHID, JJ.

Ali and *another*—Defendants—Appellants.

v.

Fazla—Plaintiff—Respondent.

Second Appeal No. 2062 of 1928, Decided on 23rd May 1933, from decree of Addl. Dist. Judge, Jhelum, D/- 26th March 1928.

(a) Custom (Punjab)—Gift of portion of ancestral property to daughter in presence of son's son in return for service is valid—Gujars of village Gumti, Kharian tahsil, Gujrat District—Riwajiam.

Among Gujars of Gumti village, Kharian tahsil, Gujrat District, a gift of a portion of ancestral property to a daughter in lieu of services rendered by her is valid even in the presence of the grandson (son's son) And in this respect the riwajiam of 1868 stands unrebutted: *AIR* 1925 *Lah* 222, *Dist.* [P 703 C 2]

(b) Riwajiam—Entry regarding special custom is prima facie proof of such custom.

An entry in a riwajiam of special custom though unsupported by instances is prima facie proof of that custom and places the onus of rebuttal upon the party disputing the correctness of the entry: *AIR* 1927 *Lah* 241 and *AIR* 1916 *P C* 129, *Foll.* [P 703 C 1]

Jalalud-Din, Mohammed Amin and *N. C. Mehra*—for Appellants.

Ghulam Mohyud-Din — for Respondent.

Abdul Rashid, J.—The parties to this litigation are Gujars of village Gumti, Tahsil Kharian, District Gujrat. On 9th January 1927, Ali, defendant-appellant, gifted one-third of his land to his daughter Mt. Raj Bhari by means of a registered deed of gift. It is recited in the deed by the donor that his only son had died about ten years ago, that his grand-son (son's son) was a minor, that he was too old and weak to carry on the cultivation himself, that he had asked his daughter and son-in-law to reside with him and assist him in cultivation, and that he had made the gift in question to his daughter in lieu of services rendered by her and her husband for a period of ten years. The plaintiff-respondent, a grandson of Ali, instituted the present suit for a declaration to the effect that the said gift will not affect his reversionary rights after the death of Ali. The trial Court dismissed the plaintiff's suit on the ground that it had been established that Mt. Raj Bhari and her husband had rendered services to Ali for a period of about ten years and that a gift of a portion of his estate by a proprietor to his daughter for services rendered was valid by custom in the presence of his grandson. The District Judge, however, accepted the appeal and granted the plaintiff the decree prayed for. The defendants have come up in appeal to this Court on the strength of the certificate granted by the learned District Judge.

The only question for determination in this appeal is whether a custom allowing a Gujar to gift a portion of his ancestral estate to his daughter in the presence of his grandson in return for services rendered by her has been established. The appellants counsel has conceded that the instances quoted by his witnesses do not help him as they all relate to gifts made by sonless proprietors to their daughters. He places his reliance mainly on para. 12, of the riwaj-i-am of 1868 and on *Umra* v. *Mt. Raje* (1). Para. 12 of the Riwaj-i-am of 1868 runs as follows:

> *Question.*—In case a deed of gift is not executed as an authority and the daughter or her descendants or her husband lived in the village of the father of the daughter and her father died without executing a deed of gift in writing and the donees are in proprietary possession, will the donees own the property after the death of the original proprietor or the proprietor himself?
>
> *Answer.*—If the proprietor had put the daughter into possession of the subject of the gift, by keeping her in his house, and the deed of gift was not executed but it might be a verbal one, in that case the daughter or her descendents would be the proprietor in possession. If any proprietor brings his daughter or her descendants at the time of his death and makes a verbal or written gift it shall not be valid. Instance.—Gujar Katana in Mauza Majra Azmat, proprietor, caste Gujjar, Got Kothana, had given his property to his daughter and put her into possession in his lifetime. After his death the descendants of his daughter became the proprietors of 46 ghamaons.

The learned District Judge has held that the above entry in the riwaj-i-am of 1868 does not help the defendants as it apparently refers to a daughter whose husband had been made a khana-

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1. A I R 1925 Lah 222=85 I C 185=5 Lah 473.

damad. The essence of the institution of khana-damadi is that the doli of the daughter should not leave the house of her father but that her husband should before the consummation of the marriage come to live with her father. In my opinion, therefore, the entry in the riwaj-i-am quoted above does not refer only to the case of a daughter whose husband is a khana-damad. It seems to me to include those cases where the daughter and her husband come to live with her father even after the lapse of a long time from the solemnization of the marriage and render services to him. In the present case it has been established that the daughter and her husband rendered services to Ali for a period of ten years before one-third of his land was gifted by him to her. It has been laid down by a Division Bench of this Court in *Labh Singh* v. *Mt. Mango* (2), that an entry in a riwaj-i-am of special custom though unsupported by instances is prima facie proof of that custom and places the onus of rebuttal upon the party disputing the correctness of the entry. This view of the law is supported by the Privy Council ruling in *Beg* v. *Allah Ditta* (3). As soon as the defendants produced the riwaj-i-am of 1868 in evidence the onus shifted on the plaintiff and he has failed to produce any evidence to show that a gift by a Gujar of a part of his estate to his daughter for services rendered by her is invalid. *Umra* v. *Mt. Raji* (1), deals with the case of a sonless proprietor and is therefore distinguishable.

There are certain observations in that ruling, however, which show that gifts to daughters of a part of the ancestral estate by proprietors for services rendered by them are being widely recognised as valid. The law relating to alienations in favour of relatives in lieu of services rendered has been summed up at pp. 215 and 216 of Rattigan's Digest of Customary law, where it has been remarked that alienations in favour of relations between whom and the alienor there is some tie as by their having been brought up by him or by their being associated with him or by their assisting him in cultivation or rendering him services in the management of land when he himself was incapable of doing so are very generally recognised by custom.

The learned District Judge has held that para 12 of the riwaj-i-am of 1868 cannot be given effect to as the present riwaj-i-am must be given preference. The learned counsel for the respondent, however, has not been able to cite any passage from the latest riwaj-i-am containing any provisions contrary to those contained in para 12 of the riwaj-i-am of 1868. In respect of gifts to daughters for services rendered the entries in the riwaj-i-am of 1868 stand unrebutted.

I would, therefore, accept the appeal, set aside the judgment of the learned Additional District Judge and dismiss the plaintiff's suit. The respondent is a minor and is the grandson of Ali, the appellant. I should therefore leave the parties to bear their own costs throughout.

Jai Lal, J.—I agree.

K.S. *Appeal accepted.*

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2. A I R 1927 Lah 241=100 I C 924=8 Lah 281.
3. A I R 1916 P C 129=38 I C 354=44 I A 89=44 Cal 749=45 P R 1917 (P C).

A. I. R. 1933 Lahore 703

SHADI LAL, C. J. AND ABDUL QADIR, J.

Haveli Shah and *another*—Plaintiffs—Appellants.

v.

Kalian Singh— Defendant — Respondent.

First Appeal No. 138 of 1927, Decided on 22nd May 1933, from decree of First Class Sub Judge, Gujrat, D/- 7th December 1926.

Evidence Act (1872), Ss. 68 and 115—Person attesting document is not estopped from taking contrary position unless he knew contents of document when signing it.

The signing of a deed as a witness does not by itself amount to a knowledge of its contents and does not estop anybody from taking a position to the contrary unless it is positively shown that he knew the contents of the document at the time of signing it : *AIR* 1922 *P C* 20, *Rel on.* [P 705 C 1, 2]

Acchru Ram, *Badri Das* and *Hem Raj*—for Appellants.

Mukand Lal Puri and *Qabul Chand*—for Respondent.

Abdul Qadir, J.—Rai Bahadur, Sundar Das, of Dinga purchased a large area of land and some houses and shops, which were the property of Sardar Jiwan Singh deceased, on 29th April 1920, in the name of his sons Haveli Shah and Chandra Parkash, minors. The vendors were Mt. Nihal Devi, Mt. Jamna Devi, widows of the deceased, and Mt. Ganga Devi, daughter of another wife of the deceased named, Mt. Lakhmi, and Gurbakhsh Singh, son of Mt. Ganga Devi. After this purchase, Chandar Parkash died in 1920 and Rai Bahadur Sundar Das

S. N. DAR, B. A. LL. B., Vakil High Court,

died in October 1921, and his estate is now represented by his minor sons, Haveli Shah and Sardari Lal, under the guardianship of their mother, Mt. Khushal Devi. It appears that a dispute has since arisen about one of the houses mentioned in the said deed, which is in possession of Sardar Kalian Singh of Dinga and which is used as a Girls School under the management of Sardar Kalian Singh. A suit with regard to this house was filed on 28th April 1925, on behalf of Haveli Shah and Sardari Lal, minors, by Diwan Chand Kakkar, agent to their guardian. It was alleged in the plaint that the defendant, Sardar Kalian Singh, got the house for Rai Bahadur Sundar Das about four years before suit, for temporary use, that he changed his intentions after the death of Rai Bahadur Sundar Das and commenced alterations in the house, in consequence of which he was given a notice dated 20th January 1923, but he refused to give possession of the house. The defendant in reply pleaded that Rai Bahadur Sundar Das had never got possession of the house in question and that the vendors were not the owners of the house and were not entitled to sell it. He further pleaded that he did not know at the time of the sale that the house in dispute was included in the sale and that he had spent about Rs. 20,000, in erecting a magnificient three storeyed building for the school in the lifetime and with the knowledge of Rai Bahadur Sundar Das, whose descendants were estopped from claiming the property as their own. He added that this suit had been brought against him, because he had filed suits against the plaintiffs at Quetta, demanding his share in the profits as a share-holder in the business of late Rai Bahadur Sundar Das. The learned Senior Subordinate Judge dismissed the suit of the plaintiffs, but left the parties to bear their own costs and the plaintiffs have preferred an appeal to this Court, which has been argued on their behalf by Rai Bahadur Badri Das. Mr. M. L. Puri has argued the case for the respondent.

A large number of issues were framed by the trial Court, some of which are no longer disputed, and the only issues that matter now are issues 4, 7, 8 and 9. Some evidence was led by both parties as to the costs of the buildings, admittedly erected by Sardar Kalian Singh after the date of the sale mentioned above. The witnesses of the plaintiffs estimated the cost of the building at about Rs. 5,000, while those produced by the defendant estimated at about Rs. 9,000 or Rs. 10,000. The issue framed on this point and the evidence concerning it does not require examination as I do not think that the appeal of the plaintiffs can succeed, on issue 4, which is the main issue in the case.

It has been found by the trial Court that the plaintiffs have failed to prove the allegation in para. 3 of the plaint that the defendant got possession of the house in dispute from Rai Bahadur, Sundar Das for temporary use. In fact, it has been found that the house was originally used for a Boys School, which was managed by Sardar Kalian Singh and after that it has been used as a Girls School and had been occupied by Sardar Kalian Singh for about thirty years. This disposes of issue 7, which was to the following effect: "Did the plaintiffs' father obtain possession of the house after the sale and did he give it to defendant about four years ago for temporary occupation ?" The plaintiffs had produced some evidence to show the alleged possession of the plaintiffs after the sale and the permissive use allowed to the defendant, but that evidence has been rightly rejected by the Court below and the learned counsel for the appellants has admitted before us that the agent of the plaintiffs was probably ill-advised in alleging what he did in para. 3 of the plaint.

The appeal has therefore been argued on the basis that the house in question has been in the possession of Sardar Kalian Singh in one capacity or other for a long time before suit. Issues 8 and 9 related to allegations made by the defendant to the effect that Rai Bahadur, Sundar Das visited the house when it was being built and offered advice regarding its constructions and that he admitted after the date of the sale that he had no concern with the house. The defendant produced evidence on these points, which, in my opinion, does not deserve to be believed. It was urged by the defendant that the representatives of Rai Bahadur, Sunder Das, were estopped from claiming the house because of the above mentioned conduct of the late Rai Bahadur, Sundar Das with respect to this house. The trial Court has given no decision on these two issues (8 and 9), and decided the case on its findings as to issue 4, and on the failure of the plaintiffs to prove that their vendors were the owners of the house in dispute. Let us therefore consider issue 4, which runs as follows: "Is the defendant estopped from denying the plaintiffs' title ?"

This issue was framed, because the defendant had admittedly signed as a witness the sale-deed of 29th April 1920, which included the house in suit. On this point the plaintiffs have led evidence to show that Sardar Kalian Singh signed with full knowledge of the details of the transaction. On the other hand, the defendant states that he signed at the instance of Rai Bahadur, Sundar Das, without knowing what the contents of the document were, and he has produced witnesses in support of his assertion. (After discussing the evidence on the point, the judgment proceeded). It is admitted on both sides that there is no documentary evidence on the record as to the original ownership of this house and there is hardly any reliable evidence to show whether it belonged to Sardar Hakim Singh, father of Sardar Kalian Singh, or to Sardar Jiwan Singh. The contention of the appellants is that as Kalian Singh was closely related to the vendors, the fact of his attesting the sale-deed amounted to an acknowledgment of the correctness of the facts entered in the deed and it was not open to him to say that Sardar Jiwan Singh had no right to this portion of the property sold by that deed. Counsel for the respondent urges that the signing of a deed as a witness does not by itself amount to a knowledge of its contention and does not estop anybody from taking a position to the contrary, unless it is positively shown that he knew the contents of the document. Reliance is placed in this connexion on the Privy Council ruling reported as *Pandurang Krishnaji* v. *Markandeya Tukaram* (1). Counsel for the appellants, while fully recognizing the principle enunciated in the Privy Council ruling, says that the distinguishing features of the present case are that the defendant, Kalian Singh was a near relative of the vendors, that he appears to have negotiated the bargain on their behalf and it is shown on the record that Rs. 1,000 out of the first sum of Rs. 3,000 paid to the vendors was paid through him.

It is further argued that the signing of the sale-deed as a witness was not a solitary act, but was preceded by the writing of the receipt for the earnest money and that therefore the knowledge of the details of the transaction must be presumed in his case. The reply of the respondent is that the receipt mentioned no details of the transaction and the deed was signed by the defendant under circumstances which, according to the scribe who appeared as a witness for the plaintiff, did not show that the whole deed was read over to him or that he understood at the time that the house in dispute was being included in the sale. It is further argued that the strongest circumstantial evidence in favour of the defendant-respondent is furnished by his conduct in erecting an extensive building superstructure over the old building of the Girls School. It is said that it does not matter whether the cost was Rs. 9,000 or Rs. 5,000, but no one in his senses would go on spending so much money in building over property, the ownership of which was doubtful. Stress is laid on the fact that this additional construction was going on in the lifetime of late Rai Bahadur, Sundar Das, without any objection by him or on his behalf. I think there is considerable force in this last contention. The allegation in the plaint that the building began after the death of Rai Bahadur, Sundar Das has in my opinion, been correctly found to be untrue. It must be held therefore that the plaintiffs have not been able to prove positively that the defendant knew the contents of the sale-deed when signing it. There is thus no estoppel against the defendant and the suit of the plaintiffs must fail. I would therefore dismiss this appeal, but in the circumstances of the case I would leave the parties to bear their own costs throughout.

Shadi Lal, C. J.—I concur.

K.S. *Appeal dismissed.*

** A. I. R. 1933 Lahore 705

Full Bench

SHADI LAL, C. J., BROADWAY, TEK CHAND, JAI LAL AND DALIP SINGH, JJ.

Mastan Singh—Plaintiff — Appellant.

v.

Santa Singh and *others*—Defendants—Respondents.

Letters Patent Appeal No. 190 of 1926 and No. 3 of 1930, Decided on 27th May 1932, from decree of Martineau, J., Lahore, D/- 27th April 1926.

**** (a) Limitation Act (1908), Arts. 32 and 120—Suit for injunction by proprietor of common land to restrain co-proprietor from diverting land to purpose other than one for which it is set apart—Defendant's act amounting to ouster of plaintiff — Limitation is governed by Art. 120 and not by Art. 32.**

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1. A I R 1922 P C 20=65 I C 954=49 I A 16=49 Cal 884=18 N L R 1 (P C).

Where a defendant, co-proprietor, perverting joint property from its specified user, admits the plaintiff's right to share the user in its perverted form and the plaintiff wishes to get rid of the perversion by a suit for injunction, limitation is governed by Art. 32, but where the defendant's act, though it might also have resulted in the perversion of the user from the original specified purpose, really amounts to an ouster of the plaintiff from the property in question, and the object of the suit is not to get rid of the perversion simpliciter but to have the dispute as to title settled, then Art. 22 has no application and the suit is governed by Art. 120. The real cause of action is the ouster of the plaintiff from the joint property reserved for their common use for specific purpose and not the perverted user of such property: *Case law discussed.* [P 707 C 1; P 709 C 1]

(b) Limitation Act (1908), Art. 120 — Art. 120 is residuary article.

Article 120, being a residuary article, will apply only if the suit does not come within the purview of any other provision in the Act. [P 707 C 1]

Prakash Chand and *Qabul Chand*—for Appellant.

Akbar Ali—for Respondents.

Tek Chand, J.—The Letters Patent Bench has referred to the Full Bench two cases (L. P. Appeals No. 190 of 1926 and No. 3 of 1930), in which the same question of law is involved. In the first of these cases (L. P. Appeal No. 190 of 1926) the plaintiff brought a suit for issue of a perpetual injunction to restrain the defendants from preventing the plaintiff from using a certain pathway, situate within the boundaries of Mauza Assal Uttar in Kasur Tehsil, Lahore District, which it was alleged, had been reserved for the purposes of a public passage, but which the defendants had encroached upon and included in their cultivated field. The defendants pleaded that the area in dispute was their own private property and not a public passage, and alleged that the plaintiff had no right to pass over it. The findings are that this area had been reserved by the village proprietary body for use as a thoroughfare, that both the plaintiff and defendants were proprietors in the village and as such equally entitled to use the pathway, that the defendants had appropriated it to their exclusive use by including it in their cultivated field more than two years before the institution of the suit and that the plaintiff had full knowledge of the defendants' act from the beginning. On these findings the suit has been held barred by time under Art. 32, Limitation Act. The plaintiff-appellant contends that that article has no application to the facts stated above and that the suit is governed by Art. 120.

In L. P. Appeal No. 3 of 1930 both parties are proprietors in Mauza Sahoongra in the Garhshankar Tehsil of the Hoshiarpur District, and the dispute relates to a portion of the shamilat which had been set apart for use as a toba (pond), but on which the defendants have built certain kothas and walls. The plaintiffs sued for a mandatory injunction directing the defendants to remove the buildings. The defendants admitted that the site in question was originally shamilat and was used as a toba, but many years ago it fell into disuse and was included in the abadi, that the defendants had been in exclusive possession for a long time and had constructed buildings on it "considering it to be their own exclusive property." The findings are that the area in dispute is a part of the village shamilat, and had been set apart for use as a toba, that the defendants constructed some kothas and walls over it more than six years before the date of the institution of the suit, but that one kotha was built about three years prior to that date. It is admitted by both counsel that the claim in respect of the walls and the former set of kothas is barred whether Art. 120 or Art. 32 is applicable, and this part of the case is not in controversy before us. The dispute is now confined to one kotha only, which has been held to have been constructed more than two years, but less than six years, before the institution of the suit. The claim for this kotha also has been held barred under Art. 32. The plaintiff-appellant contends that that article has no application and that the suit is governed by Art. 120 and is within time.

It will thus be seen that the facts of the two cases are essentially the same. In each case: (a) the property in dispute is a portion of the village shamilat, owned by the proprietary body, of which the plaintiffs and the defendants are members; (b) the property in dispute had been set apart for use for a specific purpose, and both the plaintiffs and the defendants, along with the rest of the proprietary body, had an equal right to use it for that purpose; (c) the defendants had taken exclusive possession of the disputed property and diverted it to a purpose other than the one for which it had been set apart; and (d) they set up their own exclusive ownership of the area in question and deny its character as joint property of the parties. The question for determination is whether on the above facts a suit for injunction to restrain the defendants from preventing the plaintiffs from using the common property for the specific purpose for which it had been originally set apart falls under Art. 32 or Art. 120. Art. 120, being the residuary article will, of course, apply only if the suit does not come within the purview of any other provision in the act. The question therefore resolves itself into one of interpretation of Art. 32, which reads as follows:

Against one who, having a right to use property for specific purposes, perverts it to other purposes.	Two years	When the perversion becomes known to the person injured thereby.

The judicial decisions bearing on the interpretation of this article divide themselves into two groups: (1) those in which the dispute was between the person who had given the use of his property to another for a specific purpose and this other had perverted it to an unauthorized purpose, and (2) those in which both the plaintiff and defendant were co-owners of a plot of land and had set it apart for their common use for a specific purpose, but which the defendant had diverted to an unauthorized purpose and excluded the plaintiff from using it for the purpose for which it was originally intended.

With regard to cases falling in the first category there appears to be no difficulty, all the Courts being agreed that the suit falls within Art. 32. A common instance of a case of this kind is a suit by a landlord against the tenant to whom property had been leased for a specific purpose, but who, in contravention of the terms of the tenancy, had diverted it to another purpose. The leading case on the subject is *Sharoop Dass Mondal* v. *Jaggessur Roy Chowdhry* (1), where it was held that a suit for an injunction against a tenant, who had excavated a tank on land which had been demised to him for agricultural purposes, brought more than two years after the perversion by the tenant had first become known to the landlord was barred under Art. 32. Similarly, in *Gangadhar* v. *Zahurriya* (2), the defendants, who were holding the land under the plaintiffs as cultivating tenants, had planted trees on it, and the landlord's suit for removal of the trees was held governed by Art. 32. In *Soman Gope* v. *Raghubir Ojha* (3), the facts were the same as in the Allahabad case, just cited, but the prayer was for removal of the trees as well as for ejectment of the tenant and Art. 32 was held applicable. A more recent instance of the application of this article to such a case is *Ismail* v. *Thakur Lal* (4), where the Mahomedan community of a certain village in Oudh had been allowed by the Hindu proprietor to use his land as a grave-yard and the defendants, who were some of the Mahomedan residents of that village, had converted a portion of the grave-yard into a grove. The proprietor sued more than two years after he had knowledge of the act of the defendants and his suit was dismissed as barred by limitation under Art. 32.

Coming now to the second class of cases in which the parties are admittedly co-owners of a plot and had a common right to use it for a specific purpose, but which one of them has taken exclusive possession of and diverted it to an unauthorized use more than two years prior to the suit, we find that there is a considerable divergence of judicial opinion. It is however noteworthy that there is not a single published decision of any Court in India other than the Lahore High Court in which Art. 32 has been applied to such a case, though cases of this kind are matters of every day occurrence throughout the country. In *Musaly* v. *Lakshumayya* (5) an attempt appears to have been made to apply Art. 32 to the case of co-owners, but the contention was rejected, it being ruled in a brief judgment that:

> "a suit by one co-owner for an injunction restraining the other co-owners from obstructing a co-owner is governed by Art. 120 and not by Art. 32, Lim. Act."

In this province also, it is only during the last six or seven years that Art. 32 has been held applicable to such cases. So far as I am aware, Art. 120 was invariably applied, without objection, to cases of this kind before 1925: See, for instance, *Ganda Singh* v. *Nathu Ram* (6), in which the suit was by one of the proprietors seeking a perpetual injunction against the co-proprietor-defendants directing them to restore to its original condition certain land encroached upon by them, which was originally reserved for their common use, and Rattigan, J., held that it was governed by Art. 120. Similarly in *Lal Singh* v. *Hira Singh* (7), Art. 120 was applied by Broadway, J., to a case in which some of the co-sharers of a

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1. (1899) 26 Cal 564=3 C W N 464 (F B).
2. (1886) 8 All 446=1886 A W N 210.
3. (1897) 24 Cal 160=1 C W N 223.
4. A I R 1926 Oudh 341=93 I C 89.
5. (1908) 18 M L J 602.
6. (1912) 13 I C 661.
7. A I R 1921 Lah 242=60 I C 20.

court-yard had constructed chhappars on a portion of it, and the other co-sharers had sued for an injunction for their removal. Again, in *Chandu* v. *Gajju* (8), Jai Lal, J., applied the same article to a case in which one of the co-sharers had constructed a platform on a common pathway in the shamilat and the other co-sharers had brought a suit for perpetual injunction for the demolition of the platform.

The first attempt to apply Art. 32 to such a case was made in *Achar Singh* v. *Badhawa Singh* (9), where the plaintiffs had sued for ejectment of the defendant from a specific field recorded as part of a thoroughfare in the village shamilat. The suit was nominally on behalf of the proprietary body and the prayer was for removal of the obstruction to the enjoyment of the shamilat by the proprietors generally. The defendant pleaded that Art. 32 applied to the case while the plaintiffs contended that it was governed by Art. 144. The learned Chief Judge however repelled both these contentions and held Art. 120 applicable. The judgment, as printed in the Punjab Record, does not make it clear whether the defendant in the case was one of the proprietors, but a reference to the original record shows that this was so.

The first case in which a contrary view was taken is *Ghulam Muhammad* v. *Abdul Sattar* (10), where the parties were proprietors in a village and the plaintiff sued for an injunction restraining the defendant from cultivating a portion of the shamilat which had been set apart for use as a village pond, but which the defendant had encroached upon and brought under cultivation. The learned Judge distinguished *Achar Singh* v. *Badhawa Singh* (9), on the ground that it was not clear whether the defendant in that case was a proprietor in the village, and applied Art. 32. In *Gurdit Singh* v. *Hari Singh* (11), the facts were substantially the same, both parties being proprietors and the encroachment by the defendants being on a public road in the village abadi by erection of tharas thereon. Bhide, J., followed *Achar Singh* v. *Badhawa Singh* (9) and distinguished *Ghulam Muhammad* v. *Abdul Sattar* (10), on the ground that in case before him the encroachment was on the public road and not on the "property" of any particular person or persons. In 112 Indian Cases are printed two cases, decided on the same day by Coldstream, J., sitting in Single Bench. In the case reported as *Mian Pirthi* v. *Hans Raj* (12), the disputed property was a public thoroughfare and the plaintiffs were proprietors and the defendants occupancy tenants in the village, both of whom had however a common right to use the thoroughfare. The defendants pleaded that they had acquired a prescriptive title in the site by adverse possession. It was found that the encroachment had been made four years before the suit and that the plaintiffs had full knowledge of it.

The learned Judge held that the case was governed by Art. 120 and not by Art. 32 as the defendants could pass over the land merely as individuals or members of the community and could not be said to have a specific right of any kind peculiar to themselves. It was also observed that Art. 32 was not intended to apply to a case in respect of land in which the person proceeded against had no other right than a right in common with the general public to pass over it. In the case reported as *Nand Ram* v. *Jai Chand* (13), both parties were Hindu residents of a village who had a common right to use the plot in dispute as a burning ground, but a portion of which the defendants had appropriated and built upon more than two years before suit. Coldstream, J., applied Art. 32 to this case distinguishing it from the case last cited, on the ground that here the defendants had a "real right in the land itself," parts of which any of them could from time to time temporarily appropriate and use as a support on which to cremate a dead body. In *Bhagwan Dass* v. *Rama Nand* (14) and *Dewa Singh* v. *Qarun* (15), Art. 32 was applied to suits by some members of the proprietary body against other members of the same body for a permanent injunction for the removal of buildings erected by the defendants on a part of the shamilat and thoroughfares.

From what has been stated above it will be seen that the facts in all these cases were substantially the same. The property in dispute in each case was shamilat, set apart for specific use as a thoroughfare, pond or cremation ground which both parties, as members of the proprietary body or the general public, had a common right to use for

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8. A I R 1925 Lah 455=88 I C 176.
9. (1912) 124 P R 1912=15 I C 285.
10. A I R 1925 Lah 653=89 I C 405.
11. A I R 1928 Lah 792=110 I C 517.
12. A I R 1928 Lah 794=112 I C 381.
13. A I R 1929 Lah 186=112 I C 844.
14. (1929) 115 I C 73.
15. A I R 1929 Lah 535=118 I C 447.

that purpose, but which the defendants had wrongfully appropriated to themselves by constructing buildings thereon or including it in their own fields in circumstances which amounted to an ouster of the plaintiffs. In each case the plaintiff had sued for an injunction restraining the defendant from using the land for a purpose other than the one for which it had been reserved and directing him to remove the obstruction and restore it to its original condition, so that it might be available for the joint use of the parties according to the original arrangement. This being so, there can be no doubt that the period of limitation governing all these cases is the same. It seems to me clear that in suits of this kind the real cause of action is the ouster of the plaintiff from property jointly owned by him and the defendant and reserved for their common use for a specific purpose, and not the perverted user of such property by the defendant. With all deference to the learned Judges who have taken the contrary view, I think that Art. 32 has no application to such cases.

It is no doubt true that the phraseology of the article is somewhat obscure. It does not describe explicitly the type of suit to which it applies. But a careful perusal of the language will show that it fixes impliedly the nature of the suits which it is intended to govern. It is provided expressly that the terminus a quo is the date on which "the perversion becomes known to the person injured thereby." From this it seems to me to follow clearly that the article is applicable to those cases only in which the injury complained of is the perverted user of the property by the defendant, who had the right to use it for a specific purpose, and the plaintiff seeks the assistance of the Court merely to get rid of the perversion. In my opinion, it has no application where the defendant's act, though it might also have resulted in the perversion of the user from the original specified purpose, really amounted to an ouster of the plaintiff from the property in question, and the object of the suit is not to get rid of the perversion simpliciter, but to have the dispute as to title settled.

In cases where the litigating parties are co-owners or co-tenants having an equal right to use property for a specified purpose, it must be remembered, that the presumption of law is that the possession of one is the possession of all. Each such person is seized of the property *per my et per tout*, and anything short of denial of title cannot destroy the plaintiff's right. To suits between co-owners or co-tenants inter se, where the title of one is denied by the other, Art. 144 or Art. 120 would apply, according as the relief claimed is one for possession or injunction. It seems to me that it was not the intention of the legislature to reduce the period of limitation for such suits to two years simply because the attack by the defendant on the plaintiff's title was accompanied by a perversion of the user of the property from its original specified purpose. Admittedly such a suit is not covered by the express words of Art. 32 and, if I may say so with all respect, it will be unduly extending its scope if it is made to include within its purview cases of co-owners of the type under consideration. I wish to make it clear however that I should not be understood as laying down that in no case can Art. 32 apply to disputes between co-owners or co-tenants inter se. A case might arise, for instance, where the defendant while perverting joint property from its specified user, admits the plaintiff's right to share the user in its perverted form. In such circumstances, if the plaintiff wishes to get rid of the perversion, he shall have to do so within two years from the date on which he obtained knowledge of the perversion.

Applying the principles laid down above to the two cases before us, we find on a careful consideration of the pleadings and the findings that the defendants in one of these cases have constructed buildings of a more or less permanent character on the site of the village pond, and in the other case they have included the public pathway in their own private field, and have thus practically ousted the plaintiffs from property, which was held in common by the parties for joint user in a specified manner. Indeed the defendants make no secret of their real intentions. In their respective written statements they specifically deny the plaintiff's joint ownership of the disputed property and set up their own exclusive proprietary, or prescriptive, title in it. It is also clear that the plaintiffs in each case were fully cognizant of the true nature and import of the defendant's acts, and are in substance suing to have it established that the property in dispute is jointly owned by the parties and for removal of the unauthorized encroachment made by the defendants on it, so that it may be restored to its original condition and made available for the particular purpose for which it had been set apart. In my judgment, Art. 32 has been erroneously applied to both these cases, and as the finding in each case is that the defendants had appropriated the property, in dispute before us, to their exclusive use within six years of the institution of the suit, Art. 120 is applicable and the suit is within time.

I would therefore accept both appeals and remit the cases to the Single Bench for redecision in accordance with the rule of law laid down above.

Shadi Lal, C. J.—I concur.

Broadway, J.—I concur.

Jai Lal, J.—I concur.

Dalip Singh, J.—I agree.

K.S. *Appeals accepted.*

* A. I. R. 1933 Lahore 710

SHADI LAL, C. J. AND ABDUL QADIR, J.

Hira Mal and *another*—Plaintiffs—Appellants.

v.

Sundar Singh and *others*—Defendants—Respondents.

Second Appeal No. 949 of 1928, Decided on 30th May 1933, from decree of Addl. Judge, Lahore, D/- 1st February 1928.

(a) Civil P. C. (1908), O. 22, R. 6—Death of defendant after hearing and arguments but before pronouncing judgment—Legal representative can be brought on record without making application to Court.

Where a defendant dies after the hearing of a case and arguments but before the pronouncement of the judgment and the plaintiff files an appeal, he can bring on record the legal representative of the deceased defendant without making an application to the Court for the purpose and the appeal does not abate on the ground that he has not so applied, if the appellant has substituted the name of legal representative in place of the deceased defendant. [P 710 C 2; P 711 C 1]

* **(b) Civil P. C. (1908), O. 22, R. 4 (1)—Father and son impleaded as respondents in appeal—Death of father leaving son as his sole representative—No application to bring son on record as legal representative of father is necessary.**

Both father and son were impleaded as respondents in an appeal. The father died leaving the son as his sole representative:

Held: that no application for bringing the son on record as the legal representative of the father was necessary and that the appeal did not abate on that ground: *A I R* 1926 *Lah* 607; *A I R* 1929 *Mad* 152 and *A I R* 1926 *Lah* 37, *Ref.* [P 711 C 1]

Jai Gopal Sethi—for Appellants.

Mehr Chand—for Respondents.

Abdul Qadir, J. — A suit brought by two brothers, Hira Mal and Jowanda Mal, against Sundar Singh and others, for partition of the village abadi of Theh Saharan, in Kasur Tahsil of Lahore District, was dismissed by the trial Court. The plaintiffs were proprietors in the village by purchase and the defendants were other proprietors of the village. One of the defendants, named, Dewa Singh, died on 14th September 1927, after the arguments in the case had been finished but before the judgment was pronounced. The plaintiffs filed an appeal in the Court of the Additional District Judge, Lahore, on 11th November 1927. Another defendant, named, Sher Singh, is also said to have died, though the exact date of his death is not known. At the hearing of the appeal, a preliminary objection was raised that no application to implead the legal representatives of Dewa Singh, respondent, having been made in time, the appeal must abate. So far as Sher Singh was concerned, his son Narain Singh was already on the record, as one of the defendants and had been made a respondent, but it was urged on behalf of the respondents that it was necessary for the appellants to apply to have Narain Singh brought on the record as a representative of Sher Singh, and, as this was not done, it was urged that this was an additional reason for holding that the appeal had abated. The learned Additional Judge considered these objections to be valid and holding that the appeal had abated as a whole, he dismissed it with costs, without going into the merits of the case. The plaintiffs have now come up, in second appeal, to this Court.

Mr. Sethi, on behalf of the appellants, contends that the decision of the Court below is wrong. With regard to Dewa Singh, it is pointed out, that as he had died after the conclusion of the arguments and before the decision of the suit, the appellants were entitled to bring his legal representatives on the record without making an application to the Court for the purpose and that they have actually done so. Reference to the memorandum of appeal shows that the name of Sundar Singh, son of Dewa Singh, was substituted for that of Dewa Singh. The learned Additional District Judge appears to have been under the mistaken impression that the name of Dewa Singh was entered in the memorandum of appeal in spite of his having died. It is clear that so far as the death of Dewa Singh is concerned, the action taken by the appellants was correct. No further application by them was necessary and therefore the fact that on the application actually submitted by them, after the required period, the signature of the applicant was inadvertently omitted, does not affect the case in any way. Thus there was no abatement in consequence of the death of Dewa Singh as the name of his representative has been duly substituted on the record. Coming to the case of Sher Singh, reliance was placed, in the Court below, by respondents, on a decision of a Division Bench of this Court, in *Gurditta Mal* v. *Muhammad Khan* (1), which lays down that the mere fact that the legal representatives of a deceased respondent are already on the record does not relieve the appellant from the necessity of making an application under O. 22, R. 4 (1), Civil Procedure Code. Mr. Sethi points out however, that another Division Bench of this Court has expressed a different view on the subject, in *Gopal Das* v. *Mul Chand* (2), after discussing *Gurditta Mal* v. *Muhammad Khan* (1), and according to it the present appeal could not abate, as Narain Singh, son of Sher Singh, was already one of the respondents. Our attention is also drawn by Mr. Sethi to a Division Bench ruling of the Madras High Court, in *V. Achutan Nair* v. *Manavikraman* (3), which also supports his contention and refers to *Gurditta Mal* v. *Muhammad Khan* (1) and *Gopal Das* v. *Mul Chand* (2). It is admitted by the other side, that Narain Singh is the sole representative of Sher Singh deceased, and it is not shown how it was possible for Narain Singh, in a case like the one before us, to advance any pleas as the representative of his father different to those which he could advance in his personal capacity. In my judgment it has been wrongly held by the Court below that the appeal had abated.

I would, therefore, accept this appeal and order the Court below to hear the appeal, that was filed before it, on the merits, and to decide it according to law. The appellants will get their costs in this Court.

Shadi Lal*, *C. J.—I concur.

K.S. *Appeal accepted.*

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1. A I R 1926 Lah 37=90 I C 41.
2. A I R 1926 Lah 607=98 I C 960=7 Lah 399.
3. A I R 1929 Mad 152=109 I C 372=51 Mad 847.

A. I. R. 1933 Lahore 711

ABDUL QADIR, J.

Secy. of State—Defendant—Petitioner.

v.

Ghulam Nabi—Plaintiff—Opp. Party.

Misc. Petn. No. 478 of 1932, Decided on 2nd June 1933, from decision of Senior Sub-Judge, Ferozepore, D/- 2nd May 1932.

Civil P. C. (1908), S. 151—Remarks in judgment casting slur on Government department for which no justification exists can be ordered to be expunged.

Where remarks made by a Judge in a judgment cast a slur on a Government department but was not required for the disposal of the main case and there was no justification for making such remarks:

Held: that those remarks should be ordered to be expunged from the judgment: *Ramchand* v. *Secy. of State, Lah. Civil Misc. No.* 219 *of* 1924. [P 712 C 2]

C. H. Carden Noad—for Petitioner.

Ghulam Nabi—for Opposite Party.

Order.—This miscellaneous petition has been filed by the Goverment Advocate, Punjab, in the matter of *Ghulam Nabi* v. *Secretary of State for India in Council*, praying under S. 151 of the Civil Procedure Code, that certain remarks made by Faquir Sayed Said-ud-Din, Senior Subordinate Judge, in the concluding portion of the judgment dated 2nd May 1932, against the North Western Railway Department be expunged.

The facts that have given rise to this petition are as follows: Ghulam Nabi, who was a guard on the North-Western Railway, was dismissed from service because the Sessions Judge had made some remarks against him, in his order dated 4th July 1923, in a case in which he was charged of having stolen some goods. He had been convicted by the trial Court but the Sessions Judge held that the facts of the case though raising a strong suspicion against him, were not sufficient for his conviction. Giving him the benefit of the doubt, the Sessions Judge acquitted him, but he made the following observations at the conclusion of his order:

> "I may however note that this is a good case for departmental action against Ghulam Nabi."

Upon this the North-Western Railway took departmental action and dismissed Ghulam Nabi. He went on making representations, praying for his restoration, but his applications were rejected from time to time. Eventually he succeeded in being re-employed in May 1925, but was turned out again in September 1925. On this he brought a suit in forma pauperis against the Secretary of State for recovery of Rupees 25,000 damages. This suit was decided by the Senior Subordinate Judge, Ferozepore, on 2nd May 1932. He held that the plaintiff had failed to prove that his dismissal by the Railway was wrongful, as at the time of this last discharge he was only a temporary servant, who could be discharged at any time. He concluded his judgment, however, with the following paragraph, in which he passed strictures against the Railway Department:-

> "I decide this issue 3 against the plaintiff, but after perusal of the documents on the record, I find that the plaintiff has been treated by the railway department most mercilessly and most unjustly, that the railway department discharged the plaintiff from the service on both the occasions most unreasonably and without any justification whatsoever and that the authorities concerned deliberately refused to do justice to the case of the plaintiff, who spent the best part of his life in doing good and loyal service to the railway department, which has given him a very bad return by leaving him and his large family to die of starvation. Under these circumstances though I dismiss this suit I leave the parties to bear their own costs."

The learned Government Advocate contends that the above remarks were uncalled for and an unmerited slur has been thereby cast on a Government Department. He adds that the action originally taken by the Railway against Ghulam Nabi was due to the remarks of a judicial Court and was not taken by them on their own initiative; and on the second occasion the re-employment of the gaurd was temporary and his service could be dispensed with any moment. Ghulam Nabi, who appears in person to oppose this petition, urges that the Senior Subordinate Judge had made these remarks in order to justify his order allowing the parties to bear their own costs and it cannot be said, therefore, that the remarks were uncalled for. He also contends that the remarks as to the behaviour of the Railway were justified. He points out that the Railway cannot justly take shelter behind the remarks of the Sessions Judge, in his order dated 4th July 1923, as he (Ghulam Nabi) had succeeded in having those remarks expunged by the High Court. A petition for revision filed by him had been accepted by Mr. Justice Martineau, on 28th November 1923, who expressed the view that all that the learned Sessions Judge meant was that it was a good case for a departmental enquiry and as it was said that his remarks had been interpreted differently by the Railway Authorities and that the petitioner had been dismissed without any enquiry, it was ordered that the remarks should be expunged, and they were expunged accordingly.

It is true that the learned Senior Subordinate Judge has concluded the passage in dispute as if he was justifying his order as to costs, yet it hardly stands to reason that all the observations made by him against the Raliway authorities were required for the use of this discretion in allowing each party to bear its own costs. The remarks were certainly not required for the disposal of the main case. Before making those remarks the Senior Subordinate Judge had disposed of the case and had declared that the Railway could have dispensed with the services of Ghulam Nabi as he was a temporary servant. I think he was not justified, after the above decision, in making remarks, which are calculated to do harm to the Railway Department. There was no justification for casting a slur on the North-Western Railway Department as a whole. The learned Government Advocate refers me to a decision of the learned Chief Justice of this Court dated 13th March 1925, in *Civil Miscellaneous No. 219 of 1924, L. Ram Chand* v. *Secretary of State,* in which remarks of a similar kind made in a judgment against the North-Western were expunged.

I think the present case is a fit one for having the remarks of the learned Subordinate Judge expunged and it is hereby ordered that the ten lines beginning with "I find that the plaintiff has been treated" and ending with the words "his large family to die of starvation" be expunged from the order of the Senior Subordinate Judge, dated 2nd May 1932. This petition is, therefore, accepted, but the parties are allowed to bear their own costs of this petition.

K.S. *Petition accepted.*

A. I. R. 1933 Lahore 712

BROADWAY AND MONROE, JJ.

Atma Ram and *another*—**Defendants—Appellants.**

v.

Godhu Ram and *others*—**Plaintiffs—Respondents.**

First Appeal No. 685 of 1930, Decided on 20th October 1932, from decree of Senior Sub-Judge, Multan, D/- 8th January 1930.

Specific Relief Act (1877), S. 42—Proviso—Plaintiff not in possession of joint property

but kept out of possession by defendant—Declaratory suit is barred by proviso to S. 42.

The granting of a declaration is a discretionary matter and according to the proviso to S. 42, Specific Relief Act, no Court should make any such declaration where the plaintiff being able to seek relief other than a mere declaration of title omits to do so.

Where a plaintiff is not in possession of the joint property, but is kept out of possession by the defendant, he can and ought to sue for recovery of possession of land either by a suit for joint possession or for his share by partition. Where he omits to do so but files a declaration to the effect that he is entitled along with the defendant to the property, his suit is barred by the proviso to S. 42: 25 *Mad* 504 and *A I R* 1914 *All* 19, *Rel on.* [P 714 C 1, 2]

Faqir Chand and *Achhru Ram*—for Appellants.

Badri Das, *Ajit Prasada* and *Krishna Swarup*—for Respondents.

Broadway, J.—One Bhamba Ram died on 30th April 1927, leaving him surviving four sons, named Atma Ram, Chandu Ram, Godhu Ram and Ram Chand. Godhu Ram had a son named Nathu Ram. Bhamba Ram had on 4th April 1927, executed a will disposing of his property, the bulk of which he left to Atma Ram, Chandu Ram and Nathu Ram, son of Godhu Ram. Godhu Ram was disinherited on the ground that he was of bad character and a disobedient son. Ram Chand was given a certain amount of property for the reason that although he was a disobedient son, his character was not bad. Ram Chand appears to have begun giving trouble and on 26th April 1927, Bhamba Ram executed a codicil in which he slightly varied the disposition of his property, taking care that the property left to Ram Chand should not be shared by any of the other legatees in order to avoid further trouble. Immediately on the death of Bhamba Ram, which took place, as already stated, on 30th April 1927, Atma Ram and Chandu Ram appear to have propounded the will, although probate of it was not taken out and to have taken possession of the property and dealt with it according to the terms of the said will. This resulted in a suit by Godhu Ram and Ram Chand which was filed on 6th August 1927, and in which the plaintiffs sought a declaration to the effect that they were entitled, along with the defendants, to the entire property left by their father, Bhamba Ram, as members of a joint Hindu family, and further asking for a perpetual injunction against the defendants Atma Ram and Chandu Ram to the effect that they should allow the plaintiffs to retain joint possession in equal shares of the entire property of which a list was appended to the plaint.

Various pleas were raised by the defendants, one of them being a preliminary one to the effect that the suit for a declaration and issue of perpetual injunction could not lie in its present form. The defendants alleged that they were the absolute owners in possession of the property received by them under the will, that the plaintiffs were not in possession thereof and that therefore the suit was incompetent. Further preliminary objections were taken on the question of the court-fee and the following two issues were settled as preliminary ones: (1) "Does not the suit lie in the form in which it is framed? (2) If it lies, what should be the court-fee?"

The learned Senior Subordinate Judge disposed of these issues by an order dated the 18th October 1928. He held that the court-fees paid were sufficient and, without discussing the question, held further that the suit as brought was competent. The suit then proceeded and was finally decreed in the plaintiffs' favour on 8th January 1930. Against this decision the defendants have preferred this appeal and Mr. Achhru Ram on their behalf has pressed, as a preliminary matter, the question of the competency of the suit as brought. He urged that the suit, according to the plaint, was one for a declaration and an injunction and that as the plaintiffs were at that time able to institute a suit either for joint possession or for possession by partition, the proviso to S. 42 of the Specific Relief Act, came into operation and the suit should have been dismissed.

It is perfectly clear that the position taken up by the defendants from the moment of the death of Bhamba Ram was that the property had belonged to their father alone, that the will was a valid and competent one and they had proceeded to act on it. Indeed the plaint itself showed that the defendants had definitely notified to the plaintiffs that the will existed; that they were acting on it; and were in possession of the property left by their father as owners under the will, and offered to hand over to the plaintiffs as legatees whatever their father had left to them. It has been admitted by Mr. Ajit Prashad that on the death of Bhamba Ram his clients Godhu Ram and Ram Chand could have instituted a suit either for joint possession as co-owners or for possession of their share by partition. Realising that a suit in such circumstances merely for a declaration was obviously incompetent, Mr. Ajit Parshad pressed the point that a further relief had been claimed, inasmuch as in the plaint the plaintiffs asked for a perpetual injunction. An examination of the plaint shows that the injunction asked for was for an order directed against the defendants ordering them to refrain from preventing the plaintiffs from retaining possession of the property. Inasmuch as the plaint itself shows that the plaintiffs were not in possession of the property, it is clear that this injunction was one that could never have been granted.

Admittedly the granting of a declaration is a discretionary matter and according to the proviso to S. 42 of the Specific Relief Act it has been laid down that no Court should make any such declaration where the plaintiff being able to seek relief other than a mere declaration of title omits to do so. Our attention has been drawn to *Suryanarayanamurti* v. *Tammanna* (1,) which appears to be directly in point. There the plaintiff sued his brother, his sister and his brother's son for a declaration of the invalidity of a will which purported to have been executed by his late father by which certain property had been bequeathed to one of the defendants. The plaintiff claimed that the property was ancestral, and that he was entitled to his share in it by right of survivorship, the testator having no power to bequeath it. No claim was made in the plaint for partition of the property which was stated to be in possession of tenants under leases granted by plaintiff and the first defendant.

It was held that the suit was barred by the proviso to S. 42 of the Specific Relief Act, inasmuch as the plaintiff might have sued for partition of his share in what he claimed to be the joint family property. Mr. Ajit Parshad has endeavoured to differentiate this case by saying that there only a declaration was asked for, whereas in the present case a prayer for an injunction, of a very futile nature, has been added. This view of the Madras Court is supported by a decision of the Allahabad High Court in *Ishwari Singh* v. *Narain Dat* (2), where it was held that the fact that land was waste and therefore of no immediate practical use was no bar to the application of S. 42 of the Specific Relief Act, where the plaintiff being admittedly out of possession claimed only a declaration of his title. Their Lordships towards the end of their judgment say as follows:

> "In the present case the plaintiffs were admittedly out of possession and the defendants are obviously keeping them out of it. The plaintiffs therefore could have sued and ought to have sued for recovery of possession of the land in suit."

This seems to me to be the position in the case now before us. The plaintiffs are clearly not in possession and the defendants are equally clearly keeping them out of possession. The plaintiffs, therefore, could have and ought to have sued for recovery of possession of the land either by a suit for joint possession or for possesion of their share by partition. There are various other authorities which support the view set out, and the authorities relied upon by Mr. Ajit Prasad afford him no assistance. Indeed the principles enunciated in the cases cited by the learned counsel are in complete accord with those enunciated in the Madras and Allahabad cases. In my judgment the suit as framed was incompetent and should have been dismissed. Mr. Ajit Parshad finally asked to be allowed to amend the plaint by adding a prayer for joint possession. At this stage of the proceedings, I consider that it would be wrong to allow the amendment asked for. Further, it has been brought to our notice that the plaintiffs have brought a suit for partition of this property. The matter decided in this case by the learned Senior Subordinate Judge will no doubt have to be re-opened and re-decided in the suit for partition. I would, therefore, accept this appeal and dismiss the plaintiffs' suit with costs throughout. The cross-objections filed on behalf of the respondents by Mr. Ajit Parshad are also dismissed with costs.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 714

SHADI LAL, C. J. AND MONROE, J.

Chenchal Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 50 of 1933, Decided on 19th May 1933, from order of Sess. Judge, Amritsar, D/- 21st December 1932.

Criminal Trial—Benefit of doubt—Guilt of accused depending on direct evidence—Unanimous verdict of assessors that case against accused is not proved—Accused is entitled to benefit of doubt.

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1. (1902) 25 Mad 504.

2. A I R 1914 All 19=23 I C 555=36 All 312.

Where the guilt of the accused depends on direct evidence and the evidence of the witnesses is not convincing and the verdict of the assessors is unanimous that the case against the accused is not proved, accused is entitled to the benefit of doubt. [P 716 C 1]

Petman and *Hakumat Rai*—for Appellant.

Mohammad Akar Khan — for the Crown.

Monroe, J.—Chenchal Singh, the accused, has been convicted of the murder of Dhian Singh and sentenced to death under S. 302, Penal Code. At the place where the murder is alleged to have taken place there is an irrigation channel running east and west; and very close to the irrigation channel on the south side there is a mango tree. On the evening of 24th October 1932, the field of Ladha Singh, P. W. 3, the father of the deceased were to get turn of water and after having their evening meal Imam Din, P. W. 4, who is a partner in cultivation with Ladha Singh, set out for the fields with Nawab, P. W. 5, Massu and Dhian Singh deceased. Massu and Imam Din went to the point where the watercourse leads away from the canal minor, a distance, from the mango tree already mentioned, of nearly half a mile. Dhian Singh and Nawab remained at the field which had to be watered. During the course of the evening they made a tour twice along the irrigation channel to the place where Imam Din and Massu were on guard. After they had returned on the second occasion sometime after midnight Dhian Singh told Nawab that he would sleep for a time while Nawab attended to the watering. Nawab went and stood near the point where the water was entering the field at a distance of 50 or 60 yards from the mango tree, already mentioned, under which Dhian Singh lay down to sleep. Dhian Singh had a khes under him and covered himself with a chadar. Shortly before sunrise Nawab saw a man coming out from the garden on the north side of the water channel and approaching the mango tree and he heard Dhian Singh cry out "marsutia, mar sutia." The shout also attracted Imam Din who had been making an examination of the watercourses and was then approaching the mango tree. The two witnesses saw the accused striking the deceased with a barchhi. At that time the deceased was on the northern side of the irrigation channel, that is, the other side from the mango tree. They both called out to the accused not to strike: he then came towards them threateningly with the barchhi: they retired and the accused returned where the deceased was lying, struck him two more blows with the barchhi and then ran off towards the north.

At the same time while this was going on these two witnesses saw two other men standing four or five karams from the accused, whom they were unable to identify, and they too ran off when the accused did so. Imam Din and Nawab are the only eye-witnesses of the occurrence, but immediately after the accused ran away Gain Singh, P. W. 6, arrived at the spot. He had found animals trespassing in his field which was about three hundred yards away, and while he was driving them away he heard cries coming from the direction of Dhian Singh's field and ran towards it. As he came towards the garden on the north of the irrigation channel he saw the accused running out of it with a barchhi in his hand. He called out to the accused who did not answer. When he arrived at the spot he found Dhian Singh lying dead. He then discussed what had happened with Imam Ain and Nawab. Immediately afterwards Imam Din went to inform Ladha Singh, father of the deceased, who returned with Ahmad Din Lambardar soon afterwards. Ladha Singh then went off and made a report at the police station at Mauza, China Bibi Chand, at a distance of ten miles. The report was made at 12-15 p. m., on the 25th October.

The lands in the possession of the accused and of Ladha Singh adjoin: they get water once a week and Ladha Singh's turn comes immediately before that of the accused. A few days before the occurrence when the deceased was watering his father's sugarcane fields the accused diverted the water into his own field saying that his turn had then come. They had a dispute then and Ladha Singh states that the accused took up a kahi and was about to strike the deceased. It may be doubted whether there was anything more in the incident than threats and abuse; for the first time the kahi was mentioned before the Sessions Judge. That the quarrel was a serious one is shown by the evidence of Santa Singh, P. W. 8, an independent witness, who saw the deceased and the accused quarrelling about the turn of water some days before the murder. The accused was threatening the deceased that he would kill him. When Santa Singh went up and separated them the accused went away very angry. (After discussing the evidence, the judgment proceeded). The evidence therefore seems to me to establish that the deceased must have eaten last at 7-45 p. m., and was killed about 3-30 a. m. If digestion was not suspended, all food in his stomach should have been digested by 11 p. m. The medical report shows that the deceased's stomach and other internal organs were healthy and there is no justification for an assumption that disgestion was retarded or suspended by an internal cause. Internal haemorrhage, the retarding cause suggested by the learned Judge, cannot have taken place till after the murder and cannot therefore account for retardation of digestion in this case. No other cause suggests itself, but sleep: but Nawab states that the deceased did not go to lie down till after the moon had risen: and before then he was engaged in seeing to the irrigation: it is also improbable that he went to lie down at an early hour instead of doing the work which he set out to do. I find myself unable to reconcile the evidence of the time of the murder given by the witnesses with the statement in the medical report concerning the contents of the deceased's stomach. I may say, also, that the evidence of Imam Din, Nawab and Gian Singh does not, to me at least, read convincingly though I have no specific grounds for my view. The four assessors were unanimous in thinking that the case against the accused was not proved and, as it is one of direct evidence, the only reason for this is that they distrusted these three witnesses.

In these circumstances, I cannot, but hold that there is doubt whether the accused is responsible for this crime and I would allow his appeal and acquit him.

Shadi Lal, C. J.—I concur in the conclusion.

K.S. *Appeal allowed.*

** A. I. R 1933 Lahore 716

Full Bench

ADDISON, COLDSTREAM AND JAI LAL, JJ.

Abdulla—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1150 of 1932, Decided on 19th January 1933, from order of Sess. Judge, Jullundur, D/- 20th August 1932.

**** Criminal P. C. (1898), S. 164 — Magistrate associated with investigating officer—Admission by accused in presence of Magistrate — Magistrate not recording admission under S. 164 but making written memorandum—Oral evidence of Magistrate is admissible and written memorandum though inadmissible can be used to refresh memory—Evidence Act (1872). Ss. 26 and 159.**

Where during the investigation of a criminal case a Magistrate is associated with the investigating officer and in the presence of such Magistrate the accused points out places alleged to be connected with the crime and makes admissions which do not lead to the discovery of any fact and the Magistrate does not record the admissions in accordance with the provisions of S. 164, Criminal P. C., but makes a memorandum of the conduct and admissions of the accused, the oral evidence of the Magistrate is admissible and his memorandum is not admissible though he can refresh his memory under S. 159, Evidence Act, when under examination, by referring to the memorandum :

The fact that the Magistrate is empowered to record the confession of an accused person under S. 164 would not affect the question of the admissibility of such evidence : *Case law reviewed.* [P 718 C 1, 2]

B. R. Puri—for Appellant.

Des Raj Sawhney—for the Crown.

Addison, J.—The following two questions have been referred to a Full Bench:

(1) Where during the investigation of a criminal case a Magistrate is associated with the investigating officer and in the presence of such Magistrate the accused points out places alleged to be connected with the crime and makes admissions which do not lead to the discovery of any fact and the Magistrate does not record the admissions in accordance with the provisions of of S. 164 of the Code of Criminal Procedure, but makes a memorandum of the conduct and admissions of the accused, is (a) the oral evidence of the Magistrate and (b) his memorandum, admissible to prove the admissions of the accused? (2) Whether the fact that the Magistrate is empowered to record the confession of the accused under S. 164 of the Code of Criminal Procedure would affect the question of the admissibility of such evidence?

The questions raised have all along been decided in one way by this Court. The first case of importance is *Shere Singh* v. *Empress* (1). It was held in it that an oral confession by an accused person, not being open to exception under Ss. 24, 25 or 26, Evidence Act, is, as an admission by an accused person, a relevant fact and may be proved at his trial under S. 21, Evidence Act, and therefore such a confession made to a Magistrate is relevant, and

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1. (1881) 21 P R 1881 Cr.

may be proved by the evidence of the Magistrate. If the confession is reduced to writing by the Magistrate in accordance with the provisions of Ss. 164 and 364 of the Criminal Procedure Code, the document is admissible in evidence without further proof under the provisions of S. 80 of the Evidence Act. If it is reduced to writing by the Magistrate, but not with the formalities prescribed by Ss. 164 and 364 of the Criminal Procedure Code, the document can still be admitted upon proof by the evidence of the Magistrate under S. 533 of the Criminal Procedure Code. If the defects cannot be remedied under the provisions of S. 533 of the Criminal Procedure Code the document cannot be admitted in evidence against the accused person but the Magistrate may still give evidence as to the confession made before him and the document in that case may still be used under S. 159, Evidence Act, to refresh the Magistrate's memory as to the accused's statement or under S. 160, Evidence Act. In those cases the document must be produced and shown to the adverse party, if he requires it, and the adverse party may cross-examine the witness thereupon under the provisions of S. 161, Evidence Act. The same view was taken in *Buta* v. *Empress* (2). These authorities were followed in *Feroze* v. *Emperor* (3), where it was held that an oral confession by an accused person, not being open to exception under Ss. 24,25 or 26, Evidence Act, is as an admission by an accused person, a relevant fact and may be proved at his trial under S. 21 and therefore such confession made to a Magistrate is relevant and may be proved by the evidence of the Magistrate. A Single Judge of this Court in the case *Baghel Singh* v. *Emperor, A. I. R.* 1929 *Lah.* 794, followed these authorities. There is a long discussion of this subject by Jai Lal, J., in *Jog Rai* v. *Emperor, A. I. R.* 1930 *Lah.* 534. The Division Bench in that case took the view previously held by this Court.

The Allahabad High Court however has taken the opposite view. A Division Bench of that Court in *Emperor* v. *Gulabu* (4), held that a confession of an accused person made to a Magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of S. 91, Evidence Act, and that no evidence can be given of the terms of such a confession except the record, if any, made under S. 164, Criminal P. C. There are also decisions of the Calcutta High Court to the same effect. One of these may be referred to, namely, *Queen-Empress* v. *Bhairab Chunder* (5), as typical of the others. Further, in *Emperor* v. *Maruti Santu* (6), a case decided by a Division Bench of the Bombay High Court, one Judge held that a confession made to a Magistrate during the course of an investigation, which was not reduced to writing was inadmissible in evidence and could not be proved by oral evidence. The view he took of the word "may" in S. 164 was that it should be read as "must." The other Judge however took the same view as this Court has always done. In his view the word "may" under S. 164, Criminal P. C., could never mean "shall" so long as the English lenguage should retain its meaning, as declared in *Baker, In re Nichols* v. *Baker* (7), by Cotton, L.J. The Allahabad case was not followed by him. It may also be noted here that Jenkins, C. J., in *Barindra Kumar Ghose* v. *Emperor* (8), took the view that Ss. 164, 342 and 364 of the Code were not exhaustive, and did not limit the generality of S. 21, Evidence Act, as to the relevancy of admissions.

On the other hand, a Division Bench of the Madras High Court in *Pedda Obigadu* v. *Emperor* (9), held that it was not obligatory on a Magistrate holding an investigation or preliminary inquiry under S. 159 of the Code to record in writing a confession made to him by an accused person and such confession could be proved by the oral testimony of the Magistrate. The Allahabad and Calcutta decisions and the opinion of one of the Judges in the Bombay case referred to above were not followed.

Before us it was admitted that confessions made by an accused person to an ordinary individual could be proved orally. It was however argued that it would be anomalous to allow a Magisgistrate to prove a confession made to him or in his presence by word of mouth, seeing that elaborate precau-

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2. (1887) 52 P R 1887 Cr.
3. A I R 1918 Lah 92=45 I C 843=19 Cr L J 651=11 P R 1918 Cr.
4. (1913) 35 All 260=14 Cr L J 211=19 I C 307.
5. (1898) 2 C W N 702.
6. A I R 1920 Bom 322=54 I C 465=21 Cr L J 65.
7. (1890) 44 Ch D 262=59 L J Ch 661=38 W R 417=62 L T 817.
8. (1910) 37 Cal 467=11 Cr L J 453=7 I C 359.
9. A I R 1922 Mad 40=69 I C 264=23 Cr L J 680=45 Mad 230.

tions have been enacted in the Criminal Procedure Code to insure that the recording of confessions of an accused person by Magistrates should be done with great care; but it was not contended before us that S. 164, Criminal P. C., controlled or repealed the substantive law as regards confessions given in the Evidence Act. This means that it was not seriously contended before us that the view taken by this Court and by the Madras High Court was wrong. If a confession is formally recorded under the provisions of the Criminal Procedure Code by a Magistrate the provisions of the Criminal Procedure Code must be followed. If a confession is not recorded, then the general law as enacted in the Evidence Act applies and an oral confession by an accused person, not being open to exception under Ss. 24, 25 or 26, Evidence Act, is a relevant fact as an admission by him and can be proved under S. 21,. Evidence Act.

The answer to the first question referred to the Full Bench therefore is that the oral evidence of the Magistrate is admissible to prove the admissions of the accused. Ordinarily speaking however the written memorandum of the Magistrate is not admissible, though the Magistrate under the provisions of S. 159, Evidence Act, can refresh his memory when under examination by referring to the memorandum. After he has refreshed his memory he can give evidence in the witness-box as to what the admissions of the accused were. In such a case the memorandum must be shown to the adverse party, if he requires it, under the provisions of S. 161, Evidence Act, and the witness may be cross-examined on it.

Further, S. 160, Evidence Act, allows a Magistrate to testify to facts mentioned in his memorandum, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document. The illustration to this section is as follows: A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered. In this case also he may be cross-examined on the memorandum under the provisions of S. 161, Evidence Act. The distinction between Ss. 159 and 160, Evidence Act, is stated at p. 1032 of Woodroffe and Amir Ali's ninth edition of the Law of Evidence. When the witness after reference to the memorandum finds his memory so refreshed that he can testify recollection independently of the memorandum, there is no reason or necessity for the introduction of the paper or writing itself; and it is not admissible. But another rule prevails when the witness cannot testify to the existing knowledge of the fact independently of the memorandum, but can testify that, at or about the time the writing was made, he knew of its contents and of their truth or accuracy. This is the case contemplated by S. 160, Evidence Act. In such a case both the testimony of the witness and the contents of the memorandum are admissible, the two being the equivalent of a present positive statement of the witness affirming the truth of the memorandum. Even however if the memorandum becomes admissible in this latter case it must be never looked upon as a record of the statement of the accused person; it is merely a memorandum recorded at the time of what the Magistrate says the accused stated. This disposes of the first question.

As regards the second question my reply would be that the fact that the Magistrate is empowered to record the confession of an accused person under S. 164 would not affect the question of the admissibility of such evidence. In the case before us the Magistrate was not empowered, but there would be no difference to the reply if he had been empowered. It would be anomalous, in my opinion, to hold that a confession made to an ordinary individual could be orally proved while a confession made either to a Magistrate not empowered to record confessions under S. 164, Criminal P. C., or to a Magistrate empowered to record confessions under S. 164 could not be so proved.

Coldstream, J.—I agree.

Jai Lal, J.—I agree.

K.S. *Reference answered.*

A. I. R. 1933 Lahore 718

ADDISON AND AGHA HAIDAR, JJ.

Mt. Sardaran—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 302 of 1933, Decided on 30th May 1933, from order of Sess. Judge, Sialkot, D/- 10th January 1933.

Penal Code (1860), S. 302—Illiterate woman causing death of child urged by wicked superstition — Lesser penalty should be imposed.

Where an illiterate young woman who was living in the midst of environments reminiscent

of the dark ages when gross ignorance and superstition prevailed, honestly believed that the death of her children was the direct result of the evil influence which had been cast upon her by her sister-in-law and under the urge of a wicked superstition of which she was a helpless victim, picked up the child of the latter and caused its death :

Held : **that the lesser penalty of transportation for life provided by S. 302 should be imposed and not the extreme penalty.** [P 720 C 1, 2]

Mohammad Aslam Khan—for Appellant.

Des Raj Sawhney—for the Crown.

Agha Haidar, J.—Mt. Sardaran, a young married woman aged 20, has been convicted by the Sessions Judge, Sialkot, of having caused the death of small baby named Khushi Mohammad sometime in the evening of 19th August 1932, and has been sentenced, under S. 302, Penal Code, to suffer the extreme penalty of the law. She had submitted her appeal to this Court through the jail authorities, and the record of the case is also before the Court under the provisions of S. 374, Criminal P. C.

Mt. Sardaran had been married to Mohammad Din three or four years before the occurrence. Mohammad Din has got five other brothers, all of whom live in the same compound. Lal Din is one of the brothers of Mohammad Din. His wife is Mt. Aishan, P. W. 12. She has been married for four years. She has given birth to three children, the last child being the deceased Khushi Mohammad. Two of her children died before the birth of the last child, the deceased. Mt. Sardaran had also given birth to two daughters. Both of them died. The last of them died about five or six days before the present occurrence. Mt. Sardaran had a superstitious belief that her children had died on account of the influence of "the evil shadow" cast upon her by Mt. Aishan who had already lost two children. Mt. Aishan has stated in her evidence before the Court that a few days before the occurrence when Mt. Sardaran lost her last child there was a quarrel between the two ladies in which Mt. Sardaran, accused, had openly denounced Mt. Aishan as the person who had cast parchhawan (evil shadow) upon her, resulting in the loss of her children. This querrel seems to have been forgotten by the two ladies since, on 19th August 1932, Mt. Sardaran asked Mt. Aishan to accompany her as she was going out into the fields to answer a call of nature. Mt. Aishan declined to go, saying that she had some household duties to perform. Mt. Aishan went inside her kotha in order to do some work in connexion with the evening meal. When she came out of the kotha she found that her little baby, who had been lying on a cot just in front of the kotha, was missing, and that Mt. Sardaran had also gone away. She asked Mt. Mahandan, the wife of her husband's brother Bhag, P. W. 3, as to what had become of her baby. Mt. Mahandan replied that she did not know. Mt. Aishan raised a hue and cry which attracted the male members of the family, who were sitting on the roof of the house, to the spot. They began to search for the missing child. In the meantime Mt. Sardaran also returned. She was asked if she had taken away the child, but she replied in the negative.

Information was sent to the police through Bagh one of the brothers of Lal Din and Mohammad Din. In this information he merely stated that the child of Mt. Aishan was missing and that, on a search being made, it was found in its last gasp just outside the front door of the huse and died soon afterwards. He further stated that Bhag and Lal Din, brothers, had told him that they had seen a dog running away from the place and that probably the dog had carried away the child. He finished by saying that he did not suspect anybody of having murdered the boy. While the search for the child was being continued, Jalal Din, P. W. 12, happened to see what looked like a rag floating on the surface of the pond, which lies close, to the house occupied by the family of Mohammad Din and Lal Din. He tried to pull it out by means of a stick and found that it was not a rag, but the dead body of the missing child floating on the surface of the water. The first information report (Ex. P. N.) was made on 21st August 1932, at about 9 p. m., at the police station by Mt. Aishan, P. W. 12. In this report she gave an account of the whole affair as it took place and how Mt. Sardaran suspected her of casting an evil shadow upon her and further stated that the child had been killed by Mt. Sardaran. On 22nd August 1932, the police took Mt. Sardaran into custody and the same afternoon she was produced before a Magistrate of the First Class, Mr. Hans Raj Kohli, who took the usual steps prescribed by the law before calling upon Mt. Sardaran to make a statement. She confessed to having murdered the baby and throwing the dead body into the pond. The Magistrate has appeared as P. W. 5 in the case and the Court was satisfied that the confession recorded by him was a genuine confession. I have read the confession as well as the statement of the learned Magistrate who recorded it and I have no doubt in my mind that Mt. Sardaran made a true and voluntary confession and that the said confession was not the result of any outside pressure having been brought to bear upon her.

Two witnesses, namely, Hans Raj, P. W. 13, and Sohan Singh, P. W. 14, have come forward and they say that about the time of the occurrence they happened to pass by the pond and they saw Mt. Sardaran throwing something into the water. They thought she had thrown some rubbish. At the time they did not know anything at all about the loss of the child and therefore did not pay any particular attention to the action of Mt. Sardaran. They gave their statements on the third day of the arrival of the police. Hans Raj is a Khatri and Sohan Singh is a Jat. They are natives of the same village and nothing has been brought to our notice to suggest that these witnesses had any motive for falsely implicating the poor unfortunate woman, Mt. Sardaran. The evidence of Bahadur Singh, P. W. 15, who professed to have seen Mt. Sardaran actually picking up the child from the cot and taking it out of the house was not believed by the learned Sessions Judge and in my judgment for good reasons. The confession therefore is corroborated by the evidence of the two witnesses, namely, Hans Raj and Sohan Singh. Before the Committing Magistrate Mt. Sardaran stated that she had been beaten by the police who coerced her to make the confession. Before the Sessions Judge she altered her statement and stated that she was not responsible for what she had said in the alleged confession because her mind happened to be at the time, in a weak condition on account of the premature birth of a child. There cannot therefore be any doubt that Mt. Sardaran picked up the child as it was lying on the cot on the evening in question and by fracturing its skull by dashing the head against some hard substance, caused its death and afterwards threw it into the pond. She had therefore been rightly convicted under S. 302, Penal Code.

The question of the sentence in the circumstances of the case does not present any difficulty to my mind. The accused is a young woman. She is absolutely illiterate. She has lived in the midst of environments which are reminiscent only of the Dark Ages and where gross ignorance and superstition prevail. Throughout her life all opportunities of receiving education, which would have enlightened her mind and exercised a softening and humanizing influence upon her, have been denied to her. Under the urge of a wicked superstition, of which she was a helpless victim, she honestly believed that the death of her children was the direct result of the evil influence which had been cast upon her by Mt. Aishan. It was in this state of mind that she picked up the child and caused its death in the manner set out by the prosecution. Under these circumstances I would accept the appeal to the extent of imposing the lesser penalty provided by S. 302, Penal Code, that is, transportation for life. In view of the extraordinary circumstances of the case I would further invite the attention of the local Government to this case, so that they may, in the exercise of the powers conferred upon them under S. 401, Criminal P. C., take such further steps as they may consider right and proper for the further mitigation of the sentence awarded to Mt. Sardaran.

Addison, J.—I concur.

K.S. *Sentence reduced.*

A. I. R. 1933 Lahore 720

ADDISON, J.

Kazam Khan—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1262 of 1932, Decided on 24th February 1933, from order of Sess. Judge, Rawalpindi, D/- 20th September 1932.

Criminal P. C. (1898), S. 344—It is not complainant's duty to accompany Court process server to secure service of summons upon accused or respondents.

It is not the complainant's duty in a criminal proceedings to accompany the Court process server to secure service of summons upon the accused or respondents. And an order directing the complainant to accompany the process server is not one contemplated by S. 344, Criminal P. C., and is one which cannot be passed under any other section. Hence an order awarding costs should not be passed against the complainant in case he fails to accompany the process server. [P 721 C 1]

Facts.—The petitioner has applied that a large number of persons should be placed on security under S. 107, Criminal P. C. The trial Magistrate issued summons in the names of these persons and at one hearing he directed that the complainant-petitioner should put in process fees and should accompany the process server. At the next hearing some of the respondents only were present, the remainder not having been served. It was found that the petitioner had duly put in process-fees, but had not accompanied the process server. Thereupon the Magistrate ordered that he should pay Rs. 2 costs to each of the 15 respondents who were present. The petitioner now comes in revision.

Grounds.—I have called the Public Prosecutor who draws my attention to S. 344, Criminal P. C., and to rulings establishing that the expression "on such terms as it thinks fit" includes award of costs against a complainant in a criminal proceeding, but does not oppose the application for revision. I am unable to find that it is a complainant's duty in a criminal proceeding to accompany the Court process server to secure service of summons upon the accused or respondents: moreover this being a proceeding under S. 107, Criminal P. C., it is quite possible that if the complainant did accompany the process server it would tend to provoke a breach of the peace. I am therefore of the opinion that the petitioner should never have been directed to accompany the process server and I am also of opinion that the order of the trial Magistrate is not one contemplated by S. 344, Criminal P. C., and is one which cannot be passed under any other section of that Code. In these circumstances I direct that the order be stayed and meanwhile I refer the proceedings to the High Court under S. 438, Criminal P. C., with a recommendation that the order awarding costs be set aside.

Order.—This matter has been reported by the learned Sessions Judge of Rawalpindi. I do not think that the order of the Magistrate awarding costs was a proper one in this case and for that reason I set it aside.

K.S. *Order set aside.*

A. I. R. 1933 Lahore 721

SHADI LAL, C. J. AND BROADWAY, J.

Kallu Mal—Plaintiff—Appellant.

v.

Maman—Defendant—Respondent.

Letters Patent Appeal No. 141 of 1928, Decided on 21st January 1930, against decree of Jai Lal, J., D/- 8th June 1928, reported in *A. I. R.* 1928 *Lah.* 959.

(a) Evidence Act (1872), S. 103—Onus of proving title by possession is on person asserting such possession.

The onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession: *A I R* 1916 *P C* 21, *Foll.* [P 722 C 1]

(b) Civil P. C. (1908), S. 100—Finding as to possession is one of fact.

Where the finding of the lower appellate Court is that the tenant had never set up adverse title against the owner of a house and that the tenant's possession had never been more than permissive the finding of possession thus being a question of fact, clearly entitles the owner to possession of house, and cannot be disturbed in second appeal: 113 *I C* 145=*A I R* 1928 *Lah* 959, **Reversed.** [P 722 C 1]

Kishen Dayal—for Appellant.

Shamair Chand, Qabul Chand and *Muhammad Amin*—for Respondent.

Broadway, J.—This appeal has arisen in the following circumstances: One Kallu Mal instituted a suit against Maman for ejectment from a house and for the recovery of arrears of rent, alleging that Maman was his tenant. Maman denied the tenancy and in February 1926, Kallu Mal's suit was dismissed, it being held that he had failed to prove that the relation of landlord and tenant existed between him and Maman. Thereupon Kallu Mal instituted a suit for possession of the premises and for recovery of Rupees 25-4-3 as mesne profits. This sum was equivalent to the amount of rent at the rate claimed in the former suit.

The trial Court came to the conclusion that Kallu Mal was the owner of the house, but dismissed his suit on the ground that he had failed to prove that he had been in possession within twelve years of his suit. Kallu Mal appealed, and the Additional District Judge, while agreeing with the trial Court that Kallu Mal had proved his title to the property in suit, considered that it was incumbent on Maman to prove that he had been in adverse possession for the statutory period. He therefore remanded the case for a decision on the point whether Maman had been in adverse possession for 12 years prior to the suit. The result of the remand was that the Subordinate Judge found that Maman had failed to discharge the onus which had been placed on him. The case then came up before the learned District Judge, who confirmed the finding as to Kallu Mal being the owner of the property. On the question of possession he found as follows:

> "It is apparent that the respondent has never set up an adverse title against the appellant. The mere non-payment of rent by itself proves nothing. Whether rent was paid or not, the res-

pondent's possession has never been more than permissive. . . . . ."

Kallu Mal's suit was thereupon decreed. Maman then preferred a second appeal to this Court which came up before a learned Judge in Chambers who on the question of possession took a different view, saying:

> "In my opinion if the defendant succeeds in proving his exclusive possession for more than 12 years, he is entitled to a decree unless the plaintiff can prove affirmatively that such possession was derived from him or was with his permission."

In this case therefore the defendant having proved his possession for more than thirty years, and the plaintiff having failed to prove the permissive nature of such possession, the suit should have been dismissed. Maman's appeal was accordingly accepted, and Kallu Mal's suit dismissed.

Kallu Mal then preferred this appeal under Cl. 10, Letters Patent, and on his behalf Mr. Kishen Dial has urged that inasmuch as it has been found that the plaintiff, Kallu Mal, is the owner of the house it was for Maman to prove that his possession had been adverse for a period of at least twelve years. Mere possession, it was contended, could not deprive the real owner of his title. In this connexion he cited various authorities, the principal one being: *Secretary of State* v. *Chellikani Rama Rao* (1), where their Lordships of the Judicial Committee say:

> "Nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say: 'I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions'. . . . ."

It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession. Mr. Shamair Chand for the respondent relied on S. 110, Evidence Act, and urged that the view taken by the learned Judge in Chambers is correct. I do not think it necessary to discuss the various authorities cited by the learned counsel as in my judgment the appeal must succeed on the ground that the finding arrived at on the question of possession by the learned District Judge was a finding of fact which could not be re-agitated in second appeal. As already pointed out the finding of the learned District Judge was that the respondent, Maman, had never set up adverse title against the appellant and that the respondent's possession had never been more than permissive. On this finding, coupled with the finding as to title, Kallu Mal was clearly entitled to a decree, and I would therefore accept this appeal with costs throughout, and, setting aside the order of dismissal passed by the learned Judge in Chambers, restore the decree of the learned District Judge, dated 30th July 1927.

Shadi Lal, C. J.—I concur.

R.K. *Appeal accepted.*

A. I. R. 1933 Lahore 722

TEK CHAND, J.

Ganpat Rai and *others* — **Plaintiffs— Appellants.**

v.

Har Dial—**Defendant—Respondent.**

Second Appeal No. 1750 of 1931, Decided on 17th March 1933, from decree of Senior Sub-Judge, Gujrat, D/- 22nd July 1931.

Limitation Act (1908), Art. 144—Suit for possession—Title with plaintiff—Burden of proof is on defendant to prove adverse possession.

In suits for possession of immovable property where title to the property in suit is found to be with the plaintiffs, it lies on the defendant to prove adverse possession for the period of 12 years. The onus is not on the plaintiffs to prove possession within 12 years: *A I R* 1916 *P C* 21; *AIR* 1930 *Lah* 608 and *AIR* 1933 *Lah* 721, *Foll.*
[P 723 C 1]

M. L. Puri and *Ajit Prasada*—**for Appellants.**

Charan Das—**for Respondent.**

Judgment.—The suit which has given rise to this second appeal was instituted by the plaintiffs-appellants against the defendant-respondent for possession of a shop situate in the town of Gujrat. In the plaint the plaintiffs alleged that they were the owners of the shop, that it was in a dilapidated condition, that the plaintiff had put a lock on the outer door, that the defendant broke the lock about six months before the suit, and entered into possession. The defendant denied the title of the plaintiffs and pleaded that the shop had been in his proprietary possession since the time of his forefathers. The trial Judge framed a comprehensive issue in the following terms: "Whether the shop in dispute belongs to the plain-

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1. A I R 1916 P C 21=35 I C [illegible]2=43 I A 192=39 Mad 617 (P C).

tiffs and have they been in possession within twelve years preceding the suit ?"

On the question of title, he found for the plaintiffs and held that the defendant had not established his alleged ownership. He however dismissed the suit on the ground that the plaintiffs had failed to prove their possession within twelve years. On appeal by the plaintiffs the learned Senior Subordinate Judge affirmed the finding of the trial Court that the plaintiffs were proved to be owners of the shop. On the point of limitation he agreed with the Subordinate Judge "after some hesitation," and held that "the suit appears to be barred by time." The plaintiffs have preferred a second appeal to this Court, and it has been contended on their behalf that title having been found to be with the plaintiffs, the suit would be time-barred only if the defendant succeeds in proving adverse possession. In my opinion this contention is well-founded and must succeed. The rule of law governing cases like this is laid down by their Lordships of the Privy Council in *Secretary of State* v. *Chellikani Rama Rao* (1), at p. 631 (of 39 *Mad.*), and by this Court in *A. I. R.* 1930 *Lah.* 608 and *Kallu Mal* v. *Maman* (2), overruling *Maman* v. *Kallu Mal* (3). Following these authorities I hold that the trial Court wrongly placed the onus on the plaintiffs to prove their possession within twelve years, and it lay on the defendant to prove his adverse possession of the property in dispute. As there is no clear finding on this point and the defendant's counsel states that he was misled by the form in which the issue had been framed, it is necessary to remand the case in order to afford the defendant an opportunity to establish his adverse possession of the property in dispute for a period of twelve years.

I accept the appeal, set aside the judgment and decree of the lower appellate Court and remand the case to the trial Court for decision of the issue whether the defendant has been in adverse possession of the property in dispute. Costs shall abide the event.

R.K. *Appeal accepted.*

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1. A I R 1916 P C 21=35 I C 902=43 I A 192=39 Mad 617 (P C).
2. A I R 1933 Lah 721.
3. A I R 1928 Lah 959=113 I C 145.

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* A. I. R. 1933 Lahore 723

TEK CHAND, J.

Devi Dayal—Defendant—Appellant.

v.

Ghulam Mahomed—Plaintiff—Respondent.

Appeal No. 345 of 1933, Decided on 19th June 1933, from decree of Addl. Dist. Judge, Ferozepore, D/- 21st January 1933.

*** Tort — Trespass — Defendant entering plaintiff's baithak with bailiff and naib sheriff believing that judgment-debtor was there—No trespass is committed and plaintiff is not entitled to damages on that score—Civil P. C. (1908), S. 55.**

Defendant had a decree against plaintiff's brother and the latter though residing outside, usually came and lived with his brother. In execution of the decree, defendant entered the baithak of plaintiff's house with the bailiff and naib sheriff believing that the judgment-debtor was there as usual, with the object of effecting his arrest. The judgment-debtor was not there and on the plaintiff's remonstrating, the defendant apologised. Subsequently the plaintiff sued for damages:

Held: that the bailiff and naib-sheriff acted lawfully in entering the house bona fide for arresting the judgment-debtor, that the defendant accompanied them to point out the person to be arrested, that no trespass was committed and that plaintiff was not entitled to any damages: *A I R* 1919 *Mad* 226, *Ref.* [P 724 C 1, 2]

Nand Lal—for Appellant.

Judgment.—This appeal arises out of a suit for damages for alleged injury to the reputation of the plaintiff-respondent and for physical and mental pain caused to him. The facts found are that the defendant-appellant had obtained a decree for certain sum of money against Rustam Ali, brother of the plaintiff-respondent. He took out proceedings in execution of the decree and a warrant was issued for the arrest of the judgment-debtor. The judgment-debtor lives outside Ferozepur; but he frequently goes there and stays with the plaintiff, who is a petition-writer by profession. On 6th March 1932, at about 5 p. m. the defendant, believing bona fide that the judgment-debtor was in the house of the plaintiff went there with the bailiff and the naib sheriff to have him arrested. The judgment-debtor however was not in the house at the time. As soon as the defendant entered the baithak of the plaintiff, the latter caught hold of him and remonstrated with him for having come there. The defendant apologised and the incident was closed for the time being. At the plaintiff's instance the defendant, the bailiff and the naib sheriff sat there for some time, were served with cold drinks, and a compromise of the claim against Rustam Ali was talked about. Four days later, the plaintiff served a notice on the defendant, and after a month he filed the present suit claiming Rupees 500 as damages.

In the plaint it was alleged that the defendant had actually entered the apartments occupied by the females of the plaintiff's family and that his intention was to insult and annoy him. Both Courts below have found however that these allegations were incorrect and have held that all that the defendant did was to go into the baithak where the plaintiff was sitting and that his intention in doing so was to have the warrant executed and not to insult or annoy the plaintiff or any other member of his family. The learned Additional District Judge has also found that the defendant believed bona fide that Rustam Ali was in the baithak, though actually he was not in the house at that time. He has held however that the defendants' act in entering the baithak was an invasion of the plaintiff's right and amounted technically to trespass. He has accordingly granted him nominal damages and has passed a decree for Re. 1 only.

The defendant has preferred a second appeal and has contended that on the findings of the learned Judge the suits have been dismissed. There can be no doubt as is conceded in the judgment of the learned Additional District Judge, that the bailiff and the naib sheriff were acting lawfully in entering the house of the plaintiff, for under S. 55, Civil P. C., they had the power to arrest the judgment-debtor at any hour before sunset at any place where he was to be found, and that they were informed that the judgment-debtor was in the plaintiff's house and acted bona fide in going there. The Additional District Judge is however of opinion that the entry of the bailiff and the naib sheriff alone was lawful and that the defendant was not justified in accompanying them in the baithak. Now it is not suggested that the naib sheriff and the bailiff know Rustam Ali. They had therefore to take someone with them to point out to them the person who was to be arrested. The decree-holder was obviously the proper person for the purpose and his act in accompanying them does not amount to trespass in my opinion: cf. *Assan Alliar Maraikayar* v. *Masilamani Nadar* (1). In any case, as stated already, the defendant has apologised forthwith, and the plaintiff had invited him and the bailiff and the naib sheriff to stay there for sometime and had entertained them with cold drinks. On these facts the plaintiff is not entitled to any damages and the suit has been wrongly decreed. I accept the appeal, set aside the decree of the Courts below, and dismiss the plaintiff's suit with costs throughout.

K.S. *Appeal accepted.*

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1. A I R 1919 Mad 226=51 I C 198=42 Mad 446.

A. I. R. 1933 Lahore 724

ADDISON, J.

Banwari Lal—Petitioner.

v.

Nanak Chand and *another*— Opposite Parties.

Misc. Petn. No. 200 of 1933 and Civil Appeal No. 509 of 1933, Decided on 12th May 1933, from decision of First Class Sub-Judge, Delhi, D/- 16th December 1932.

Civil P. C. (1908), O. 41, R. 5—Appeal from preliminary decree—Stay of further proceedings depends upon particular facts of case, and conditions of O. 41, R. 5 should be satisfied.

The mere fact that an appeal from a preliminary decree is pending in the appellate Court does not preclude the trial Court from passing a final decree. Hence the question of stay of further proceedings after preliminary decree depends upon the particular facts of each case; and unless the conditions of O. 41, R. 5 are fulfilled, i. e., there must be likelihood of substantial loss to the party applying who must also give full security, stay cannot be ordered: *A I R* 1928 *Lah* 904, *Ref* ; 111 *I C* 383, *Expl* and *Dist.* [P 725 C 1]

J. N. Aggarwal—for Petitioner.

Fakir Chand for *Nanak Chand*, *Nawal Kishore* and *M. C. Mahajan* for *Manohar Lal*—for Opposit Parties.

Order.—The plaintiff obtained a preliminary decree against the defendants for the account of a partnership. The period of accounting fixed by the preliminary decree was about three years. One of the defendants, Banwari Lal, has appealed against the preliminary decree on the ground that the accounting period should be something like six years. He obtained an ad interim order of stay of further proceedings and the question whether this order should be made absolute has been argued before me.

It was held by a Division Bench of this Court in *Shibba Mal* v. *Rup Narain* (1)

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2. (1928) 111 I C 383.

that the mere fact that an appeal from a preliminary decree is pending in the appellate Court does not preclude the trial Court from passing a final decree. This means that the question of stay of further proceedings after a preliminary decree has been passed depends upon the particular facts of each case. For an order of stay to be made the conditions of R. 5, O. 41, Civil P. C., should be fulfilled, that is, there must be likelihood of substantial loss to the party applying, who must also give full security. In the present case, I am unable to see how any loss can result to the appellant if further proceedings are allowed in the trial Court. An account will have to be taken in any case for the three years mentioned in the preliminary decree and the time taken in going into this account will not be wasted if the appeal is successful and the taking of the account is extended back for other three years. That can be done without upsetting the account already taken. In my judgment therefore O. 41, R. 5, does not apply and the stay should be refused in this case. It was said that I have come to a contrary decision in a case reported as *Chote Lal* v. *Sultan Singh* (2), the head-note to which is as follows:

> "Proceedings in connexion with the final decree should generally be stayed pending the hearing of the appeal from the preliminary decree."

This head-note is wrong, and nowhere did I use the word "generally." All that I held in that case was that further proceedings should be stayed in it for special reasons set forth by me which applied in that case. These or other special reasons do not exist in this case. For the reasons given I set aside the ad interim order of stay of further proceedings and direct the trial Court to proceed with the further hearing of the suit.

K.S. *Order set aside.*

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1. A I R 1928 Lah 904=111 I C 274=10 Lah 132.

A. I. R. 1933 Lahore 725 (1)

ADDISON, J.

Harbans Lal and *another*—Appellants.

v.

Bute Khan—Respondent.

Misc. First Appeal No. 1541 of 1932, Decided on 25th April 1933, from order of Dist. Judge, Gujranwala, D/-16-7-1932.

(a) Provincial Insolvency Act (1920), S. 6—Concealment.

Concealing property to defeat creditors is not an act of insolvency. [P 725 C 2]

(b) Provincial Insolvency Act (1920), S. 6—Suspension of payment.

In order to constitute suspension of payment as an act of insolvency the debtor must give notice to a creditor that he has suspended payment of his debts. [P 725 C 2]

Shamair Chand—for Appellants.

Ram Lal Anand—for Respondent.

Judgment.—Two creditors applied to have one Bute Khan adjudicated an insolvent. Their petition has been dismissed and they have appealed. Two acts of insolvency were alleged to have taken place on 17th September 1931 and 31st January 1932 respectively. The first is obviously time-barred and it has been held as regards the second that the gift actually took place on 23rd January 1932 which admittedly is more than three months before the application was made. This gift also cannot be treated as an act of insolvency as it is beyond the period of three months laid down in S. 9 (1) (c), Insolvency Act.

Other three grounds were urged in the Court below. The first was that he was concealing his property to defeat his creditors. It is admitted that this is not an act of insolvency. The second was that the respondent had suspended payment of his debts from the 1st February. This also in the present case was not relied upon in appeal as it is not the case of a shop or business. Further, in itself it cannot be said to be an act of insolvency. In order to constitute it an act of insolvency the debtor must give notice to a creditor that he has suspended payment of his debts. The third allegation was that he was concealing himself since the 20th April. This is disproved by the petitioners' own evidence. No act of insolvency having been established, the petition was properly dismissed and I dismiss the appeal with costs.

R.K. *Appeal dismissed.*

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* A. I. R. 1933 Lahore 725 (2)

ADDISON AND BHIDE, JJ.

Miran Bakhsh and *another*—Plaintiffs—Appellants.

v.

Ghulam Nabi and *others*—Defendants—Respondents.

First Appeal No. 1687 of 1927, Decided on 22nd March 1933, from decree of Senior Sub-Judge, Gurdaspur, D/- 29th March 1927.

*** (a) Mahomedan Law — Religious endowment—Private property descending not to natural heirs but successive Gaddinashins—Presumption is of dedication.**

Where the private property of a Mahomedan did not go to his natural heirs but descended to the next twelve Gaddinashins to the exclusion of their natural heirs, it may be reasonably inferred that the property was treated as dedicated to religious purposes and not as private property of the Gaddinashins: *A I R* 1933 *Lah* 154 and *A I R* 1921 *Lah* 337, *Rel on.* [P 727 C 1]

The mere fact that in the revenue records the names of the Gaddinashins have been shown in the column of "owner" cannot be attached much significance: 40 *Cal* 297, *Rel on.* [P 727 C 2]

(b) Evidence Act (1872), Ss. 18 and 101—Admission shifts burden of proof to party making admission.

An admission by a person that a certain property is attached to a Khankah is sufficient to shift the burden of proving that the property is his to the party making the admission: 29 *All* 184, *Rel on.* [P 727 C 1]

Mehr Chand and *Badri Nath*—for Appellants.

Shamair Chand and *Mohammad Amin*—for Respondents.

Bhide, J.—Plaintiffs, who are the "Khadims" or servitors of a Mohammadan Shrine known as Khankah Godar Shah at Kastiwal in the Gurdaspur District, sued for a declaration that the land in dispute (1,404 kanals 3 marlas), was dedicated to the shrine and was not the private property of the defendants as claimed by them. The learned Senior Subordinate Judge has found that the property in question was not proved to be dedicated to the shrine and has dismissed the suit. From this decision plaintiffs have appealed.

Before proceeding to discuss the grounds on which the learned counsel for the appellants has sought to challenge the above finding of the trial Court, it will be convenient to set out a few facts relating to this Khankah. It appears from the history of the foundation of the village given under the pedigree table of the proprietors prepared at the settlement of 1865 that the Khankah was founded many generations ago by Sheikh Farid and that he purchased 97 Ghumaons of land and became a proprietor. Since that time the land has been held by the Gaddinashins of the Khankah and it is in evidence that for thirteen generations the succession has been from the preceptor to the disciple. In the earliest Revenue Records of the village prepared in 1865, Mian Nathu Shah, disciple of Daud Shah, caste Faqir Chisti, was recorded as the owner of the land. He was succeeded by Sultan Shah. Sultan Shah died in 1913 leaving a will by which he appointed his eldest son Allah Bakhsh as the next Gaddinashin. The land was accordingly mutated in favour of Allah Bakhsh at first; but he got his brothers enterd as co-sharers therein subsequently. The plaintiffs allege that the defendants have neglected the Khankah and that they are not using the income of the land for the purpose of the Khankah and they have therefore instituted the present declaratory suit.

There is no direct evidence as to the dedication of the land to the Khankah, but the learned counsel for the appellants urged that the dedication is proved: (i) by the user of the income of the land; (ii) by its descent from preceptor to disciple for 13 generations, and (iii) by the will of Sultan Shah and the admissions of Allah Bakhsh defendant. As regards the first point, the evidence relied on by the plaintiffs is purely oral and inconclusive. The plaintiffs' witnesses have deposed that the income from the land has been always spent on the Khankah, but they have given no details as to what the income was, how much of it was spent on the Khankah and in what manner. The Khankah has admittedly other sources of income as well. There is a "Muafi" attached to the Khankah fetching an income of about 200 per year and offerings are also received at an annual fair. Some of the witnesses for the defendants no doubt depose that a portion of the income from the land also is spent on the Khankah; but this may be voluntary on the part of the Gaddinashin and could not, by itself, be held to be sufficient in the circumstances to prove dedication.

The next point is important and stress has been laid upon it by the learned counsel for the appellants. It was urged that even if the property was acquired by Sheikh Farid in the beginning, the fact that it has descended from the preceptor to his disciple for so many generations is in itself sufficient to prove the religious character of the property. In support of this contention, the learned counsel for the appellant has referred to *Indar Singh* v. *Fateh Singh* (1), in which it was held that when property has descended from one Granthi to another to the exclusion of natural heirs, it may be presumed that it has been dedicated to religious uses, even if there is no positive evidence of its actual dedication. This principle, which was recently approved by a Division Bench of this Court in *Devigir* v. *Chambamal* (2) would seem to be applicable to the circumstances of this case. In the present instance, we are

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1. A I R 1921 Lah 337=59 I C 734=1 Lah 540.

2. A I R 1933 Lah 154=140 I C 771.

concerned with a Mohammadan Shrine. If the property acquired originally by Sheikh Farid had been treated as private property of a Mahomedan there was no reason why it should not have gone to his natural heirs. But it did not go to his natural heirs, and similarly, it descended to the next 12 Gaddinashins to the exclusion of their natural heirs. From this fact it may be reasonably inferred that the property was treated as dedicated to religious purposes and not as private property of the Gaddinashins.

The above conclusion also receives support from the will of Sultan Shah dated 9th May 1913, in which Sultan Shah described the land as "attached" to the Khankah. It is significant that he left the property in dispute to his eldest son only, whom he nominated as the next Gaddinashin. If he had looked upon it as his private property, he might have been expected to leave it to his four sons in equal shares. We have further the fact that defendant Allah Bakhsh himself described the land in dispute as attached to the Khankah in his application to the Deputy Commissioner, dated 18th May 1914. Allah Bakhsh had to admit that he did describe the land as such in the said application though an attempt was made by him to belittle the effect of this admission (in reply to questions in cross-examination) by saying that he did not know the contents of the application. But the latter statement seems on the face of it unreliable. As pointed out by their Lordships of the Privy Council in *Chandra Kamdar* v. *Narpat Singh* (3) such an admission is sufficient to shift the burden of proving that the property is his, to the party making the admission. It was for Allah Bakhsh to give a satisfactory explanation of his admission and to rebut it; but he has entirely failed to do so.

The learned counsel for the respondents has relied mainly on the history of the foundation of the village in which it is stated that Mian Farid acquired 97 Ghumaons of land, the successive entries in the Revenue Records from 1865, in favour of the Gaddinashins and certain mortgages of the land effected by the Gaddinashins. As to the first point, even assuming that Mian Farid acquired the land, the question still remains whether it has retained its original character. The contention of the appellants that the property must be held to be dedicated to the Khankah is supported not only by the rulings referred to above, but also by the will of Sultan Shah and the admission of Allah Bakhsh, defendant, as shown above. The mere fact that in the Revenue Records the names of the Gaddinashins have been shown in the column of "owner" cannot be attached much significance. It must be remembered that the fact that the incumbent is only a "trustee" and not an owner in the true sense of the terms is not ordinarily of importance for the purposes of the Revenue Records and it is not unusual to find such entries in the case of persons who are mere custodians or trustees: cf. *Court of Wards* v. *Ilahi Bakhsh* (4). Lastly, the evidence as regards transfers seems to be meagre. Only one mortgage-deed of the year 1867 has been produced, whereby the land was mortgaged for Rs. 1,400. There were apparently one or two other mortgages, but the purposes for which these mortgages were effected are not known. These mortgages seem to have been redeemed long ago. It is significant that there have been no sales and the instances of mortgages are also so few. If the property had been looked upon by the incumbents as their personal property with full power of alienation, the transfers would probably have been much more numerous. In *Sheo Ghulam Puri* v. *Shiam Lal* (5), to which reference was made by the learned counsel, there were many transfers ranging over a long period from 1874 to 1922 showing that the property had all along been looked upon as private property. In view of the above findings I would hold that the land in suit is dedicated to the Khankah. The other issues were not pressed. I would accordingly accept this appeal and grant the plaintiffs the declaration prayed for with costs throughout.

Addison, J.—I agree.

R.K. *Appeal accepted.*

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3. (1907) 29 All 184=34 I A 27 (P C).
4. (1913) 40 Cal 297=17 I C 744=40 I A 18=27 P R 1913 (P C).
5. A I R 1928 All 257=107 I C 252=50 All 485.

A. I. R. 1933 Lahore 727

ADDISON, J.

Girdhari Lal—Defendant—Appellant.

v.

Panjab Singh—Plaintiff—Respondent.

Second Appeal No. 1589 of 1932, Decided on 26th April 1933, from decree of Addl. Dist. Judge, Ferozepore, D/- 4th August 1932.

Tort—Defamation—Slander—Calling person outcaste is not actionable without special damage.

G called *P* an outcaste. The persons gathered there were people belonging to the locality who knew that *P* had not been outcasted :

Held : that the language used amounted to mere verbal abuse and was not actionable without proof of special damage : 26 *Cal* 653 (*F B*) and *A I R* 1925 *All* 371, *Rel on.* [P 728 C 2]

Gurcharan Singh—for Appellant.

Maya Das—for Respondent.

Judgment.—There was a complaint against the Secretary of the Small Town Committee of Dharmkot, Ferozepore District, and the Revenue Assistant had come to investigate the matter. The plaintiff and the defendant belonged to different parties, one supporting the Secretary and the other being against him. During the investigation the plaintiff called the defendant an outcaste. The plaintiff brought a criminal complaint against the defendant which was dismissed. He then brought the present suit and on the above finding he has been awarded Rs. 100 damages. Against this decision the defendant has preferred this second appeal. In the English law it is quite clear that such a statement as the above is not actionable without proof of special damages and there is no proof in the present case of such damages. That certain words are not actionable in themselves, but require proof of special damage would appear to be part of the law of this country also, for Art. 24, Limitation Act, provides one year's limitation for compensation for libel from the date the libel is published, while Art. 25 provides one year's limitation for compensation for slander from the date when the words are spoken or, if the words are not actionable in themselves, when the special damage complained of results. In Underhill's Law of Torts, Edn. 11, p. 107, the words, which are actionable in themselves according to English law, are given.

Apart from that it was held by four Judges of the Calcutta High Court in *Girish Chunder Mitter* v. *Jatadhari Sadhu* (1), that the mere use of abusive and insulting language, such as bastard, is not actionable irrespective of any special damage, there being no intention to defame, but merely to use insulting language. In *A. I. R.* 1925 *All.* 371, it was held that mere verbal abuse not tending to lower the man in the estimation of others may not be actionable without special damage. With this view of the law I am in agreement. It is obvious that the persons gathered there were people belonging to the locality who knew that the plaintiff had not been outcasted. The words used therefore must be held to be mere personal abuse or insult. Actions for slander, as was held by the majority of four Judges in the authority referred to above, ought not to be encouraged. Otherwise there will be grave danger of an action being lodged for what has been inadvertently said during an ordinary conversation. In the present case therefore I hold that the language used amounted to mere verbal abuse and was not actionable without proof of special damage. I accept the appeal and dismiss the suit, but leave the parties to bear their own costs.

R.K. *Appeal accepted.*

A. I. R. 1933 Lahore 728

SHADI LAL, C. J. AND ABDUL QADIR, J.

Mrs. D. William Kallan — Petitioner —Appellant.

v.

Mr. K. W. William Kallan and *anothe* —Opposite Parties—Respondents.

First Appeal No. 860 of 1932, Decided on 29th May 1933, from decree of Addl. Dist. Judge, Lahore, D/- 29th March 1932.

(a) Divorce Act (1869), S. 10 — Marriage—Dissolution—Proof of adultery and cruelty is necessary.

In order that a wife can have a marriage dissolved, it is necessary that there should be proof of adultery and cruelty on the part of the husband. [P 730 C 2]

(b) Divorce Act (1869), S. 10 — Marriage—Dissolution — Adultery can be proved by strong circumstautial evidence.

Though adultery can be proved by circumstantial evidence and the Court may presume adultery when it is satisfied that a guilty attachment subsisted between the parties and that opportunity occurred when a guilty intercourse might with ordinary facilities have taken place, unless the circumstantial evidence is sufficiently strong, the inference as to adultery cannot be raised : 61 *I C* 238 and 62 *I C* 782, *Ref.* [P 730 C 1]

(c) Divorce Act (1869), S. 10—Marriage — Dissolution — Legal cruelty — Mere isolated acts of violence are not sufficient to constitute legal cruelty.

To constitute legal cruelty, there must be danger to life, limb or health, bodily or mental or a reasonable apprehension of it. In order to establish cruelty against the husband, the wife must prove more than insolated acts of violence; *AIR* 1928 *Oudh* 114, *Rel on.* [P 730 C 1]

J. W. Fairlie—for Appellant.

Ajit Ram—for Respondents.

Abdul Qadir, J.—This is an appeal against the order of the Additional District Judge, Lahore, dated 29th March 1932, refusing to dissolve the marriage between Mr. K. W. William Kallan and Mrs. D. William Kallan.

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1. (1899) 26 Cal 653=3 C W N 551 (F B).

The parties are Indian Christians and are governed by the Divorce Act, 4 of 1869. They were married at Saharanpur on 18th July 1907. The petition for dissolution of marriage was made by the wife, who alleged adultery coupled with cruelty as the justification for the dissolution prayed for. Mrs. Olive Perry was cited as co-respondent and it was alleged that Mr. William Kallan had committed adultery with her. The learned Additional District Judge held that no legal cruelty was proved and that no adultery subsequent to April 1928, was established. (In the judgment 1927 appears to have been put down instead of 1928 by mistake). He also held adultery between Mr. Kallan and Mrs. Perry, which took place in 1927, appears to have been condoned, but since October 1930, Mrs. Kallan was not responsible for any act which could be treated as a condonation of adultery, if it did occur. On these grounds the petition was dismissed, but the parties were left to bear their own costs. Mrs. Kallan has appealed to this Court and her appeal has been argued by Mr. Fairlie, and Mr. Ajit Ram has argued the case of the respondent.

It appears that there was no trouble between the husband and the wife till 1923. The husband was working as a cook and the wife as a nurse for children. In 1923 she and her husband were employed at Bangalore in one household, and Mrs. Perry was also serving there as a nurse under Mrs. Kallan. In the summer of 1924 the children of Mrs. Kallan went with Mr. Kallan, and Mrs. Perry to Dehra Dun, while Mrs. Kallan remained at Bangalore on duty. She joined them at Dehra Dun, in November 1924, and they all lived together till January 1925, when Mrs. Kallan went to Quetta on service and later on left for England with her mistress. She returned in 1927. In her absence an illegal intimacy developed between her husband and Mrs. Perry and when Mrs. Kallan came back she found that Mrs. Perry was about to give birth to a child and she actually had a child on 14th December 1927. Mrs. Kallan however continued to live with her husband and Mrs. Perry in the same house until June 1928. According to herself they all lived together till June 1928, but according to the version of the other side, Mrs. Perry left the house in April 1928, either of her own accord or on being turned out by Mrs. Kallan.

The fact of Mrs. Kallan having continued to live with her husband and Mrs. Perry upto April or June 1928, coupled with the alleged fact that she paid the expenses of the confinement of Mrs. Perry has been taken to be a condonation of the adultery admittedly committed by Mr. Kallan upto that stage. Mrs. Kallan states that on her return from England in 1927, she protested against the intimacy that existed between her husband and Mrs. Perry, but she left again for Gulmarg on service in June 1928 and after that again went to England in November 1929, returning to India in October 1930. On her return she refused to live with her husband and has not lived with him since. Her petition for dissolution of marriage was lodged on 11th August 1931.

It may be stated at once that there is no direct evidence of adultery between Mr. Kallan and Mrs. Perry, after Mrs. Perry left the house occupied by the Kallans in 1928. The petitioner relies upon certain circumstances, from which she wishes to have it inferred that adulterous connexion between her husband and Mrs. Perry took place after that date. One of these circumstances is that in 1928, Mrs. Perry took a room on rent in a building situated near Bibian Pak Damanan in Lahore and Mr. Kallan used to visit her in that room. The other circumstances are that, subsequent to this, Mr. Kallan went to Mussoorie and Mrs. Perry also went there after sometime and they were both employed in the same household and shifted to Jhelum together with their master and mistress and then came to Lahore. As regards cruelty, Mrs. Kallan alleges that when she was last with her husband in 1928, he used occasionally to beat her and that they had disputes over Mr. Kallan's connexion with Mrs. Perry. As regards condonation, she deposes that though she lived with her husband after discovering that Mrs. Perry had given birth to a child, which was born of him, she did not resume conjugal relations with him and they did not cohabit as husband and wife during the time of her stay with him. On the contrary Mr. Kallan states that he and she lived as husband and wife during that period.

Evidence as to the fact that Mrs. Perry stayed in a room near Bibian Pak Damanan is given by Ram Ditta Mal, (P. W. 5), who says that the buildings belonged to him and he used to pass by the place and he saw Mr. Kallan there on many occasions by day as well as by night. Mr. Fairlie says that there can very rarely be any direct proof of adultery and it must be presumed to have occurred after April or about June 1928, because there was previous illegal attachment between Mr. Kallan and Mrs. Perry and his frequent visits to Mrs. Perry afforded an opportunity to him to commit adultery. He refers to the case of *E. G. Hunter* v. *Emperor* (1), which laid down the principle that adultery could be proved by circumstantial evidence. He also refers to *Captain S. I. Davidson* v. *Norah MacDonald Davidson* (2), where a Division Bench of this Court held that the Court may presume adultery when it is satisfied that a guilty attachment subsisted between the parties and that opportunities occurred when a guilty intercourse might with ordinary facilities have taken place. These authorities, while correctly laying down a principle that can be followed in certain cases where circumstantial evidence is sufficiently strong and conclusive cannot, I am afraid, be very useful, where the material for the required inference is so meagre as in this case.

In *Captain S. I. Davidson* v. *Norah MacDonald Davidson* (2), the circumstances which led to the inference, clearly indicated the existence of adulterous relations between the wife and the co-respondent. Similarly, in *Hunter* v. *Emperor* (1), which was a case under S. 497, Penal Code, it was proved that the accused took up his abode in the house of another man's wife and that he and she slept in the same bed for fifteen days. This, added to the evidence of attachment between them was taken as sufficient to prove adultery. In the present case all that is alleged is that Mr. Kallan used to go and meet Mrs. Perry in the room in which she lived. Bearing in mind the fact that she had given birth to a child, which was his child, these visits alone are, to my mind, insufficient to raise a presumption that adultery did take place on the occasion of any of these visits. Similarly, the fact that Mrs. Perry followed Mr. Kallan to Mussoorie and they both got service in one household for sometime there and after that at Jhelum is also not sufficient to prove adultery between them during that period, though the possibility of it may be easily admitted.

So far as the question of cruelty is concerned, there is, in the first place, no corroboration of the statement of Mrs. Kallan as to any beating given to her by husband. The learned counsel for Mrs. Kallan does not lay any stress on her statement and relies on constructive cruelty. He adds that persistence of a husband in keeping up adulterous connexion with another woman itself amounts to cruelty to the wife on account of the great mental trouble that it causes to her. It is pointed out however by Mr. Ajit Ram that to constitute a legal cruelty there must be danger to life, limb or health, bodily or mental, or a reasonable apprehension of it. He refers to *G. C. Foster* v. *A. B. Foster, A. I. R.* 1928 *Oudh* 114, in which this maxim is adopted as the rule of decision, and in which it is stated that in order to establish a case of cruelty against the husband, the wife must prove more than isolated acts of violence. In my opinion, it must be held that there is no proof whatever of any legal cruelty in the present case and it is obvious that for want of proof of such cruelty this appeal must fail, even if it were possible to infer adultery from the facts relied upon by the appellant. Under the above circumstances the question of condonation does not require discussion. Mr. Fairlie has argued that the appellant has been very badly treated by her husband and the conduct of the husband has been so unfair that it is impossible for the husband and wife to live together any longer, but I do not see what can be done to help her, in spite of the sympathy that one may have with her misfortune, because the law as it stands insists on proof of adultery and cruelty, and here the proof of adultery is insufficient and proof of legal cruelty is absolutely wanting. I would therefore dismiss this appeal, but would leave the parties to bear their own costs.

Shadi Lal, C. J.—I concur.

R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 730

TEK CHAND, J.

Rachhpal Singh—Plaintiff.

v.

Lal Singh and *others*—Defendants.

Civil Ref. No. 39 of 1932, Decided on 29th March 1933, from decree of Asst. Collector, First Grade, Montgomery, D/- 22nd February 1932.

(a) Punjab Tenancy Act (1887), S. 77 (3) K —Suit for accounts between sons of co-lessees—Civil Court has jurisdiction.

A suit for accounts by the son of one co lessee against the other, is not a suit by a "co-sharer in an estate or holding for settlement of accounts" and the suit is therefore not excluded from the

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1. (1920) 61 I C 238.
2. (1921) 62 I C 782.

cognizance of civil Court by any provision contained in S 77. [P 731 C 1, 2]

(b) Punjab Tenancy Act (1887), S. 100—Trial Revenue Court's order unprejudicial—Defect of jurisdiction discovered in second appeal—Trial and not first appellate Court's order should be registered as that of trial civil Court.

Where a suit has been tried very fully by the Assistant Collector and neither party is prejudiced by the trial in his Court owing to defect of jurisdiction but the case went up in appeal and the trial Court's order is modified in appeal and the defect in jurisdiction is found in second appeal, it is better to register the decree of the trial Court as one of Second Class Sub-Judge rather than as one of the District Judge. [P 731 C 2]

Harnam Singh—for Plaintiff.

Badri Das—for Defendants.

Judgment.—This is a reference under S. 100, Punjab Tenancy Act, by the Commissioner, Multan Division, recommending that the decree passed by Khan Ali Mohammad, Assistant Collector, First Grade, Montgomery, in revenue suit No. 19 of 1929, on 22nd February 1932, be registered in the Court of the Subordinate Judge, Second Class, Montgomery. The relevant facts are that the plaintiff's father and the defendant were co-lessees of certain land which belonged to Government and had been allotted to the Fisheries' Department. The plaintiff brought a suit against the defendant for rendition of accounts relating to the income and the expenditure of the land. The suit was brought in the Court of the Assistant Collector, First Grade, Montgomery, and was tentatively valued at Rs. 200 for purposes of jurisdiction and payment of court-fee. The defendant raised various pleas, one of which questioned the jurisdiction of the Revenue Court to try the suit. The Assistant Collector held that the suit was exclusively triable by the Revenue Court under S. 77 (3) (k), Punjab Tenancy Act. On the merits, he decided most of the issues in favour of the plaintiff and passed a decree for Rs. 2,408-8-6, with proportionate costs in his favour against the defendant. The defendant's appeal to the Collector was partially accepted, the decretal amount being reduced to Rs. 1,605-10-8. Both parties preferred further appeals to the Commissioner, who after certain intermediate proceedings which it is not necessary to mention here, was of opinion, that the suit was not triable by Revenue Courts. He has accordingly made a reference to this Court under S. 100, Tenancy Act.

There can be no doubt that Cl. (k), sub-S. (3), S. 77 is not applicable to the case. As stated already the suit is one for accounts by the son of one co-lessee against the other, and not by a "'co-sharer in an estate or holding for settlement of accounts." Both counsel admit that the parties are not "co-sharers in an estate or holding" as defined in the Punjab Land Revenue Act and the suit is therefore not excluded from the cognizance of Civil Courts by any provision contained in S. 77, Punjab Tenancy Act. Mr. Harnam Singh on behalf of the plaintiff asks me to register the appellate decree of the Collector as that of the District Judge and urges that the recommendation of the Collector that the decree of the Assistant Collector be registered as that of the Subordinate Judge, Second Class, should not be accepted Mr. Badri Das on the other hand urges that the suit should be tried de novo. After hearing both counsel I am of opinion that the recommendation made by the Commissioner is eminently reasonable and should be accepted. If I were to accede to the prayer of the plaintiff and register the appellate decree of the Collector as that of the District Judge, his findings of fact will be final and the High Court shall be debarred on second appeal from examining the questions of fact involved in the litigation. This will clearly be prejudicial to the defendant. The suit has been tried very fully by the Assistant Collector and neither party appears to have been prejudiced by the trial in his Court owing to defect of jurisdiction. I accordingly accept the recommendation of the Commissioner and direct that the decree of the Assistant Collector, Montgomery, dated 22nd February 1932, be registered as that of the Subordinate Judge, Second Class, Montgomery. The memorandum of appeal filed by the defendant in the Court of the Collector shall be returned to him for presentation in the Court of the District Judge, Montgomery.

It is agreed by both counsel that in the meantime the execution of the decree of the Subordinate Judge, Second Class, shall not be taken out, provided the defendant furnishes security for payment of the decretal amount in the event of his appeal to the District Judge being dismissed. Having regard to all the circumstances I leave the parties to bear their own costs in the Court.

M.N. *Order accordingly.*

A. I. R. 1933 Lahore 732 (1)

DALIP SINGH, J.

(*Firm*) *Thakar Das-Kalayan Das*—Decree-holders—Appellants.

v.

(*Firm*) *Jagan Nath-Charan Das*—Judgment-debtors—Respondents.

Misc. Second Appeal No. 1309 of 1932, Decided on 18th May 1933, from order of Dist. Judge, Attock, D/- 5th May 1932.

Compromise—Compromise involving future payment — Question whether compromise amounts to adjustment depends on intention of parties and not on question whether terms are to be performed in future or in present —Civil P. C. (1908), O. 23, R. 3.

In the case of a compromise which involves a future payment, the question whether the compromise amounts to an adjustment is not a question of the terms to be performed in the future or the present, but the question is whether parties intended to make the decree no longer executable in whole or in part. If they did so intend, there is an adjustment, if not there is not an adjustment. But in this case, his Lordship was constrained to hold that a compromise involving a future payment is not an adjustment as he was bound to follow *AIR* 1931 *Lah* 608. [P 732 C 1]

Shamair Chand—for Appellants.

Des Raj Mahajan and *M. C. Mahajan*—for Respondents.

Judgment.—I am constrained to hold in view of the clear words used by the Letters Patent Bench in *A. I. R.* 1931 *Lah.* 608, that the compromise which involved a future payment was not an adjustment. I cannot after giving my best attention to the question consider that my decision is right. To me it seems that the question in each case is not a question of terms to be performed in the future or the present, but the question is whether the parties intended to make the decree no longer executable in whole or in part. If they did so intend then there is an adjustment. If not, there is not an adjustment. A contract is not executory because terms have to be performed in the future. However the decision of the Letters Patent Bench binds me and bowing to that decision I hold that the decree is not adjusted by this compromise. I allow a Letters Patent appeal certificate which has been orally asked for by learned counsel for respondent. No order as to costs of this appeal.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 732 (2)

SHADI LAL, C. J. AND BROADWAY, J.

Lachhman Das—Appellant.

v.

Jaimni Das—Respondent.

Letters Patent Appeal No. 143 of 1929, Decided on 16th February 1933, from judgment of Addison, J., passed in Civil Appeal No. 1521 of 1929, D/- 6th November 1929.

Civil P. C. (1908), Sch. 2, Para. 20—Award partitioning joint property including agricultural land by metes and bounds — Civil Court has no jurisdiction to entertain application for filing award and for passing decree in accordance therewith—Punjab Land Revenue Act (17 of 1887), S. 158 (2) (xvii).

Where an award partitioning joint property including agricultural land by metes and bounds is made, the civil Court has no jurisdiction to entertain an application to file the award and pass a decree in accordance therewith: *AIR* 1914 *Lah* 296, *Rel on.* [P 732 C 2]

Har Gopal—for Appellant.

Achhru Ram for *R. C. Manchanda* and *S. C. Manchanda*—for Respondent.

Shadi Lal, C. J.—Two brother, were joint owners of certain moveable property and immovable property, including agricultural land, referred their dispute as to the partition of the joint property to an arbitrator. The arbitrator made an award partitioning the joint property by metes and bounds. One of the brothers made an application to the Court of first instance asking it to file the award in Court and to pass a decree in accordance therewith. The defendant contested the jurisdiction of the Civil Court to entertain the application, and the learned Single Judge, from whose order this appeal under Cl. 10, Letters Patent, has been preferred. held that objection to be valid, and decided that the case was not cognizable by civil Courts.

Now, para. 20, Sch. 2, Civil P. C., lays down that such an application can be entertained only by a Court having jurisdiction over the subject-matter of the award. There can be no doubt that the award in this case divides, inter alia, agricultural land by metes and bounds; and that there was no dispute as to the title between the parties. The case therefore, comes within the ambit of S. 158 (2) (17), Punjab Land Revenue Act, which enacts that a civil Court shall not exercise jurisdiction over any claim for partition of an estate, holding or tenancy, or any question connected with, or arising out of, proceedings for partition, not being a question as to title in any of the property of which partition is sought. In *Fazal Din* v. *Shah Nawaz* (1), it was held that an application to file an agreement for reference to arbitration of a dispute about partition of certain properties including agricultural land could not be entertained by a civil Court, as part of the agreement related to the agricultural land. The principle of that judgment is applicable to the present case.

For the foregoing reasons, I would affirm the judgment of the Single Judge and dismiss the appeal with costs.

Broadway, J.—I concur.

K.S. *Appeal dismissed.*

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1. A I R 1914 Lah 296=22 I C 381.

A. I. R. 1933 Lahore 733

MONROE, J.

Teja Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1517 of 1932, Decided on 19th May 1933, from order of Sess. Judge, Gujranwala, D/- 10th November 1932.

Penal Code (1860), Ss. 326 and 304, Part. 2 —Deceased being aggressor — Accused making ferocious attack without knowledge that wounds inflicted were likely to cause death—Conviction must be under S. 326 and not under S. 304, Part. 2.

Where the deceased and his son were the aggressors who made an attack on the accused and the accused even though his life was not in danger, attacked the deceased with ferocity but had no knowledge that the wounds he inflicted were likely to cause death :

Held : that the conviction must be under S. 326 and not under S. 304, Part. 2. [P 734 C 1]

B. R. Puri—for Appellant.

Abdul Rashid—for the Crown.

Judgment.—The accused has been convicted under S. 304 (2) and S. 326, Penal Code, for having caused the death of Pandit Thakar Das, and for having inflicted grievous injury on Chuni Lal: for the former offence he has been sentenced to ten years' rigorous imprisonment and a fine of Rs. 500, for the latter to five years' rigorous imprisonment and a fine of Rs. 100, the sentences of imprisonment to run concurrently. The accused and the deceased lived in opposite houses in Garjakh, a suburb of Gujranwala and on the evening of 27th June 1932, the accused was on the roof of his house and Mt. Durga Devi, wife of the deceased, was on the roof of her house and objected to the accused's looking in her direction. The accused is a man of 62 of good family with an excellant record and it has not been suggested that if he did look in the direction of the lady, it was with any improper motive: he objected and in my opinion, not without reason, to being taken to task by Mt. Durga Devi and he returned her abuse. On her husband's return she made a complaint to him and hot words were exchanged by the two men: the accused challenged the deceased to go down and settle the matter: the deceased said that a woman had chained the door of his house from the outside and the accused opened it and as the deceased stepped out he stabbed him and also his son, Chuni Lal who followed him.

The learned Sessions Judge came to the conclusion that the story against the accused as told to him had been considerably improved as compared with that originally told to the police and I have given the story as accepted by the Magistrate. A perusal of the evidence has satisfied me that the story told by the prosecution witnesses cannot be accepted as substantially true and it is extremely difficult to discover what part of it ought to be acted on. The deceased was stabbed in the left arm, the left thigh and in the right hand and in the ordinary course none of the wounds would have been serious, but for the fact that the brachial artery was severed: no medical aid was given to him for several hours after his injury with the result that he bled to death. Chuni Lal had two small cuts on his hands and a few slight abrasions caused by friction with a hard substance: the doctor Dr. M. L. Sial, (P. W. 2), states that his life was in danger for some days which I find hard to believe.

The accused put in a written statement before the Sessions Judge in which he admits the scene on the roof: he goes on to state that after he and the deceased had abused one another the deceased invited him to come down to have the dispute settled by neighbours: he went down and was suddenly attacked by the father and son: he gives an account of the fight stating (as is true) that he was injured and he says that Thakar Das snatched his kirpan and had a knife with which he wounded his (the accused's) hands and Chuni Lal tried to strike him with a stick: and that in self-defence having recovered his kirpan he inflicted injuries on his assailants. It is admitted by some of the prosecution witnesses that Chuni Lal had the sheath of the accused's kirpan in his hand at the end of the fight. The accused's statement is supported by one witness Mohammad Din, (D. W. 1). The statement of the accused was put before the two doctors who gave evidence: and each knew of the injuries that the accused, the deceased and Chuni Lal had received. Dr. Sial's opinion that a consideration of the injuries showed that it was a possibility though remote that the injuries to the deceased and Chuni Lal were inflicted by the accused in self-defence. Dr. A. E. Mathews, (P. W. 1), Civil Surgeon at Gujranwala, who conducted the post mortem examination and examined the accused's injuries stated that the version of the accused was more likely than that of the prosecution: he was of the opinion that the accused deliberately inflicted the wounds on the deceased and Chuni Lal. Both doctors thought that timely medical aid would have prevented the death of the deceased.

I strongly dissent from the views on the evidence of Dr. Mathews expressed by the learned Sessions Judge. Dr. Mathews was a witness for the prosecution and had no interest whatever in the result of the case: his opinion is entitled to consideration and respect and when the case for the prosecution as here is largely concocted, it is a relief to find even an opinion in which some confidence may be reposed. I am satisfied from all the circumstances of the case that the deceased and his son were the aggressors and made an attack on the accused, that the accused had no knowledge that the wounds that he inflicted were likely to cause death: but I find that his life was not in danger and that he was not justified in attacking the deceased and Chuni Lal with such ferocity as he did.

Accordingly I allow this appeal and acquit the accused of an offence under S. 304, part 2. I alter his conviction for his attack on the deceased to a conviction under S. 326: I confirm the conviction for the assault on Chuni Lal. I consider that the sentences awarded by the learned Sessions Judge are out of all proportion to the magnitude of the offence: and I see no reason for awarding compensation to the woman who so indiscretely caused the trouble and Chuni Lal who is at least as blameworthy as the accused. I impose a sentence in respect of each offence of one year's rigorous imprisonment, the sentences to run concurrently and if the term of three months' solitary imprisonment imposed by the Sessions Judge had been undergone by the accused the sentence of one year's rigorous imprisonment will be reduced to ten months. I remit the fines.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 734

ADDISON, J.

Sondu and *others* — Convicts — Petitioners.

v.

Rama—Complainant—Opposite Party.

Criminal Revn. No. 1235 of 1932, Decided on 22nd December 1932.

Penal Code (1860), S. 447—Tenant leaving property—Owner's entry on land and taking possession is not offence under S. 447.

The complainant who was a tenant and living in the house of the accused left the premises when the house fell down. The accused entered upon the vacant land:

Held: that he was entitled to do so as owner of the land and that no offence was committed by him. [P 735 C 2]

Bishan Narain—for Petitioners.

Duni Chand Gupta — for Opposite Party.

Facts.—Rama, the complainant alleged that he intended to build on a piece of land and that the accused had interfered and prevented him from building and had taken forcible possession during the night. The lower Court convicted the accused and sentenced them to pay a fine as above, and further ordered that the possession be restored to the complainant through the police. The accused filed a revision and in the grounds stated: (1) that the complainant was not in actual and physical possession of the property and therefore S. 447 did not apply; (2) that procedure adopted by the lower Court in the trial of the case and framing of the charge was defective; (3) that the lower Court erred in examining four witnesses as Court witnesses after the parties had closed their case without giving the accused an apportunity to cross-examine the witnesses or rebut their evidence; and (4) that the lower Court gave no finding as to the intent with which, according to the Court's finding, the accused committed trespass and the judgment therefore ought to be set aside, and lastly, that the order of restoration of possession to the complainant was contrary to law.

Grounds.—It is admitted by the complainant himself that the land in dispute belongs to the accused. He alleged that his father and grand-father used to occupy the land in dispute and that his grand-father had built a house on it. He further alleged that this house fell down about 2 or 3 years ago and that he then left the place and began to live with his cousin. On 18th January 1932 he entered into possession and while he was in possession the accused viz., the owners of the land stopped him from building the house. The accused on the other side produced two rent deeds showing that Ganga Ram the grand-father of the present complainant was a tenant of the ancestors of the accused. One deed is dated 1st September 1866 and the other 5th June 1877. As both of them are more than 30 years old, they are admissible in evidence without further proof. The oral evidence is also to the same effect. Two out of four Court witnesses, viz., Chaudhri Bharat Singh and Mahbub stated that the last occupant of the house was Hardewa, father of the complainant, and that for the last 15 to 20 years the land remained a vacant site and that they had not seen the complainant in possession. In view of these two old rent-deeds and oral evidence it is clear that Ganga Ram was the tenant of the accused and his possession was permissive.

On the house falling down about 3 years ago the real owners had the right to enter upon the land and take possession of it. At the time the present complainant was not in possession. Admitting the allegation of the complainant to be correct it amounts to this that the complainant 2 or 3 years after the house fell down, wanted to enter upon the land on the basis of his old right of tenancy. This he could not do. Once the tenant had left the property and it was lying vacant the real owners had a right to enter upon the land and take possession. The tenant could not again come back after 3 years and take possession of the land. The trial Court examined two witnesses on behalf of the complainant and three witnesses on behalf of the accused, but not being satisfied with this evidence summoned four Court witnesses. The evidence of Bunyad Hussain the Secretary of the Notified Area Committee may be ignored, but out of the remaining three wiitnesses, two of them supported the accused that the accused were in possession of this land. The same can also be inferred from the judgment of a Civil Court dated 1st April 1931, produced by the accused.

It appears that the Municipal Committee of Shahdara challenged the ownership of the accused over this land and the accused filed a declaratory suit to the effect that they were owners in possession. In this they were successful against the Committee. Even if it be assumed that the complainant had taken posssession of the land, in my opinion, this possession was of an illegal character. Once the house fell down and the complainant left the premises, the possession of the vacant site was that of the owner. In any case there was no criminal intention in the mind of the accused. They were simply claiming the possession in their own right. No permanant tenancy was pleaded on behalf of the complainant. I am therefore of opinion that on the facts of this case the accused committed no offence and that the judgment of the lower Court is wrong. Accordingly I forward this record to the High Court with the recommendation that the judgment of the lower Court be set aside and possession of the. land restored to the accused.

Note.—The fine has already been paid.

Order.—For reasons given by the Additional District Magistrate, I accept the revision, set aside the convictions and sentences, as well as the order giving possession to the complainant. The fines, if paid, will be refunded and possession will be restored to the accused.

K.S. *Revision accepted.*

A. I. R. 1933 Lahore 735

DALIP SINGH, J.

Fakir Chand—Defendant—Appellant.

v.

Khushi Ram—Plaintiff—Respondent.

Second Appeal No. 1767 of 1932, Decided on 9th May 1933.

Tort—Malicious prosecution — Vexatious prosecution for resistance to execution—Subsequent unconditional withdrawal of application—Action for damages lies.

The defendant brought an application against plaintiff to have the latter prosecuted for resistance to execution by the defendant, in execution of a decree against plaintiff's brother. The proceedings came to a close on the parties making statements Plaintiff stated that he had no objection to the attachment of his brother's property and defendant gave up the proceedings regarding the alleged resistance offered by plaintiff Subsequently plaintiff brought a suit for damages for malicious prosecution. It was found that the defendant had acted maliciously and without reasonable and probable cause :

Held : that the prosecution which was vexatious and not bona fide implied malice, that there was an unconditional withdrawal by the defendant and that an action for damages for malicious prosecution did lie : *AIR* 1922 *Cal* 145, *Rel on.*

[P 736 C 2]

Achhru Ram—for Appellant.

Fakir Chand and *Badri Das*—for Respondent.

Judgment.—Fakir Chand, defendant, in this case had obtained a decree against one Hem Raj. In execution of that decree Fakir Chand, defendant, pointed out a shop occupied by Khushi Ram, brother of Hem Raj, for purposes of attachment. Khushi Ram stated that the shop was his own and that any attachment of the said shop would be illegal. The bailiff reported that Khushi Ram had no objection to the attachment of Hem Raj's property, but objected to the attachment of his own property. Fakir Chand, defendant, applied to the Court that Khushi Ram had offered resistance to the bailiff and he urged that Khushi Ram and Hem Raj were members of the same joint Hindu family and that the two shops were joint. The Court issued process on Khushi Ram, and proceedings continued for sometime and then, according to the evidence of Lala Dhirt Ram, counsel for Khushi Ram in that case, at the suggestion of the Court, the parties made statements. Khushi Ram stated that he had no objection to the attachment of Hem Raj's shop situate in Imliwala Bazar. Defendant, Fakir Chand, stated that he gave up the proceedings regarding the alleged resistance offered by Khushi Ram. Thereafter Khushi Ram brought the present suit against the defendant, Fakir Chand, for Rs. 200 by way of damages for malicious prosecution and expenses incurred in defending the same.

The trial Court came to the conclusion that the plaintiff had no locus standi and he could not bring a suit for damages. It also held that no malice was proved and that therefore the plaintiff had no case. It accordingly dismissed the suit. On appeal the learned District Judge held that the suit was one for damages for a vexatious claim and not for malicious prosecution, but that the defendant had acted maliciously and without reasonable and probable cause and that the statement of Lala Dhirt Ram, (P. W. 4), did not mean that Khushi Ram had agreed not to bring an action for damages. He therefore accepted the appeal and gave a decree for Rs. 85 damages to the plaintiff with proportionate costs.

On second appeal it is contended, firstly, that the application made by the defendant, Fakir Chand, did not by itself constitute an actionable wrong. The Court as a matter of fact made no complaint and there was no such damage to person, (i. e. reputation) or property, as to constitute legal damage in the eye of the law or which could not be compensated for by costs. Certain rulings were cited holding that a civil action does not constitute an actionable cause for damages in a suit. Next, it was contended that, even if an action lay, whether for malicious prosecution or for abuse of judicial process, it is necessary for that proceeding to have terminated in favour of the plaintiff in the present suit and the proceedings in the previous application had not terminated in favour of the plaintiff, either by judicial decision or by unconditional withdrawal, but had terminated in a compromise, and that therefore the foundation of the action in the present case did not arise. In reply the learned counsel for the respondent contends that the suit was one for damages for malicious prosecution and that the word "prosecution" is wider than the sense in which it is usually employed in the Criminal Procedure Code and *Naraindra Nath Dey* v. *Jotish Chandra* (1) was cited in support of the proposition. That case is almost on all fours with the present case and, agreeing with it, I would hold that an action did lie in the circumstances of this case. The learned District Judge found as a fact that the prosecution was vexatious and was not bona fide. This, I think, clearly implies malice.

The only point therefore necessary to consider is whether the application terminated by way of compromise or in substance was an unconditional withdrawal on the part of the defendant. After considering the matter and the evidence of Lala Dhirt Ram I consider that on the whole the District Judge is right in coming to the conclusion that in substance there was an unconditional withdrawal by the present defendant of the application to have the plaintiff prosecuted for illegal resistance to execution. Khushi Ram's position, as is clear from the bailiff's report, remained the same throughout. He never objected to the property of Hem Raj being attached. He had maintained that his shop was separate. In the so-called compromise be re-literated this position, and the decree-holder, the present defendant, then stated that he withdrew the proceedings. I therefore consider that the learned District Judge was correct and I dismiss this appeal with costs.

K.S. *Appeal dismissed.*

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1. **A I R 1922 Cal 145=67 I C 705=49 Cal 1035.**

A. I. R. 1933 Lahore 737

DALIP SINGH, J.

Jaswant Ram—Plaintiff — Appellant.

v.

Jassu Ram and *others*—Defendants—Respondents.

Second Appeal No. 1851 of 1932, Decided on 16th May 1933, from decree of Dist. Judge, Multan, D/- 17th August 1932.

(a) Hindu Law — Alienation — Manager—Legal necessity—Joint family property mortgaged—Subsequent sale to mortgagee--Alienor or his legal representative cannot challenge validity of mortgage on ground of legal necessity by considering that only equity of redemption had been sold and that proportion should be judged after leaving out amount due on mortgage.

Where a manager of a joint Hindu family mortgages the property and the same is subsequently sold to the mortgagee partly in lieu of mortgage debt, the alienor or his legal representative cannot challenge the validity of the mortgage on ground of legal necessity by inviting the Court to consider that only equity of redemption had been sold and that proportion of consideration for legal necessity should be judged after leaving out amount due on mortgage. The mortgage is either good or not good, and it cannot first of all be held to be bad and then held to form a good part of the consideration for the sale. [P 738 C 1]

(b) Hindu Law — Alienation — Manager — Alienation accepted by members of family—Third persons cannot challenge it.

An alienation by karta of a joint Hindu family is not void but only voidable at the instance of the members of the family. If they accept the alienation no third party has any right to challenge it. [P 738 C 1]

M. L. Puri and *S. L. Puri*—for Appellant.

Badri Das—for Respondents.

Judgment.—On 22nd April 1929, Sham Das, as manager of a joint Hindu family, consisting of himself and his two minor brothers, executed a deed of mortgage for Rs. 825 in favour of the plaintiff. On 14th December 1929, Sham Das executed a deed of exchange in respect of the house under mortgage. The price of the house was fixed at Rs. 2,000 and the house to be given in exchange to Sham Das Rs. 1,500 was made up of Rs. 956-4-0 was priced at Rs. 500. The remaining principal and interest due on the previous mortgage, Rs. 14 due as rent, as the previous mortgage was with possession, Rs. 464 due on a bahi account to the plaintiff, and Rs. 65-12-0 to be paid before the sub-registrar. The defendant, Sham Das, refused to register the deed when presented for registration and the plaintiff was obliged to have the deed compulsorily registered, which he did sometime in April 1930. In the meantime on 23rd December 1929 Sham Das and his mother, Menghi Bai, sold the same house to defendant, Jassu Mal, and delivered possession to him in consideration of Rs. 2,500, Rs. 956 were left with the vendee for payment to the plaintiff on the prior mortgage, Rs. 500 were paid before the sub-registrar and it was alleged that about Rs. 900 had been paid at home. The present plaintiff, after having his deed compulsorily registered, brought the present suit for possession of the house which had been sold to him. He made the alienors and Jassu Ram, the second vendee, parties to the suit. Various defences were raised which need not now concern us, but the trial Court decreed the suit holding that Sham Das was the karta of the joint Hindu family, that the deed in favour of the plaintiff had priority over the deed in favour of Jassu Ram and that there was sufficient necessity proved for the sale to the plaintiff.

The alienors did not appeal from this decree, but Jassu Ram, the second vendee, appealed to the learned District Judge, who accepted the appeal, holding that the transaction as between the alienors and the plaintiff was not a fair one though this plea had not been raised previously at all and also that the necessity for the alienation to the plaintiff had not been proved. The plaintiff has come in second appeal, and it is urged on his behalf, first, that Jassu Ram could not raise the question of necessity at all, which was a matter wholly between plaintiff and the alienors, and secondly, that, even if he could do so, so far as the mortgage was concerned, Jassu Ram by withholding that amount had acknowledged the validity of the mortgage and therefore could not challenge its necessity. That if the said mortgage was admitted then obviously there was necessity for the sale and the small amount which the trial Court had held to be not proved for necessity was not sufficient to set aside the sale. In reply Jassu Ram contended that he could raise the question of necessity, as he stood in the shoes of the alienors, that he could also challenge the validity of the prior mortgage because qua the plaintiff it was an alienation to the plaintiff himself but qua Jassu Ram it was a debt due to a third party and that the proper way of judging the amount which was not held proved for necessity was to consider that only the equity of redemption had been sold and the proportion should be judged after leaving out the amount due on the mortgage. The last argument seems to me to involve a contradiction. The mortgage is either good or not good and it cannot, first of all, be held to be bad and then held to form a good part of the consideration for the sale. It seems to me very doubtful whether Jassu Ram could raise any question of necessity. An alienation by a karta of a joint Hindu family is not void but only voidable at the instance of the members of the family. If they accept the alienation no third party has any right to challenge it. However at any rate it seems to me clear that Jassu Ram by withholding the amount of the mortgage furnished the best of all proofs that the prior mortgage was for necessity and was valid, and if this is so, as the mortgage was accumlating interest, there was a necessity for the previous alienation to the plaintiff. Moreover this mortgage was not contested before the trial Judge at all.

It is unnecessary to enter into the question of proportion once the necessity for the sale is proved. I may say however that, though possibly certain items were fictitiously entered to swell the amount of consideration, I think that the greater portion of the consideration was actually paid or was due for previous debts. I therefore accept the appeal, set aside the order of the District Judge and give the plaintiff a decree for possession of the house on condition of his paying the alienors Rs. 65-12-0 as agreed to, and delivering possession of the house priced at Rs. 500. The costs of this appeal and the appeal before the District Judge will be paid by Jassu Ram to the plaintiff-appellant.

V.B. *Appeal allowed.*

A. I. R. 1933 Lahore 738

BHIDE, J.

Rai Singh and *another*—Defendants—Appellants.

v.

Man Singh and *others* — Plaintiffs—Respondents.

Second Appeal No. 1837 of 1932, Decided on 8th May 1933, from decree of Dist. Judge, Delhi, D/- 26th July 1932.

(a) Civil P. C. (1908), S. 11 — Might and ought—Res judicata is not confined to S. 11—Revenue Court having exclusive jurisdiction—Finding operates as res judicata in civil Court.

The principle of res judicata is not confined to the provisions of S. 11 and is applicable when the finding of the Revenue Court is a matter in which it had exclusive jurisdiction. [P 739 C 2]

P and *S* were indebted to *M* and entered into a settlement with him by virtue of which they agreed to execute a bond for Rs. 1,000 in favour of *M* and also got some land mutated in favour of one *R*. Mutation was sanctioned by the revenue authorities in favour of *R*, although according to the allegations of *P* and *S* the transaction was benami. *R* instituted a suit in the Revenue Court for the ejectment of *P* and *S* as his tenants and obtained a decree against them. *P* and *S* instituted a suit for a declaration that the mortgage in favour of *R* was a benami transaction and that the decree for ejectment obtained should not affect their rights:

Held: that it was not open to *P* and *S* to dispute the position of *R* as his landlord and as a result he could not also question the validity of the mortgage. [P 740 C 1]

(b) Practice—New point.

A point not taken up in the grounds of appeal but patent on the record was allowed to be argued. [P 739 C 1]

Shamair Chand and *M. C. Sud*—for Appellants.

S. C. Manchanda—for Respondents.

Judgment.—The material facts giving rise to this second appeal may be briefly stated as follows:

Phul Singh and his brother, Chandgi, were indebted to Piare Lal and Prabhu Lal, Mahajans, and entered into a settlement with them by virtue of which they agreed to execute a bond for Rs. 1,000 in their favour and also got some land mutated in favour of one Sheo Singh. The mutation was reported to be as that of a mortgage for a sum of Rs. 15,000, but, according to the allegations of the plaintiff, the mortgage was fictitious and was really to be intended to be for the benefit of the Mahajans. The revenue authorities refused to sanction the mutation in connection with the mortgage on the ground that the transaction was intended to defeat the provisions of the Punjab Alienation of Land Act. The mortgagee took no steps to enforce his rights. In 1923 the Mahajans obtained a decree against Phul Singh and Chandgi for the sum of Rs. 1,900 and the same land, which was reported as mortgaged in favour of Sheo Singh in 1918, was again mortgaged in favour of Ranpat, son of Sheo Singh. On this occesion, mutation was sanctioned by the revenue authorities in favour of Ranpat, although according to the allegations of the plaintiff this transaction was also benami. In 1930 Ranpat transferred his mortgagee rights to Rai Singh and Dhan Singh. These men instituted a suit in the Revenue Court for the ejectment of Phul Singh and Chandgi as their tenants and obtained a decree against them. Subsequently, Chandgi transferred his rights in the land to Phul Singh, and Phul Singh instituted the present suit for a declaration that the mortgage in favour of Ranpat was a benami transaction and was void inasmuch as it was intended for the benefit of the Mahajans, that the transfer of mortgagee rights by Ranpat conferred no title on Rai Singh and Dhan Singh in the circumstances and that the decree for ejectment obtained against the plaintiff should also not affect his rights.

The suit was dismissed by the trial Court but on appeal the learned District Judge held that the transaction of mortgage in favour of Ranpat was proved to be benami and invalid and granted the plaintiff a declaration to that effect. At the same time he made a reference to the Deputy Commissioner under S. 9 (3), Punjab Alienation of Land Act, for revision of the terms of the mortgage. From this decision Rai Singh and Dhan Singh have preferred a second appeal, three points having been raised on their behalf, viz: (1) That the finding of the learned District Judge that the mortgage in favour of Ranpat was benami was erroneous. (2) That the appellants were protected by virtue of the principle laid down in S. 41, T. P. Act, inasmuch as they purchased the mortgagee rights in good faith from Ranpat who held ostensibly a good title. (3) That the question of the validity of the mortgage must be treated as res judicata inasmuch as the relationship of landlord and tenant was not disputed in the ejectment suit in the Revenue Court. With regard to the first point, the finding in question seems to me to be clearly a finding of fact and there are no good grounds for interfering in second appeal.

The second point also cannot help the appellants inasmuch as the learned District Judge has found that the appellants had not proved that they were bona fide transferees for good consideration, and this finding again being one of fact, is final for the purpose of this appeal. The third point however appears to be important. This point was not taken up in the grounds of appeal, but, it seems to me to be patent on the record and I therefore allowed it to be argued. The fact that the appellants obtained a decree for the ejectment of the plaintiff in a Revenue Court is stated in the plaint itself and the plaintiff has sought for a declaration that the decree should not affect his rights. The decree is based on the assumption that the relationship of landlord and tenant subsisted between the parties. If this relationship were disputed and was found not to subsist, the Revenue Court could not have granted any decree for ejectment at all. But this relationship was apparently not disputed in the Revenue Court. This relationship in its turn was founded on the appellants' position as mortgagees. The appellants could claim to be landlords of Phul Singh and Chandgi only on the strength of the mortgagee rights in the land, which they had purchased from Ranpat. It was open to Phul Singh and Chandgi to plead in the Revenue Court that the mortgage in favour of Ranpat was benami and was void inasmuch as it was intended to defeat the provisions of the Punjab Alienation of Land Act; but this plea was, for some reason or other, not taken. The question for consideration in these circumstances is whether it is now open to Phul Singh to take up that plea in the present suit.

The contention on behalf of the appellants is that Phul Singh, having failed to take the plea in the Revenue Court, the matter must be taken to be decided against him in the Revenue Court, and the finding of the Revenue Court in the suit for ejectment in which it had exclusive jurisdiction operated as res judicata. In support of this contention reliance has been placed on *A. I. R.* 1932 *Oudh* 199 (*F. B.*); *A. I. R.* 1932 *Lah.* 623 and *Harnath Singh* v. *Sri Ram* (1). The learned counsel for the respondents urged that the present suit not being cognizable by the Revenue Court which tried the suit for ejectment, the provisions of S. 11, Civil P. C., cannot apply. But it has been held by their Lordships of the Privy Council that the principle of res judicata is not confined to the provisions of S. 11, Civil P. C: cf. *Ram Kirpal Sukul* v. *Mt. Rupkuari* (2), *Hook* v. *Administrator General of Bengal* (3) and *Sahib Zadi Begam* v. *Muhammad Umar* (4). In view of the authorities cited

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1. A I R 1926 Oudh 348=93 I C 874.
2. (1883) 6 All 269=11 I A 37 (P C).
3. A I R 1921 P C 11=60 I C 681=48 I A 187=48 Cal 499 (P C).
4. A I R 1926 Lah 608=96 I C 1002=8 Lah 15'

above I am of opinion that the principle is applicable, to the circumstances of the present case and the finding of the Revenue Court in a matter in which it had exclusive jurisdiction operates as res judicata. I therefore hold that it was not open to the plaintiffs to dispute the position of the appellants as his landlords, and as a result he cannot also question the validity of the mortgage in favour of the appellants in the present case. The plaintiff's suit must consequently fail. I accordingly accept the appeal and dismiss the plaintiff's suit. But in view of all the circumstances I leave the parties to bear their costs throughout.

R.K. *Appeal accepted.*

A. I. R. 1933 Lahore 740

JAI LAL AND ABDUL RASHID, JJ.

Mt. Ishar Kaur—Plaintiff—Appellant.

v.

Amar Nath and *others*—Defendants—Respondents.

Second Appeal No. 2787 of 1928, Decided on 1st June 1933.

Succession Act (1925), Ss. 211 and 307 — Whole of self-acquired property bequeathed in favour of widow constituting her residuary legatee—She is entitled as executrix to recover debts due to deceased.

A person bequeathed the whole of his self-acquired property to his wife subject to certain bequests in favour of his children. The widow was granted probate. She was the residuary legatee under the will and as the executrix sued to recover debts due to her deceased husband:

Held: that she as executrix was his legal representative for all purposes, that all the property vested in her and that in the absence of any restriction imposed upon her by the will she was entitled to recover the debts due to her deceased husband. [P 740 C 2]

J. L. Kapur—for Appellant.

Jai Lal, J.—The dispute in the present appeal relates to the amount due to Kirpa Ram as mortgagee from Abdulla. Kirpa Ram died leaving a will dated 25th April 1924, whereby he bequeathed the whole of his estate to his widow Mt. Ishar Kaur subject to certain bequests mentioned in that will in favour of his children by Mt. Ishar Kaur. He stated in the will that the whole property bequeathed by him was his self-acquired property. Probate of this will was granted to Mt. Ishar Kaur. It appears that subsequently there was a dispute between Mt. Ishar Kaur and Amar Nath, son of Kirpa Ram, by another wife, who claimed that the property was ancestral and the will was invalid. A compromise was effected and Rs. 4,000 were given to Amar Nath who relinquished his rights, if any, in the estate of his father in favour of his step-mother and her sons, and the amount in dispute in this appeal was expressly mutated in the name of Jiwan Lal, a brother of Amar Nath. The appellant, Mt. Ishar Kaur, instituted a suit that she was entitled to realise the rent of the mortgage money from Abdulla and her right was denied by Amar Nath. The trial Judge gave her a decree, but the District Judge on appeal dismissed the suit holding that the will in favour of Mt. Ishar Kaur did not confer on her any powers to collect the amount in dispute. He in fact proceeded to hold that the will was silent as to her power to sell or alienate any property or to collect any debts.

As I have already stated, the will constituted Mt. Ishar Kaur the residuary legatee of her husband Kirpa Ram and a probate of the will was granted to her. Under S. 211, Succession Act, an executor of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. In the case of Hindus, Mahomedans, Buddhists, Sikhs or Jains or any exempted person, however an exemption is made with regard to the property of the deceased which would otherwise have passed by survivorship to some other person. It having been found in this case that the property in dispute was self-acquired of Kirpa Ram the exemption does not come into operation. Mt. Ishar Kaur therefore as an executrix is the legal representative of Kirpa Ram for all purposes and the whole of his property vests in her as such. Under S. 307 of the same Act an executor in the case of a Hindu, Mahomedan, Buddhist, Sikh or Jain or an exempted person has the power to dispose of the property of the deceased subject to any restriction which may be imposed in this behalf by the will unless the Court has granted him the permission notwithstanding the restriction. There are no restrictions imposed by the will in this case, therefore Mt. Ishar Kaur is entitled to recover the debts due to the deceased Kirpa Ram as an executrix. Her suit therefore should have been decreed. I would therefore accept this appeal and, setting aside the decree of the District Judge, restore that of the trial Judge with costs throughout.

Abdul Rashid, J.—I agree.

K.S. *Appeal accepted.*

* A. I. R. 1933 Lahore 741

JAI LAL AND ABDUL RASHID, JJ.

Dial Singh and *others*—Defendants—Appellants.

v.

Davindar Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 3168 of 1927, Decided on 10th May 1933, from decree of Addl. Dist. Judge, Lyallpur, D/- 30th August 1927.

(a) Mortgage — Possession not given to mortgagee as stipulated in mortgage-deed—Suit for possession by mortgagee — One of mortgagors residing out of British India for considerable time between date of suit and date of mortgage—Such period can be deducted for purposes of limitation as against such mortgagor—Limitation Act (1908), S. 13.

Where possession is not given to the mortgagee as stipulated in the mortgage-deed and one of the mortgagors resides out of British India for a considerable period between the date of mortgage and date of suit, such period can be deducted in computing limitation for a suit for possession by the mortgagee as against such mortgagor. [P 741 C 2]

*** (b) Limitation Act (1908), S. 20—Cheque signed by debtor and accepted by creditor duly honoured — Payment is sufficient for purposes of S. 20.**

Where a cheque signed by the debtor is accepted by the creditor and is subsequently honoured for the purpose of S. 20 the payment must be deemed to have been made by the debtor and it must further be deemed to appear in his handwriting by virtue of his signature and writing on the cheque: 42 *Cal* 1043; *A I R* 1931 *Sind* 28 and *AIR* 1930 *Pat* 372, *Rel on*; 1 *P R* 1897; 9 *Mad* 271 and 19 *All* 307, *Diss from.* [P 742 C 1]

(c) Limitation Act (1908), S. 20—Possession stipulated to be given to mortgagee and mortgagee entitled to appropriate rent towards interest— Mortgagee not taking possession under mortgage-deed—Mere receipt of rent from tenants of mortgaged property by mortgagee does not save limitation.

Where in a mortgage-deed possession is stipulated to be given to the mortgagee and the mortgagee is entitled to credit towards interest any rent realised from the mortgaged property, but the mortgagee is not given possession, mere receipt of rent by the mortgagee from tenants of the mortgaged property does not save limitation under S. 20 as the condition as to possession under the mortgage-deed is not satisfied and as no interest can be held to have been paid by the mortgagors to the mortgagee. [P 742 C 2]

Badri Das—for Appellants.

Mehr Chand Mahajan — for Respondents.

Jai Lal, J.—This second appeal is by the defendants, mortgagors, eight in number. A decree for possession of mortgaged property has been passed against them. The mortgage was with possession and it was stipulated that if any rent be realized by the mortgagee the same should be credited in payment of the interest and the excess or deficiency in the balance shall be adjusted. The learned Judge has found that possession of the mortgaged property was not given at the time of the mortgage to the mortgagee as stipulated in the mortgage-deed of 5th October 1904. That being so, and in the absence of a different date being mentioned in the mortgage-deed for passing of possession, the limitation against the mortgagee must be deemed to run from 5th October 1904. The suit was instituted on 16th March 1923, and the only question raised on this second appeal is that the suit is barred by time. The respondent, on the other hand, claims exemption from the ordinary period of limitation on three grounds: (1) that Tirath Singh, one of the defendants, resided outside British India for a considerable time and if that time is deducted from the time that has elapsed between the date of the deed and the date of the suit, the plaintiffs' suit would be within time, that is to say, the defendant Tirath Singh has resided in British India for less than twelve years. The District Judge has found that this assertion of the plaintiff is correct that Tirath Singh has resided in British Inida for less than twelve years between the date of the mortgage and the suit. This is a finding of fact which cannot be attacked on this second appeal. I would accordingly hold that the suit is not barred as against Tirath Singh.

The second ground for exemption claimed by the plaintiffs is that a cheque for Rs. 1,400, was given by Chatar Singh, father of Kesar Singh, one of the appellants, and was accepted by the mortgagee and duly cashed in the Bank. It is claimed that the payment of Rs. 1,400 by means of the cheque must be deemed to be a payment of principal to the creditor which appears in the hand-writing of the person making the same as contemplated by S. 20, Limitation Act. The learned District Judge following ***Bachattar Singh* v. *Jagannath*** (1), ***Mackenzie* v. *Thiruvengadathan*** (2) and ***Ramchandar* v. *Chandi Parshad*** (3), has held that the payment of the amount by means of a cheque does not in law amount to payment of money

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1. (1897) 1 P R 1897.
2. (1886) 9 Mad 271.
3. (1897) 19 All 307=(1897) A W N 48.

which appears in the hand-writing of the person making the same. The authorities relied upon by the District Judge support his view, but the discussion in them is meagre and the view taken in these cases is opposed to a number of subsequent authorities, e. g., in *Kedar Nath* v. *Dinobandhu Sah* (4) and *Chotirmal Tirith Das* v. *Rupchand Raghunath Das* (5), and in *A. I. R.* 1930 *Pat.* 372. This view was taken after a discussion of cases relied upon by the appellants. It was held in those cases that where a cheque is accepted by a creditor and is subsequently honoured, for the purpose of S. 20 the payment must be deemed to have been made by the debtor and it must further be deemed to appear in his hand-writing by virtue of his signature and writing on the cheque. In my opinion this is the correct view of the law on the subject and I would hold that the payment Rs. 1,400 saves limitation as against Chatar Singh and consequently against his son Kesar Singh.

The third ground on which exemption from limitation has been claimed and has been allowed by the District Judge as against all the defendants is the payment of interest as such. The view of the learned Judge is that as it is provided in the mortgage-deed that the creditor is entitled to appropriate any payment first towards interest and then towards principal, and as in this case the payments made by the debtors were appropriated by the creditor in that manner, S. 20, Limitation Act, applies. This view of the District Judge appears to me to be erroneous. Mr. Mehr Chand on behalf of the respondents claims that the conclusion of the learned Judge on this question must be taken as a finding of fact. That however is not so, because the District Judge has found that possession of the mortgaged property was never given to the mortgagee by virtue of the mortgage-deed. It is no doubt provided in the mortgage-deed that any amount realised by the mortgagee as rent of the property shall be first credited toward interest, but that the condition would have come into operation only if the mortgagee had taken possession of the mortgaged property under the mortgage-deed. A witness produced by the plaintiffs stated that he had paid some moneys to the credit of the plaintiffs' account on behalf of the mortgagors and these moneys he had recovered from the tenants of the mortgaged property. The statement as it stands is vague, but even if it be assumed that he had recovered the rents from the tenants, then it must be held that he recovered them at a time when the property was in possession of the mortgagors. Therefore the condition in the mortgage-deed as to the appropriation of rent towards interest did not come into operation. The District Judge has held that the mortgagee had not been in possession of the mortgaged property and the relationship of landlord and tenant did not come into existence either between the mortgagee and the mortgagors or between the mortgagee and the tenants of the mortgagors. This is a finding of fact which operates against the respondents. In my view therefore no interest as such can be held to have been paid by the mortgagors to the mortgagee and therefore the latter is entitled to claim exemption on this ground.

The result is that this appeal must be accepted and the decree of the District Judge modified to this extent that there will be a decree for possession of a one-fourth share in the property in suit in favour of the mortgagees against Tirath Singh and Kesar Singh, defendants, with proportionate costs. The suit as against the other defendants shall be dismissed. There will be no order as to costs in favour of the defendants as against whom the suit has been dismissed.

Abdul Rashid, J.—I agree.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 742

TEK CHAND AND COLDSTREAM, JJ.

Punjab National Bank, Ltd., Delhi—Defendant—Appellant.

v.

Nanneh Mal-Janki Das and *another*—Plaintiffs—Respondents.

First Appeal No. 2554 of 1929, Decided on 15th March 1933, from decree of Senior Sub-Judge, Delhi, D/- 21st August 1929.

Interest—Fixed deposit by joint family firm—Deposit for six months—Interest to cease—Deposit receipt to be presented duly endorsed to prevent loss of interest—Disputes between members of firm—Notice by Bank to return receipt duly endorsed not replied — Suit by member of firm for deposit amount with interest—Plaintiff held not entitled to interest either on equitable grounds or by way of damages.

On 17th April 1926 *B* acting as manager of the joint family firm placed a lakh of rupees in fixed deposit in the Bank. The deposit was for six

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4. (1915) 42 Cal 1043=31 I C 626.
5. A I R 1931 Sind 28=129 I C 909=25 S L R 360.

months and to carry interest at 6 per cent and was subject to six months' notice of withdrawal. Such notice was given at the time of deposit and this was noted on the receipt given by the Bank to *B*, on which it also recorded that the deposit was repayable on 17th October 1926 after which date it would cease to carry interest. A memorandum printed on the receipt stated that the receipt must be presented, endorsed by the depositor, before any payment could be made thereon and receipt intended to be renewed should be sent in on due date to prevent loss of interest. Before the period of deposit lapsed *B* quarrelled with his nephew, *N* a member of the joint family firm, and on the 2nd October lawyer sent a letter to the Bank cautioning the Bank not to pay, transfer or otherwise deal with the money deposited in the Bank by the firm, which money belonged to *N* jointly with the other proprietors of the firm. On the 9th October, the Bank gave notice on the usual form to the firm intimating that the deposit would fall due for repayment on 17th October 1928 and asking to be informed whether the firm wished to withdraw the money or continue to keep it in fixed deposit. The notice requested that in any case the receipt should be endorsed and returned, and pointed out that interest would cease from the date on which the deposit became repayable. No reply was sent to this notice. On 11th March 1927 *B* for the first time wrote to the Bank with reference to the deposit. He asked the Bank to renew the deposit assuring the Bank that a signature on the receipt by *N* was not necessary in view of the terms of the agreement to refer to arbitration. The Bank replied that they had been prohibited from dealing with the firm's deposits without *N*'s consent and pointing out that no renewal request had been made by *B* in spite of notice. They declined to renew the deposit. Having failed to recover the deposit, *B* on 7th February 1929 instituted against the Bank a suit to recover Rs. 1,16,875 being the sum deposited with interest. He also asked for future interest:

Held: that by the terms of the contract made between the firm and the Bank the deposit was to cease to bear interest on 17th October and that no repayment or re-deposit was to be made unless the receipts were presented at due date 'to prevent loss of interest.' The Bank were bound to hold the money at call after due date and repay it on presentation of the receipt so endorsed as to bind all the old partners or their representatives, and were not at liberty to deal with it as they chose best and thus lay themselves open to possible claims for damages because they had dealt with it in a manner which one of the partners considered disadvantageous to himself. The taking of a loan did not necessarily imply a promise to pay interest. There had been no wrongful or unjust retention of money and no fraud and no rule of equity in regard to interest could have any application. There being no stipulation for interest after due date in the contract between the parties, and interest not being recoverable under the Interest Act or payable under the statutory law, all *B* could recover, had the Bank been proved to have retained his money wrongly, would have been damages on the basis of proved loss resulting from breach of contract. The Bank fulfilled their contract with the firm to whom they were always ready to return their money and it was *B* who was responsible for the loss of interest. [P 745 C 2; P 746 C 1]

Jagan Nath Aggarwal and *Har Gopal*—for Appellant.

Manohar Lal and *Chiranjiva Lal Aggarwal*—for Respondents.

Coldstream, J.—On 17th April 1926 Banarsi Das acting as manager of the joint family firm, Nanneh Mal-Janki Das of Delhi placed a lakh of rupees in fixed deposit in the Punjab National Bank, at Delhi. The deposit was for six months and to carry interest at 6 per cent and was subject to six months notice of withdrawal. Such notice was given at the time of deposit and this was noted on the receipt given by the Bank of Banarsi Das, on which it also recorded that the deposit was repayable on 17th October 1926, after which date it would cease to carry interest. A memorandum printed on the receipt stated that the receipt must be presented, endorsed by the depositor, before any payment could be made thereon and receipt intended to be renewed should be sent in on due date to prevent loss of interest.

Before the period of deposit lapsed Banarsi Das quarrelled with his nephew Rai Sahib Lala Nanak Chand, also a member of the joint family firm, and on 2nd October Rai Sahib Nanak Chand's lawyer sent a letter to the Bank cautioning the Bank not to pay, transfer or otherwise deal with the money deposited in the Bank by the firm, which money belonged to Rai Sahib Nanak Chand jointly with the other proprietors of the firm. On 9th October, the Bank gave notice on the usual form to the firm intimating that the deposit would fall due for repayment on 17th October 1926, and asking to be informed whether the firm wished to withdraw the money or continue to keep it in fixed deposit for 3, 6, 9, 12 or 18 months. The notice requested that in any case the receipt should be endorsed and returned, and pointed out that interest would cease from the date on which the deposit became repayable. No reply was sent to this notice.

On 22nd December 1926, Banarsi Das, Rai Sahib Nanak Chand and the other members of the firm and family executed an agreement to have their properties partitioned by an arbitrator, and on 31st of the same month Rai Sahib Nanak Chand again addressed the Bank requesting the Bank to withhold payment of the firm's money in deposit pending the arbitrator's award. With this letter was sent an extract from the reference to the arbitrator, para 7 of which stated that until partition the business and dealings of the family would continue as before, but until completion of the partition the arbitrator was authorised to make suitable arrangements for carrying on the business. A third letter was sent to the Bank by Rai Sahib Nanak Chand on 9th March 1927, asking the Bank not to pay or cash any cheque drawn in favour of the firm unless it was signed by him.

On 11th March 1927, Banarsi Das for the first time wrote to the Bank with reference to the deposit. He asked the Bank to renew the deposit assuring the Bank that the signature on the receipt by Rai Sahib Nanak Chand was not necessary in view of the terms of para 7 of the agreement to refer to arbitration, a translation of which was enclosed with the letter, (P. 5). To this the Bank replied that they had been prohibited from dealing with the firm's deposits without the Rai Sahib's consent and pointing out that no renewal request had been made by Banarsi Das in spite of notice. They declined to renew the deposit. A few days later the Bank received a letter dated 16th March from Banarsi Das's lawyer asking it to pay the money to Banarsi Das as managing partner of the firm within a week or to issue a new fixed deposit receipt. The Bank again declined to act without authority given by all the partners of the firm. The arbitrator delivered an award in two portions on 8th and 29th August 1927, one of the provisions being that a lakh of rupees was to be paid out of the firm's money in deposit with the Bank to Banarsi Das in accordance with an agreement between the family recorded in the reference to arbitration. It was not stated that this lakh was to be the money deposited on 17th April 1926. As the award was not accepted by Banarsi Das, Rai Sahib Nanak Chand applied for an order that the awards be filed in Court and a decree passed on them. The Senior Subordinate Judge, Delhi, on 27th July 1928, upheld Banarsi Das's objection that the two awards were not enforceable as neither was complete. On 27th November 1928 Rai Sahib Nanak Chand again warned the Bank that any payment by it to either party would be made at the Bank's responsibility.

Having failed to recover the deposit Banarsi Das on 7th February 1929, instituted against the Bank the suit from which this appeal arises to recover Rs. 1,16,875, being the lakh deposited with interest. He also asked for future interest. For the Bank it was pleaded that the existing dissensions between the members of the firm justified their refusal to pay the deposited money to Banarsi Das who had not replied to their letter sent before repayment became due asking for instructions, and had refused to tender the deposit receipt duly endorsed, while on the other hand they had been prohibited by Rai Sahib Nanak Chand to repay the money. The Bank was prepared to repay the deposit with interest up to 16th October 1926, provided a valid discharge was given. The fixed deposit receipt was signed by Banarsi Das and Rai Sahib Nanak Chand and the Bank deposited the principal amount and interest to due date in the Chartered Bank.

The learned Senior Subordinate Judge decided that although there had been disruption of the joint family firm probably in August or September 1926 and certainly in December 1926, the change of relationship of its members inter se did not affect the relations of the "firm with the world outside". He further held that in the present case Cl. 7 of the agreement to refer to arbitration (to which reference has been made above) showed that the business and dealings of the family were to continue as before, and that as Banarsi Das had been carrying on the business as manager, the Bank ought to have acted on his instructions notwithstanding Nanak Chand's prohibition. In view, however, of Banarsi Das's omission to demand repayment on due date, and his delay in asking for a renewal of the deposit, the learned Subordinate Judge considered that "some latitude should be given to the Bank". In allowing interest at 6 per cent by way of damages he accordingly deducted the amount of interest payable for two months and granted a decree for Rs. 1,15,875, that is to say Rs. 12,875 more than the sum which the Bank had been ready to pay. Against this decree this Bank has appealed through Mr. Jagan Nath Aggarwal who contends that the Bank was under no obligation to return the money deposited or transfer it to any other account bearing interest after notice of disruption had been given by one of the partners, and that interest should not have been awarded, there having been no statutory demand under the Interest Act or any stipulation making interest payable after due date and no damages having been proved.

So far as I understand his judgment the learned Subordinate Judge has held that a Bank was justified in not repaying the money or in renewing the deposit on due date, there being no instructions to do this and no return of the deposit receipt. As regards its obligation to renew the deposit later his judgment is not clear. First he has held that the Bank was bound to act on the instructions given by Banarsi Das on 11th March 1927 because, according to the authorities found applicable Banarsi Das was entitled to give a valid release on behalf of the firm. But in granting interest he has not excluded the whole period between the due date and 11th March. Nor has he based his award of interest on any proof of damages, or on any implied promise to pay interest, for, as he remarks, no such promise could be implied from trade, usage or other circumstances. His decision is that interest should be awarded "in equity"

> "because the deposit was made for getting interest and the Bank did not pay or renew the receipt as it misjudged its position."

But if this was good reason for granting interest he ought surely to have awarded interest for the whole period after due date. Mr. Manohar Lal in replying to appellant's counsel has admitted that he cannot support the lower Court's judgment in so far as it lays down that the Bank was bound to renew the deposit because Banarsi Das could have given a valid release on behalf of the firm. The authorities for the proposition that each partner in a business has implied authority to act for the others in the management of that business do not justify the conclusion that after disruption one of them who acted previously as manager can appropriate part of the firm's property for himself or deal with it in a manner contrary to the wishes of the others. By March 1927 the Bank had been informed of the disruption and been again and again warned not to deal with the firm's money without the consent of Nanak Chand. The terms of reference made it clear that Banarsi Das could no longer act as manager without the consent of other persons who had been his partners and para 7 of the terms of reference certainly did not empower any debtor to act upon the instructions given by Banarsi Das. In view of Mr. Manohar Lal's admission this part of the case requires no further consideration and it becomes unnecessary to discuss the rulings cited by the lower Court in support of his decision.

Mr. Manohar Lal first argues that the Bank, being in possession of the firm's money, were bound to deal with it to the best advantage of the firm either by renewing the deposit or placing the money in current account bearing interest. So far as the first alternative is concerned the argument not only proceeds on the presumption that the Bank was a person in a fiduciary position or acting as trustee or mortgagee or agent, for which there is no basis whatever, but overlooks (as the lower Court appears to have done) the essential facts that by the terms of the contract made between the firm and the Bank the deposit was to cease to bear interest on 17th October and that no repayment or re-deposit was to be made unless the receipts were presented at due date "to prevent loss of interest". Obviously the Bank were bound to hold the money at call after due date and repay it on presentation of the receipt so endorsed as to bind all the old partners or their representatives, and were not at liberty to deal with it as they chose best and thus lay themselves open to possible claims for damages because they had dealt with it a manner which one of the partners considered disadvantageous to himself. As regards the second alternative it was never contended at the trial that the Bank ought to have put the money into a current account carrying interest. It is not shown that current accounts in this Bank carried interest without an agreement to this effect. On the contrary the evidence is that the Bank paid interest on current accounts "if opened and run regularly". The taking of a loan does not necessarily imply a promise to pay interest. Ultimately Mr. Manohar Lal has been forced to fall back on the contention that his client was properly awarded interest on equitable grounds. Here he cites *Muhammadin Abdul Gaffur Rowther* v. *Hamida Bibi Amal* (1). The decision in that case (that even in cases where payment of interest is not justified under the Interest Act interest may be allowed on broad equitable principles) was, however, dissented from in *Nanchappa Koundan* v. *Ittichathara* (2), where it was held by another

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1. AIR 1919 Mad 164=52 I C 505=42 Mad 661.
2. AIR 1930 Mad 727=127 I C 630=53 Mad 549.

Bench of the same Court that apart from the Interest Act the law in India may be taken to be the same as in England where, in order to invoke a rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance. In the present case there has been no wrongful or unjust retention of money and no fraud, and no rule of equity in regard to interest can have any application.

The conclusion is that there being no stipulation for interest after due date in the contract between the parties, and interest not being recoverable under the Interest Act or payable under the statutory law, all that the plaintiff could recover, had the appellant been proved to have retained his money wrongly, would have been damages on the basis of proved loss resulting from breach of contract. In this case the appellant fulfilled his contract with the firm to whom he was always ready to return their money and it was the plaintiff himself who was responsible for the loss of interest. He took no notice of the Bank's request for instructions regarding the disposal of the money before due date. It would have been easy for Banarsi Das to obtain Nanak Chand's signature on the receipt and renew the deposit or re-invest the money pending the result of the partition proceedings. Banarsi Das admits that Nanak Chand asked him to join with him and take the money from the Bank when the award was delivered, but he refused to do this, and he also admits that he never asked Nanak Chand to sign the receipt. The inference is justified that he was endeavouring to procure the money for himself or deprive Nanak Chand of control over it.

For all these reasons the decree of the Subordinate Judge appears to me to be wholly unjust and indefensible from any point of view. I would accept the appeal accordingly and dismiss the suit with costs throughout, the costs to be calculated on the amount in dispute between the parties, namely, Rupees 12,875, and not, as in the lower Court's decree, upon Rs. 1,15,875.

Tek Chand, J.—I agree.

R.K. *Appeal accepted.*

A. I. R. 1933 Lahore 746

BHIDE, J.

Abdul Rahman and *others* — **Defendants—Appellants.**

v.

Mt. Ishar Kaur and *others*—**Plaintiffs—Respondents.**

Misc. First Appeal No. 1211 of 1932, Decided on 13th January 1933, from order of First Class Sub-Judge, Lahore, D/- 1st June 1932.

(a) Civil P. C. (1908), Sch. 2, Para. 20—Several pending suits referred to arbitration without applying to Court for reference to arbitration—Award cannot be made rule of Court under para. 20.

Several suits were pending between the parties when the dispute was referred to arbitration; but the parties did not apply to the Court for reference to arbitration. The arbitrators gave the award and an application was made to file the award and pass decree in accordance therewith:

Held: that the award cannot be made a rule of the Court under para. 20, Sch. 2, Civil P. C., even though the parties had the intention to withdraw the suits later on: *A I R* 1922 *Lah* 369, *Dist*; 115 *P R* 1912 and *A I R* 1927 *Bom* 565, *Ref.* [P 747 C 2]

(b) Estoppel—Failure to raise point of law.

Mere failure to raise a point of law cannot operate as estoppel. [P 747 C 2]

(c) Jurisdiction — Parties cannot confer jurisdiction.

Parties cannot confer jurisdiction on a Court even by mutual consent. [P 747 C 2]

Mohammad Amin Khan—for Appellants.

Mehr Chand—for Respondents.

Judgment.—The parties to this appeal had a number of cases pending in different Courts, when on 25th August 1929, they referred the matters in dispute to three arbitrators for decision. The arbitrators gave an award the next day. In consequence of the award application was made for withdrawal of an appeal which was pending in this Court, though eventually an order was passed therein by Dalip Singh, J., with the consent of counsel for both the parties that a decree be passed in terms of the award. The other suits are also said to have been withdrawn.

On 16th February 1930, an application was made on behalf of the respondents to the Subordinate Judge First Class, Lahore, under para. 20, Sch. 2, Civil P. C., for the filing of the award. Certain objections were raised by the appellants, but these were rejected after inquiry and eventually an order was passed that the award be filed and a decree passed in terms of the award. From this decision the present appeal has been preferred.

The sole point which the learned counsel for the appellants has raised is that as the reference to arbitration was made during the pendency of suits, in which the same matters were subjudice, but without intervention of the Courts concerned, the award could not be filed under para. 20, Sch. 11, Civil P. C. The learned counsel's contention is that it was incumbent on the parties to apply to the Courts in which the suits were pending for reference to arbitration and follow the procedure laid down in paras. 1 to 16 of the said schedule and as this was not done the award could not be made a rule of the Court under para. 20 of the schedule. In support of this contention, counsel has relied on *Dhan Singh* v. *Khan Singh* (1) a Division Bench ruling of the Punjab Chief Court, in which the subject has been discussed exhaustively.

The learned counsel for the respondents has not attempted to challenge the correctness of the law as laid down in *Dhan Singh* v. *Khan Singh* (1), which is in accordance with the view recently taken by a Full Bench of the Bombay High Court in *Chambasappa Gurushantoppa* v. *Basalingaya* (2), but has urged: (1) that the point was never taken in the Court below and being a mixed question of law and facts should not be allowed to be raised for the first time in this appeal and (2) that the appellants are now estopped from challenging the validity of the award as they accepted it before Dalip Singh, J., at the hearing of the appeal which was pending in this Court and agreed to a decree being passed in terms thereof in that appeal. As regards the first point, it is true that the point was not taken up in the Courts below, but it seems to be patent on the facts appearing on the record. The agreement to refer to arbitration itself mentions clearly that there were a number of cases pending with regard to the subject-matter of the reference. The learned counsel urged that the parties intended to withdraw the suits and that if the point had been raised in the Courts below, he would have been able to prove this fact. But even assuming that the parties had such intention, that would not, I think, affect the decision of this point. The fact remains that litigation was pending when the reference to arbitration was made and the mere intention to withdraw the suits later on seems to be immaterial. The learned counsel has referred to *Jai Narain Babu Lal* v. *Narain Das Jaini Mal* (3), but I am unable to see that the ruling supports the contention of the learned counsel in this respect.

The second contention of the learned counsel also does not seem to have force. No authority has been cited that mere failure to raise a point of law can operate as estoppel. In the present instance, the law-point involves a question of jurisdiction and goes to the root of the case. The contention of the learned counsel for the appellants is that the learned Subordinate Judge had no jurisdiction at all to entertain the application under para. 20 as reference had been made during the pendency of the suits. It is a well established proposition that parties cannot confer jurisdiction on a Court even by mutual consent. I am therefore of opinion that this objection also cannot prevail. The fact that the respondents accepted the award before Dalip Singh, J., might help the respondents to have it enforced in some other manner but it seems to me that the award cannot be made a rule of the Court under para. 20, of the said schedule of the Civil Procedure Code.

I accordingly accept the appeal and set aside the order of the learned Subordinate Judge, but as the objection raised by the appellants is a technical one and has been raised at a late stage, I direct them to pay the costs of the respondents.

K.S. *Appeal accepted.*

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1. (1912) 115 P R 1912=15 I C 140.
2. A I R 1927 Bom 565=105 I C 516=51 Bom 908 (F B).
3. A I R 1922 Lah 369=69 I C 588=3 Lah 296.

A. I. R. 1933 Lahore 747

JAI LAL AND ABDUL RASHID, JJ.

Mt. Shibbi—Plaintiff—Appellant.

v.

Jodh Singh—Defendant—Respondent.

Second Appeal No. 2657 of 1928, Decided on 9th May 1933, from decree of Dist. Judge, Ambala, D/- 20th September 1928.

(a) Hindu Law — Maintenance — Right of maintenance of wife is in abeyance during unchastity but revives when such disqualification ceases.

The claim of a wife for maintenance is a recurring right which may be in abeyance during her unchastity and may revive on the cessation of this disqualification : 39 *Mad* 658 and *A I R* 1924 *Cal* 364, *Rel on.* [P 748 C 2]

(b) Limitation Act (1908), Arts. 128 and 129—Suit for maintenance—Article which is to be applied explained.

Article 129 is intended to apply to cases where the status of a person on the basis of which maintenance is claimed is denied and the person inter alia wants to establish that status: but where such status is not denied Art. 128 applies: 15 *Bom* 135 and 26 *Mad* 291, *Ref.* [P 749 C 1]

Bishan Nath—for Appellant.

J. N. Aggarwal—for Respondent.

Jai Lal, J.—Mt. Shibbi, widow of Gurdit Singh, instituted a suit against her step-son, Jodh Singh, for possession of one-third share in certain land left by her husband in lieu of her maintenance or in the alternative for a cash allowance by way of maintenance. This suit was defended on the grounds that it was barred by time, that the plaintiff was not entitled to maintenance because she was not chaste, that the plaintiff had waived her rights and that her husband had deprived her of such rights. The Senior Subordinate Judge held that unchastity had not been established, that the suit was not barred by time, that there was no waiver by the plaintiff of her rights and that there was no other obstruction in her way to obtain a decree for maintenance. He fixed Rs. 400 per annum as the proper amount of maintenance for the plaintiff and granted a decree for the amount due to her at that rate from June 1928. This amount was charged on property mentioned in the judgment and decree of the Senior Subordinate Judge. From this decree the defendant appealed to the District Judge and repeated the objections which he had raised in his defence in the trial Court and the plaintiff filed cross-objections in so far as the decree awarded her maintenance from June 1928 and claimed that she should have been given maintenance from the date of the death of her husband.

An objection was raised before the District Judge that the cross-objections were not maintainable but was overruled. On the defendant's appeal the District Judge held that the suit was barred by time by virtue of Art. 129, Limitation Act, and also of Art. 128. He however agreed with the trial Court that unchastity of the plaintiff had not been proved and that Rs. 400 per annum was the proper amount of maintenance as fixed by the trial Court. At the same time he found that the defendant had already agreed to pay Rs. 10 per mensem as maintenance to the plaintiff to which in spite of the question of limitation she was entitled. He accordingly reduced the amount of maintenance to Rs. 10 per mensem payable from June 1928. Against this decree the plaintiff has lodged this appeal and the defendant has also filed an appeal so far as the decree for maintenance at Rs. 10 per mensem is concerned.

With regard to the defendant's appeal, it seems to me that the learned District Judge was in error when he granted a decree on the basis of the so-called admission by the defendant. A reference to the record shows that the defendant was examined as a witness and when he was cross-examined by the plaintiff's counsel he said that if so ordered by the Court he would be prepared to give Rs. 10 per mensem which was adequate for the maintenance of the plaintiff. He however did not abandon his objection to the right of the plaintiff to be maintained out of the estate of her husband or as to limitation. Under these circumstances, in my opinion, no decree on the so-called admission of the defendant should have been granted against him.

As to the appeal by the plaintiff I am of opinion that the view of the learned District Judge that the suit was barred under Art. 129, Limitation Act, is erroneous. In the first instance the plaintiff has not expressly claimed any declaration of her right to be maintained out of the estate of her husband, on the other hand, her claim is for possession of immovable property left by her husband or in the alternative for maintenance in the form of cash allowance to be fixed by the Court. Secondly, the District Judge has held that Art. 129 operates as a bar in the way of the plaintiff by virtue of certain proceedings under S. 488, Criminal P. C., which were taken by the plaintiff against her husband in the Court of a Magistrate. Those proceedings terminated on 25th February 1909, and as the husband had asserted that his wife was unchaste the Magistrate declined to grant her maintenance. It was contended before the learned District Judge, and also before us that this denial by her husband of her right to maintenance made it incumbent on her to establish her right within twelve years from 25th February 1909. The claim to maintain in such cases however is a recurring right which may be in abeyance during the unchastity of the wife and may revive on the cessation of this disqualification. There is authority in support of the proposition that it revives when the unchastity ceases, e. g., *Satyabhama v. Keshavacharya* (1). As remarked by the Calcutta High Court in *A. I. R.* 1924 *Cal.* 364, the cause of action for maintenance accrues from time to time according to the want and exigencies of the person entitled.

In this case the learned District Judge has found that the plaintiff was not unchaste at the time when she instituted the suit at any rate. In fact his finding is that she never was unchaste. Moreover, it seems to me that Art. 129 is intended to apply to cases where the status of a person, on the basis of which maintenance is claimed, is denied. The Article reads as follows:

> "By a Hindu for a declaration of his right to 'maintenance', and the period provided is 12 years from the date when the right is denied."

Raoji v. *Bala* (2) and *Ratnamasari* v. *Akilandammal* (3) cited by Jagan Nath on behalf of the respondent, do not appear to support him because it appears from an examination of these cases that the status of the respective plaintiffs had been denied and the suit in each case was inter alia to establish that status. In view of the above discussion, I am of opinion that this suit was not barred by time and was governed by Art. 128, Limitation Act. I would therefore accept the appeal by the plaintiff and, setting aside the decree of the District Judge, restore that of the Senior Subordinate Judge. This course is necessary because the plaintiff in her grounds of appeal has not claimed that she is entitled to maintenance from the date of the death of her husband as she had claimed in her plaint. She merely contested the finding of the District Judge that her suit was barred by time. The appellant will get her costs throughout against the defendant-respondent. In view of the above it necessarily follows that the defendant's appeal becomes infructuous but it must formally be accepted. No order as to costs of that appeal.

Abdul Rashid, J.—I agree.

K.S. *Appeal accepted.*

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1. (1916) 39 Mad 658=29 I C 397.
2. (1891) 15 Bom 135.
3. (1903) 26 Mad 291=13 M L J 27.

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* A. I. R. 1933 Lahore 749

TEK CHAND AND COLDSTREAM, JJ.

Punjab Co-operative Bank Ltd., Lahore—Defendant—Appellant.

v.

Hari Singh and *others*—Plaintiffs—Respondents.

First Appeal No. 1969 of 1929, Decided on 22nd March 1933, from decree of First Class Sub-Judge, Lahore, D/- 20th June 1929.

*(a) **Civil P. C. (1908), O. 1, R. 8—"Numerous persons."**

"Numerous persons" does not mean 'persons capable of being ascertained': 33 *Cal* 905 and *A I R* 1920 *Cal* 245, *Rel on* ; 20 *Cal* 397, *held not good law*. [P 751 C 1]

*(b) **Civil P. C. (1908), O. 1, R. 8—Formal order recording permission is not necessary—Permission can be inferred from proceedings.**

It is not not necessary under the law that permission should be expressly recorded. Permission may be inferred from the proceedings in the trial Court.

Plaintiffs instituted a suit for 'themselves and the whole of the Zamindar Sabha, Lahore.' They also filed an application under O. 1, R. 8, asking for leave to sue in a representative capacity, the trial Judge after getting such information as he could from the plaintiffs' counsel actually caused to be published in a newspaper a notice purporting to be under that rule:

Held: that in these circumstances the mere omission to pass a formal order granting sanction could not vitiate the decree: 21 *Cal* 180; *A I R* 1924 *Cal* 998 and *A I R* 1922 *All* 16 (*FB*), *Ref*. [P 751 C 1, 2]

(c) **Civil P. C. (1908), O. 1, R. 8—Issue of proper notice is mandatory.**

The issue of a proper notice and its service either personally, or by public advertisement, on the persons concerned is an indispensable preliminary to the trial of the suit under O. 1, R. 8. [P 751 C 2]

*(d) **Civil P. C. (1908), O. 1, R. 8 and S. 99—Suit instituted for self and Zamindar Sabha—Sabha consisting of 70 members—No notice issued to them or to members generally—Notice on eight named persons of which three not mentioned in proceedings — No mention about asking or giving of permission under O. 1, R. 8—Notice published in English newspaper—Members not knowing English—Notice and its service held not proper—Irregularity vitiated whole proceedings.**

The plaintiff instituted a suit for themselves and on behalf of Zamindar Sabha. The Sabha consisted of at least 70 members, but no notice was issued to them or to the members of the Sabha generally but to eight named persons only, of which three were not mentioned in the proceedings book. The notice did not state that the plaintiffs had asked for, or had been granted, permission to sue as representatives of the Zamindar Sabha. It merely stated that the three plaintiffs had instituted a suit against the defendants, and called upon the eight persons to appear in person in the Court:

Held: that this notice did not fulfil the requirements of R. 8 either in letter or spirit.

The insertion of the notice in a newspaper published in English and having little or no circulation among the class of persons to which the members of the Sabha belonged, could not be said to be effective service in accordance with the provisions of O. 1, R. 8. No proper notice was issued under R. 8 nor was it duly served on the persons concerned. An irregularity of this kind vitiated the entire proceedings in the lower Court and could not be condoned under S. 99: 35 *Cal* 1021; *A I R* 1922 *All* 16 (*FB*) and *A I R* 1925 *Cal* 547, *Rel on.* [P 751 C 2; P 752 C 1]

Gobind Das and *Madan Gopal*—for Appellant.

M. L. Sethi for *J. G. Sethi* and *Shaukat Rai*—for Respondents.

Tek Chand, J.—This appeal arises out of a suit instituted by Hari Singh, Arjan Singh and Natha Singh, plaintiffs, "for themselves and on behalf of the whole Zamindar Sabha, Lahore," against Nand Kishore, defendant 1, and the Punjab Co-operative Bank, Limited, Lahore, defendant 2, for recovery of Rs. 5,170, i. e., Rs. 4,700 as principal and Rs. 470 as interest by way of damages. The allegations in the plaint were that certain zamindars of Lahore district formed a sabha, known as the Lahore District Zamindar Sabha, and the defendant 1 was its president. The sabha collected certain sums of money for carrying out its objects, and a part of this money was deposited in current account with the defendant bank. It was alleged that on or about 1st October 1925, a sum of Rs. 4,700 was embezzled out of the amount in deposit with the defendant bank by means of a cheque which had been drawn by defendant 1 and Kundan Singh and Khushal Singh, the two other operators, in favour of one Dina Nath. Along with the plaint an application under O. 1, R. 8, was presented by the plaintiffs stating that the Zamindar Sabha, on whose behalf the plaintiffs had brought the suit, was:

> "a very big body, which had a very large number of members, but these members had a common interest and it was impossible for them to bring a suit together."

It was therefore prayed that permission under O. 1, R. 8, be granted to the plaintiffs to bring this suit in a representative capacity on behalf of the sabha. On this petition the learned Subordinate Judge passed an order on 13th July 1927 requiring the plaintiffs to state whether the members of the sabha, on whose behalf the suit had been brought, were or were not capable of ascertainment and to give the names of some leading members of the sabha. The plaintiffs accordingly filed an application on 28th July 1927, repeating that:

> "the number of members was so large that it was almost impossible to tell their names and addresses"

and giving a list of the names and addresses of eight "leading members." No formal order granting the plaintiffs permission to sue on behalf of the sabha was passed, but it was noted on the record that the plaintiffs have filed "a list of the members of the sabha" and directing that the plaint be entered in the register and notices issued to the defendants calling upon them to file their respective written statements. This order was passed on 1st August and a few days later, on 10th August 1927, a notice, purporting to be under O. 1, R. 8, was published in the Sunday Times, an English newspaper published at Lahore. A reference to the contents of this notice will be made later in the judgment. The defendants appeared in due course and filed separate written statements raising numerous pleas on the merits. They also pleaded that O. 1, R. 8, was inapplicable and that the permission obtained under that rule was neither legal nor valid. On the pleadings several issues were framed the first of which related to the applicability of O. 1, R. 8, to the suit. After recording the evidence of the parties the learned Subordinate Judge held that the suit had been properly brought in a representative capacity. On the merits he found against the defendants and passed a decree for Rs. 5,170 with costs in favour of the plaintiffs against the defendants directing them to pay the decretal amount half and half.

From this decree two separate appeals have been filed in this Court by the defendants, and the first contention raised on their behalf is that O. 1, R. 8, was not applicable to the suit as brought, that, in any case, the procedure laid down in that rule had not been followed, that this irregularity vitiated the judgment of the lower Court, and consequently its decree should be set aside. Mr. Mehr Chand Mahajan, counsel for defendant 1, drew our attention to the plaintiffs' application dated 28th July 1927, where it was stated that the number of the members of the sabha was large, that it was "almost impossible to give their names and addresses" and urged that on this admission O. 1, R. 8 was inapplicable as it governed those cases only in which the suit was brought on behalf of an ascertained or ascertainable body of persons. In support of this contention reliance was placed on *Sajedur* v. *Baidyanath* (1), where it was held that "numerous parties" mentioned in S. 30, Civil P. C., of 1882, meant "parties capable of being ascertained." I cannot find anything either in the dictionary meaning of the word "nemerous," or in the context in which it is used in R. 8, to justify this narrow interpretation. Moreover, the case cited has been expressly dissented from in *Monmotha Nath* v. *Harischandra* (2) and *Probhat Chandra* v. *Hari Mohan* (3) and is no longer regarded as laying down sound law in the Calcutta Court. It may also be mentioned that in the present case the proceedings-book of the sabha was produced in the course of the trial and it appears from the various resolutions passed, that the number of persons who were appointed as members of the sabha from time to time was seventy, though it is not quite clear if all of them had actually accepted the membership. It is therefore clear that the sabha was not an indeterminate body, as wrongly stated by the plaintiffs' counsel in the application referred to above. In my opinion, the contention of Mr. Mehr Chand is devoid of force and I have no hesitation in rejecting it.

It was next urged that the proceedings in the lower Court were bad, as the learned Subordinate Judge has omitted to pass an order granting permission to the plaintiffs to sue on behalf of the sabha. It is no doubt true that there is no express order on the record, formally allowing the plaintiffs to bring a suit in a representative capacity, but it is not necessary under the law that permission should be expressly recorded. It is well-settled that permission may be inferred from the proceedings in the trial Court: *Dhunpat Singh* v. *Paresh Nath Singh* (4), *Krishna Kumar Deb* v. *Atul Chandra* (5) and *Shiam Lal* v. *Mt. Lalli* (6). As stated already, the plaintiffs had instituted the suit for "themselves and the whole of the Zamindar Sabha, Lahore." They had also filed an application under O. 1, R. 8, asking for leave to sue in a representative capacity, and the learned trial Judge after getting such information as he could from the plaintiffs' counsel had actually caused to be published in a newspaper a notice purporting to be under that rule. In these circumstances the mere omission to pass a formal order granting sanction cannot vitiate the decree. The next objection relates to the notice which was actually issued in the case and is of a more serious nature. R. 8, while conferring on the Court power to allow one or more of a numerous body or persons to sue, or be sued, on behalf of, or for the benefit of, all persons so interested, imposes on it the duty of issuing:

> " at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct."

This provision is mandatory and not merely directory, and is an essential condition for the trial of the case as a representative suit. The reason for this obviously is that any decision given in the case operates as res judicata not only against the persons who were actually before the Court but also against those whom they were permitted to represent. It follows therefore that the issue of a proper notice and its service either personally, or by public advertisement, on the persons concerned is an indispensable preliminary to the trial of the suit under O. 1, R. 8.

Now, as stated already, the sabha consisted of at least 70 members, but admittedly no notice was issued to them or to the members of the sabha generally. On the other hand, it was issued to eight named persons only, of which three are not mentioned in the proceedings-book. Further the notice does not state that the plaintiffs had asked for, or had been granted, permission to sue as representatives of the District Zamindar Sabha, Lahore. It merely stated that the three plaintiffs had instituted a suit against the defendants, and called upon the eight persons above-mentioned, to appear in person in the Court on 20th August 1927. There can be no doubt that this notice does not fulfil the requirements of R. 8, either in letter or spirit, and counsel for the plaintiff-respondents has not attempted to defend it. It is also clear that in the circumstances, the insertion of the notice in a newspaper published in English and

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1. (1898) 20 Cal 397.
2. (1906) 33 Cal 905=10 C W N 865.
3. A I R 1920 Cal 245=54 I C 742.
4. (1894) 21 Cal 180.
5. A I R 1924 Cal 998=84 I C 79.
6. A I R 1922 All 16=65 I C 259=44 All 231 (F B).

having little or no circulation among the class of persons to which the members of the sabha belonged, cannot be said to be effective service in accordance with the provisions of O. 1, R. 8. I am therefore constrained to hold that in this case, neither was a proper notice issued under R. 8 nor was it duly served on the persons concerned. An irregularity of this kind vitiates the entire proceedings in the lower Court and cannot be condoned under S. 99, Civil P. C: *Mukhal Singh* v. *Jagdeo Tedain* (7), *Shiam Lal* v. *Mt. Lalli* (6) and *Abdul Hakim* v. *Abdul Gani* (8).

This does not mean however that the suit should be dismissed as contended by counsel for the appellants. There is no warrant for such a course in the Civil Procedure Code, nor is it in consonance with justice, equity and good conscience that such a serious consequence should result from the failure of the Court to do its duty. No ruling supporting this contention has been cited before me, and in most of the reported cases the appellate Court sent back the cases to the trial Court with direction to take up the proceedings from the stage at which it ought to have issued the notice.

I would accordingly accept both appeals, set aside the judgment and decree of the learned Subordinate Judge and remand the case to him with instructions to issue a proper notice under O. 1, R. 8, and retry the case in accordance with law. It seems desirable that before the issue of the notice, the plaintiffs should be called upon to make a definite statement as to the constitution of the sabha. After the defendants have filed amended written statements (if they desire to do), the Court may allow the parties to rely on the whole or part of the evidence already recorded, so as to avoid further delay and expense. Court-fee on both appeals shall be refunded; other costs shall be costs in the cause.

Coldstream, J.—I agree.

R.K. *Case remanded.*

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7. (1908) 35 Cal 1021.
8. A I R 1925 Cal 547=80 I C 26.

A. I. R. 1933 Lahore 752

JAI LAL AND ABDUL RASHID, JJ.

Raju—Defendant—Appellant.

v.

Ram Chand and *others* — Plaintiffs — Respondents.

Second Appeal No. 2278 of 1928, Decided on 17th May 1933.

(a) Mortgage—Mortgage with possession of banjar qadim—Declaratory suit by mortgagee that he is owner of such land lies.

In case of waste lands possession follows title. Hence a mortgagee with possession of banjar qadim for over three settlements is entitled to file a declaratory suit that he is the owner of such land. [P 752 C 2]

(b) Civil P. C. (1908), O. 22, R. 9—Abatement or dismissal of suit—No fresh suit can be brought on same cause of action nor can plaintiff resist defendant's claim to enforce right under suit.

Where a suit abates or is dismissed, no fresh suit can be brought on the same cause of action, nor can the plaintiff resist the claim of the defendant when he (defendant) wants to enforce his right challenged in the former suit. [P 753 C 1]

Mohsin Shah—for Appellant.

Nanak Chand and *Mehr Chand Sud*—for Respondents.

Abdul Rashid, J.—This second appeal has arisen out of a suit brought by the mortgagees for a declaration to the effect that they are owners of the property which was mortgaged to them by defendants 2 to 14 in the years 1840 and 1849. The appellant, Rajju was impleaded as defendant 1 as he asserted that he had been in adverse possession of the property in suit for a period exceeding 12 years and had therefore become its owner. He alone contested the suit. The learned District Judge has found that almost the whole of the land in dispute is banjar qadim and that a small area only is under the cultivation of tenants, that defendant 1 has failed to show that he has ever been in possession of this land and that there is nothing on the record to indicate as to how he acquired it. He has therefore confirmed the decree of the trial Court in favour of the plaintiffs. On appeal the learned counsel for the appellant has argued that a declaratory suit is not maintainable as plaintiff has not been proved to be in possession of the land. This argument, has no force as the learned District Judge has found that almost the whole of the land is banjar qadim and that the plaintiffs are recorded as mortgagees in possession. It has been repeatedly held that in the case of waste lands possession follows title. In the Settlement Record of 1856 the plaintiffs were shown as mortgagees in possession and the same entry has been repeated in three subsequent settlements. The small area of land which is under cultiviation is in the actual possession of tenants. In these circumstances I am of the opinion that a declaratory suit is maintainable.

In the year 1917 the appellant had sued the mortgagees and the mortgagors for a declaration to the effect that he was in possession of the land in dispute and was its owner. So far as the mortgagors are concerned the appellant had been granted the decree prayed for, but his suit against the mortgagees had abated. It was urged before us that the decree which the appellant had obtained in 1917 was conclusive proof of the fact that the land has been in his possession for a period of over 12 years and that the abatement of the suit against the mortgagees does not in any way debar the appellant from denying the title of the mortgagees. I am however of the opinion that the appellant's claim against the plaintiffs having abated during the litigation of 1917 he cannot resist the present claim by denying their rights. Under O. 22, R. 9, Civil P. C., where a suit abates or is dismissed under that order no fresh suit can be brought on the same cause of action. Rajju cannot bring a fresh suit to establish his title to this land nor can he ask for a declaratory decree to the effect that he is in possession of the mortgaged property. No authority has been quoted by the learned counsel for the appellant to show that though Rajju, appellant, cannot bring a suit himself to establish his title he can resist the claim of the plaintiffs in spite of the definite finding of both the Courts below that he is not in possession of the mortgaged property. I would therefore affirm the judgments of the Courts below and dismiss this appeal with costs.

Jai Lal, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 753

SHADI LAL, C. J. AND ABDUL QADIR, J.

Hira and *others* — Plaintiffs — Appellants.

v.

Mt. Hussain Bibi and *others*—Defendants—Respondents.

Second Appeal No. 963 of 1928, Decided on 17th May 1933, from decree of Dist. Judge, Sialkot, D/- 7th January 1928.

Custom (Punjab) — Adoption — Brother's daughter's son cannot be adopted.

Although amongst Awans of Sialkot District adoption of daughter's son was valid according [illegible] custom, the custom cannot extended by anal[illegible] to brother's daughter's son so as to entitle Awan[illegible] adopt brother's daughter's son: *A I R* 1931 *L*[illegible]08 and *A I R* 1924 *Lah* 532, *Ref.*

[P 755 C 1]

Shamair Chand—for Appellants.

Mohammad Amin Khan—for Respondents.

Abdul Qadir, J.—Arura, a childless male proprietor of village, Daultanwali in Sialkot tahsil of Sialkot District, who was an Awan by caste, made a gift of his land and houses, in favour of Mt. Hussain Bibi, daughter of his brother, on 11th January 1925. His collaterals, related to him in the fourth degree brought a declaratory suit, challenging the validity of this gift and got a decree. Mt. Hussain Bibi appealed and the case was remanded for fresh decision with permission to the plaintiffs to amend their plaint, so as to sue for possession of the property as the donor had died in the meantime. The plaintiffs succeeded in taking possession of the property after the death of Arura, and therefore there was no necessity to amend the plaint. Subsequent to the gift in dispute, on 17th January 1927, Arura had executed a registered-deed, adopting Fazal Hussain, minor son of Mt. Hussain Bibi, as his son. During the proceedings on remand therefore Fazal Hussain, minor, was added as a defendant, at the instance of his mother, Mt. Hussain Bibi, and a second line of defence was set up, i. e., if the gift was not valid, there was the adoption of Fazal Hussain by Arura. The trial Court found that the property in dispute was ancestral qua the plaintiffs, barring a small area of 6 kanals and 9 marlas.

It is also held that the plaintiffs were the Collaterals in Arura in the fourth degree and were entitled to bring this suit. With regard to the gift, which was alleged by the defendants to have been made in lieu of services rendered to the deceased, the finding was that it was not proved to have been made in lieu of services, nor was it to be held to be valid by custom. On the question of adoption, the Court of first instance came to the conclusion that Arura did execute the deed of adoption after the decree dated 19th October 1926 passed in the suit as originally brought with the obvious object of defeating the claim of the plaintiffs. It held that the defendants had failed to prove a custom by which the Awans of Sialkot district could adopt a brother's daughter's son, and declared that the plaintiffs were entitled to remain in possession of the property in suit with the exception of 6 kanals and 9 marlas, which had been found to be non-ancestral. Mt. Hussain Bibi appealed against this decision on behalf of her minor son as well as herself and the learned District Judge agreed with the findings of the Court below on all points except the validity of the adoption. He held that the adoption of Fazal Hussain by Arura was valid by custom and was not collusive. He therefore accepted the appeal and reversing the decree of the trial Court dismissed the suit and allowed costs of both Courts to the appellants.

The collaterals have now come up to this Court in second appeal, with a certificate on the question of custom, and their contentions are that the adoption of Fazal Hussain was not valid by custom, that the onus of proving the existence of the alleged custom was on the respondents, who had failed to discharge it, and that the adoption is not recognised by the Riwajiam of the Sialkot district. Mr. Shamair Chand has argued the case for the appellants and Mr. Mohammad Amin Khan has addressed us on behalf of the respondents. The learned District Judge has relied on the answer given to question No. 71 in the Customary Law of the Sialkot district and instances Nos. 7, 18, 21 and 24 cited in it. These instances relate to Awans in Sialkot tahsil, but they do not help the respondents, because none of them relates to the adoption of a brother's daughter's son. In No. 7 the person adopted was a nephew of the childless owner; in No. 18 it was the sister's son; in No. 21 it was a grandnephew, i. e., the brother's son's son; in No. 24, it is not stated who the adopted person was, but the objector was a daughter's son, whose suit failed.

Two witnesses, Karim Baksh (D. W. 11) and Ditta (D. W. 14), have given oral evidence that a brother's daughter's son could be adopted amongst Awans in Sialkot tahsil, and against them one Shahamad Khan (P. W. 6), who was also an Awan, alleges that such an adoption is not allowed. The learned District Judge has not commented on the oral evidence on each side, nor does he say that there are any reasons to prefer the statements of Karim Bakhsh and Ditta to that of Shahamad Khan. I think no decision can be based on such oral statements. The only other piece of evidence relied upon by the lower appellate Court is Ex. D-1, which is a copy of a judgment of Lala Har Dial, Subordinate Judge, Second Class, dated 28th February 1921, upholding the adoption of a brother's daughter's son amongst Awans in the Sialkot tahsil. We have looked at that judgment and I find that the Court concerned, made a mistake in applying the analogy of adoption of a daughter's son to the case of a brother's daughter's son, as appears from the following observations made in the said judgment:

> "Thus an Awan in the Sialkot District can favour his daughter and other female relations against agnates. But it is pleaded that though he can adopt a daughter's or sister's son he cannot adopt a son of a brother's daughter. I do not see where the difference lies."

Mr. Shamair Chand urges that this judgment failed to recognise the principle that custom cannot be extended by analogy, but must be founded on evidence, as was laid down in *Santu* v. *Abhe Singh* (*A. I. R.* 1931 *Lah.* 708). He also refers to *Bur Singh* v. *Dalip Singh* (*A. I.R.* 1924 *Lah.* 532) where a Division Bench of this Court held that a son's daughter's son does not stand on the same footing as a daughter's son, so far as the eligibility for adoption is concerned. In the latter case the Riwajiam of the district in which the parties resided, recognised the adoption of a daughter's son or a sister's son, but the learned Judges observed that they were unable to hold that a son's daughter's son was on the same footing as a daughter's son. Mr. Mohammad Amin Khan, on behalf of the respondents, refers to *Muhammad Ali* v. *Jamita* (1), in which the adoption of a daughter's son was held to be valid, according to custom, among Gurrac Awans of Sialkot district, but this instance cannot help him for reasons, already mentioned above, that the recognition of a daughter's son for the purposes of adoption cannot necessarily lead to an inference that a brother's daughter's son is also equally privileged. He also refers to the answer to question No. 72 in the Customary Law of the Sialkot district, where the question put was:

> "Is there any rule prohibiting the adoption of the son of a woman whom the adopter could not have married, such as sister's or his daughter's son ?"

and the answer was "No." I do not see how this question and answer ca be made use of by the respond for the purpose of supporting th cision of the lower appellate

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1. A I R 1914 Lah 143=20 I C 197=

The question was based on a principle of Hindu Law, which prohibits the adoption of the sons of women whom the adoptor could not have married. The answer simply shows that that prohibition no longer exists, but the question still remains who are the women whose sons can be adopted and it seems that in Sialkot district among Awans, there is no instance in which the adoption of a brother's daughter's son has been allowed. Among the instances cited under question No. 71, there are two cases, Nos. 5 and 13, at pp. 40 and 41, respectively, in which the adoption of a brother's daughter's son was recognised, but both those cases relate to Jats and cannot support the case of the respondents.

In my judgment therefore the conclusion arrived at by the trial Court on the question of custom was correct and the lower appellate Court erred in holding that the Awans of Sialkot district were entitled to adopt a brother's daughter's son. I would therefore accept this appeal, reverse the decree of the lower appellate Court and restore that of the trial Court with costs against Mt. Hussain Bibi throughout.

Shadi Lal, C. J.—I concur.

V.B. *Appeal allowed.*

A. I. R. 1933 Lahore 755

HARRISON AND ADDISON, JJ.

Basant Singh and *another* — Plaintiffs —Appellants.

v.

Bhagwan Singh and *another* — Defendants—Respondents.

First Appeal No. 564 of 1927, Decided on 10th April 1933, from decree of Senior Sub-Judge, Sialkot, D/- 17th January 1927.

Custom (Punjab)—Divorce—Jats of Sialkot District—Writing is necessary—Oral relinquishment is not sufficient.

According to the Customary law of the Sialkot district among Hindus divorces must be in writing, and in the absence of such writing the oral relinquishment by a Jat of his wife would not be sufficient under the custom binding on his tribe : 78 *P R* 1884 and 84 *P R* 1889, *Ref.* [P 756 C 1]

M. L. Puri and *Manohar Lal Suri*— for Appellants.

Addison, J.—The parties are Jats of Sialkot district. The plaintiffs claim that they are the sons of the late Sardar Lal Singh, Zaildar of Manak, by his second wife, Ishar Kaur, and they accordingly sue the defendants who are admittedly his sons by his wife As Kaur, for possession of one-half of the land and houses left by the deceased. The defendants denied that the plaintiffs were the sons or legitimate sons of Lal Singh. They said that the plaintiffs were the sons of Ishar Kaur whose husband Buta Singh was still alive. They pleaded that much of the land had already been gifted to them by Lal Singh, the first gift having taken place in 1909. They also set up a will dated the 24th March 1925 by means of which what remained was bequeathed to them. Numerous issues were framed by the learned Senior Subordinate Judge who has written an exhaustive judgment. He found on practically all the issues against the plaintiffs and dismissed the suit. Against this decision the plaintiffs have appealed.

The learned counsel appearing on behalf of the appellants confined his arguments to the first issue whether the plaintiffs were the lawful sons of Lal Singh deceased and said that it was unnecessary to discuss any other question arising in the appeal if the findings of the trial Judge on that issue were upheld. The question arising out of this issue are: (1) whether Buta Singh, the husband of Ishar Kaur, divorced her, (2) whether such a divorce is valid, and (3) whether Lal Singh thereafter married Ishar Kaur by chadar andazi and kept her as his wife. As regards the divorce, only one witness has given direct evidence, namely, Buta Singh who was undoubtedly the husband of Ishar Kaur. He stated that Lal Singh abducted his wife, and that he brought an abduction case against Lal Singh which was finally dismissed. Thereafter Lal Singh sent him Rs. 300, through one Taba, and the witness thereupon gave up his wife. Shortly after this he heard that Lal Singh had married Ishar Kaur by chadar andazi. Ishar Kaur herself merely stated that the compromise took place between Buta Singh, her husband, and Lal Singh, her abductor. At the time in question she was under the protection of Lal Singh and obviously had no knowledge whether there was a divorce or not. The plaintiffs have produced evidence to the effect that Ishar Kaur used to live as Lal Singh's wife in Lal Singh's house in Manak and and also in Lora in a house built by Lal Singh for her. The trial Judge has exhaustively discussed the evidence on this point and there is no question that it is not established that she lived at Manak with Lal Singh. Nor apparently did she go back to her hus-

S. N. DAR, B.A., LL. B.,
Vakil High Court,

band, Buta Singh, but lived in village Lora in a house where, I think, the proper inference is that she was visited by Lal Singh.

Jats' notions of sexual morality are lax and it is not established from these facts either that Buta Singh divorced her or that Lal Singh married her. Even if Buta Singh, as he has stated, got some money from Lal Singh through Taba, that does not mean that he then divorced his wife. It may have only been the price of his conniving at the illicit connection between Lal Singh and his wife. Lal Singh, if he wanted to marry the woman, should have taken a written document from Buta Singh. As Zaildar he must have known the custom of the district which demands such a written document. In the Customary Law of the district it is laid down that among Hindus divorces must be in writing. The fact that no deed was taken goes to show that Lal Singh did not wish to marry Ishar Kaur. It was held in *Mt. Jassan* v. *Nihala* (1), that amongst Jats of this district a second marriage in the first husband's life-time is illegal in the absence of proof of a divorce in writing by the first husband; while in *Sundor* v. *Nihala* (2), it was found that by the custom of Jats of the Sialkot district a woman who has received a written divorce from her husband was free to contract a second marriage. These are instances where the custom as stated in the Customary Law of the district has been judicially recognised, and there is no evidence entitling us to go beyond what is stated in the Customary Law of the district. This means that as there was no written document of divorce there could be no remarriage with Lal Singh.

Not only must it be held that there could be no remarriage because there was no written divorce, but the evidence is not sufficient to prove that there was an actualy divorce. The money paid to Buta Singh may only have been to stop him interfering with the illicit connection between his wife and Lal Singh. Ishar Kaur was living with Lal Singh at the time as his mistress and Buta Singh's present statement that he gave up his wife is not sufficient to establish that he did so. In my judgment, however, as already said, the oral relinquishment of his wife would not have been sufficient under the custom binding on this tribe. Similarly, the evidence to establish that there was a remarriage is far from good. Ishar Kaur, plaintiffs' maternal uncle, Jhanda Singh, Nihal Singh, Sham Singh and Mihan Singh are the principal witnesses as to this. On the other hand most of the relatives of deceased Lal Singh denied that there was any marriage. As already stated the evidence examined by the plaintiffs is not sufficient to show that Ishar Kaur ever lived with Lal Singh as his wife at Manak. Nor does the evidence establish that he put her sons to school. This was done by Ishar Kaur herself. Mr. Fyson, Deputy Commissioner of Sialkot, is an important witness who has given evidence that Lal Singh told him that he had only two sons, one at Lyallpur and the other working as Canal Zilladar.

For the reasons given, it must be held that the plaintiffs have failed to prove that they are the legitimate sons of Lal Singh. But there is no doubt that their mother had an illicit connection with him. It may be that they are the natural sons of Lal Singh but they have certainly not established that they are his legitimate sons. It follows that the suit was properly dismissed. The appeal is accordingly dismissed but without costs as none appeared for the respondents. Under the provisions of O. 33, R. 11 and O. 44, Civil Procedure Code, the appellants are ordered to pay the court-fees payable by them if they had not been permitted to sue as paupers.

Harrison, J.—I agree.

R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 756

JAI LAL AND AGHA HAIDAR, JJ.

Buta—Plaintiff—Appellant.

v.

Munshi and *others*—Defendants—Respondents.

Second Appeal No. 2191 of 1928, Decided on 4th April 1933, from decree of Dist. Judge, Hoshiarpur, D/- 13th June 1928.

Custom (Punjab)—Alienation—Necessity—Money raised by sale for paying previous creditors—Part of sale consideration found to be for necessity — Commission paid to auctioneer was allowed as necessary.

A certain piece of land was mortgaged with possession for Rs. 5,000. The mortgagor was indebted to other persons. In order to raise money to pay the other creditors he decided to sell the land by auction and Rs. 600 was paid as commission to the auctioneer, the land having been sold for Rs. 10,300. It was found that out of Rupees 10,300 Rs. 7,771 were for necessity. This included Rs. 600 commission paid to the auctioneer. It

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1. (1884) 78 P R 1884.
2. (1889) 84 P R 1889.

was contended that the sale having been set aside it must be assumed that there was no necessity for the payment of Rs. 600 as commission:

Held: that as it was necessary for the alienor to raise more money in order to pay his previous creditors, the best method of raising the money was by creating a mortgage on the property or by selling it was a matter which was really for the debtor to decide. The mere fact that the sale had been converted into a mortgage did not affect the question. Under the circumstances Rs. 600 were rightly allowed. [P 757 C 2]

Fakir Chand and *Chandra Gupta*—for Appellant.

Charanjiv Lal—for Respondents.

Jai Lal, J.—This appeal is by the plaintiff who instituted a suit to set aside certain alienations made by his father. The District Judge has upheld all the alienations except alienation No. 1 mentioned on p. 25 of the printed paper book. The learned counsel for the appellant has appealed against the decision of the District Judge with regard to four alienations, but before us he has conceded that there was no ground to interfere with the judgment of the District Judge with regard to the fourth alienation on the same page of the judgment. With regard to alienation No. 2 the learned counsel says that out of Rs. 600 the consideration mentioned in the deed, Rs. 100 should not have been allowed. It appears that Rs. 600 was due to Thakur Singh, a previous creditor of the alienor, and Rs. 100 was left with the alienee for payment to Thakur Singh. It appears that the alienee had not paid this Rs. 100 at the date of the institution of the suit, but Thakur Singh was produced as a witness and he duly proved the amount due to him, and the alienee admitted his liability to pay this amount to him; the appellant therefore has no reason to complain against the decree of the District Judge.

With regard to the third mortgage, out of Rs. 650, Rs. 70 were paid to the alienor at the time of the registration of the mortgage-deed. This is a very small part of the consideration and it is not necessary to interfere with the decree of the District Judge. The main contention of the learned counsel was with regard to alienation No. 1. It appears that about 51 kanals of land was mortgaged with possession for Rs. 5,000 and as the mortgagor was indebted to other persons, in order to raise money to pay the other creditors he decided to sell the land by auction and Rs. 600 was paid as commission to the auctioneer, the land having been sold for Rs. 10,300. The District Judge has found that out of Rs. 10,300, Rs. 7,771 must be deemed to be for necessity. This includes Rs. 600 commission paid to the auctioneer. The learned counsel says that the sale having been set aside it must be assumed that there was no necessity for the payment of Rs. 600 as commission. In my opinion there is no force in this contention. It has been found that it was necessary for the alienor to raise more money in order to pay his previous creditors; under the circumstances whether the best method of raising the money was by creating a mortgage on the property or by selling it is a matter which was really for the debtor to decide. The mere fact that the sale has been converted into a mortgage does not, in my opinion, affect the question specially as it has not been shown by any evidence that the amount could be raised by affecting a mortgage of the property. Under the circumstances, in my opinion, Rs. 600, have been rightly allowed by the District Judge and I would dismiss the appeal with costs in favour of the respondents who have appeared before us. The respondents in alienation No. 1 not having appeared before us there would be no order of costs in their favour.

Agha Haidar, J.—I agree.

R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 757

JAI LAL AND ABDUL RASHID, JJ.

Bakhtawar and *another*—Defendants—Appellants.

v.

Jindwadda Shah and *another*—Plaintiffs—Respondents.

First Appeal No. 2064 of 1927, Decided on 10th May 1933, from decree of First Class Sub-Judge, Shahpur, D/- 21st June 1927.

Custom (Punjab) — Custom recorded in wajibularz — Abrogation must be proved — Order of abrogation by Deputy Commissioner —Circumstances under which order was passed must be shown.

The burden of proving that a custom embodied in the wajibularz had been subsequently abrogated lies heavily on the party alleging abrogation, and it is not discharged by merely filing an order of the Deputy Commissioner ordering abrogation without showing how the order came to be passed. [P 758 C 1, 2]

R C Manchanda—for Appellants.

Ghulam Mohiyuddin and *L. M Datta*—for Respondents.

Abdul Rashid, J. — The plaintiff, Jindwadda Shah, is one of the proprietors of the village Adhi Kot, Tahsil Khushab, District Shahpur. He has brought a declaratory suit against the remaining proprietors of this village to the effect that he is the full owner of a plot of land measuring 1210 kanals which he has reclaimed from the Shamilat deh and which has ever since its reclamation been under his cultivating possession. In support of his claim he relied upon a condition embodied in the wajibularz of 1865 which had been repeated in the Settlement Record of 1893 to the effect that if a proprietor of land or a tirniguzar makes land abad out of the shamilat it shall be recorded as his exclusive property. The case of the defendants was that this condition was in force till 1905, but that by an order of the Deputy Commissioner in 1905 it had been abrogated and a person who now breaks up and reclaims land from the shamilat can only be recorded as merely a co-sharer in possession of such land and not as its exclusive owner. The Subordinate Judge who tried the case has given the decree prayed for by the plaintiff on the ground that on the present record there is no proof that the order of the Deputy Commissioner made in 1905 was the result of any contract or agreement arrived at between the proprietors of this village. He has therefore held that the conditions laid down in the wajibularz of 1865 and repeated in the Settlement Record of 1893 still govern the case.

From this decree of the Subordinate Judge the defendants have filed an appeal in this Court. The main ground urged on their behalf is that ever since 1901 no proprietor who has broken up land from the shamilat deh has ever been recorded as exclusive owner of that land. It is contended that the old custom prevailing upto 1905 has therefore been abrogated by implication. It is urged that as none of the proprietors since 1901 has been recorded as the exclusive owner of the land that he has broken up, it must be taken that all the proprietors tacitly agreed to be governed by the order passed by the Deputy Commissioner and that it may now be taken that the custom prevailing is one in accordance with that order. No evidence has been placed on the present record as to how the order of the Deputy Commmissioner which is alleged to have been made in 1905 was secured, in fact even the original order of the Deputy Commissioner has not been brought on the present record. Reliance is placed on a report by the Tahsildar which was made by him as a result of an application which the plaintiff presented on 11th May 1921. It seems to me that this report of the Tahsildar embodying certain opinions formed by him as to the rights of the parties is not admissible in evidence in the present proceedings. The oral evidence produced by the parties is of no assistance as both the witnesses for the plaintiff support his case while the two witnesses for the defendants depose in their favour.

The burden of proving that the custom embodied in the wajibularz had been subsequently abrogated lay heavily on the defendants and, in my opinion, they have utterly failed to discharge it. I would therefore reject the appeal with costs and affirm the decree of the Subordinate Judge.

Jai Lal, J.—I agree.

M.N. *Appeal dismissed.*

A. I. R. 1933 Lahore 758

JAI LAL, J.

Bhagwant Singh—Decree-holder—Appellant.

v.

Santa Singh and *another* — Judgment-debtors—Respondents.

Misc. Second Appeal No. 1833 of 1932, Decided on 6th March 1933, from order of Dist. Judge, Ludhiana, D/- 23rd August 1932.

Execution — Decree varied by consent—Court attesting it—Varied decree can be executed—Separate suit is unnecessary — Civil P. C. (1908), O. 20, R. 11.

The agreement between the judgment-debtor and the decree-holder was for the payment of an amount smaller than the decretal amount payable by instalments and this agreement was attested by the Court :

Held : that it is not now open to the executing Court to go behind that adjustment or arrangement. Under O. 20, R. 11 it is open to the Court with the consent of the parties, to vary the terms of a decree and this having been done the executing Court cannot refuse to execute the varied decree and drive the decree-holder to a civil suit. [P 759 C 1]

Jhanda Singh—for Appellant.

Nihal Singh—for Respondents.

Judgment.—A decree for Rupees 983-5-6, and costs was passed against the estate of one Jaimal. Subsequent to the decree the respondent, Santa Singh, became one of the legal representatives of Jaimal and during the execution proceedings he agreed with the decree-holder to pay Rs. 750 in full satisfaction of the decree by instalments with the proviso that if default be made in the payment of any instalment the whole of the balance out of Rs. 750 would become recoverable by execution of the decree. The decree-holder agreed to these conditions and relinquished the difference between the original amount of the decree and Rs. 750. This arrangement was duly presented in writing to the Court and on both the parties agreeing to it it was attested by the Court and the execution proceedings filed. Default having been made in the payment of the instalments by Santa Singh, the decree-holder presented an application for execution of the decree as varied against him, and the learned District Judge has held that the only remedy of the decree-holder is by means of a civil suit and that the decree could not be executed because the arrangement mentioned above was an adjustment of the decree, as that expression is understood in law. He has relied on certain authorities in support of this view, but I do not think it is necessary to mention them or to discuss them.

The agreement between Santa Singh and the decree-holder was for the payment of an amount smaller than the decretal amount payable by instalments and, as I have already stated, this arrangement was attested by the Court. It is not now open to the executing Court to go behind that adjustment or arrangement. Under O. 20, R. 11, it is open to the Court, with the consent of the parties, to vary the terms of a decree, and this was done in the present case. Moreover, the order attesting the terms of the compromise having been passed by the Court in the presence of the parties and with their consent it is not now open to either of them to contend that the Court was not competent to attest it. I accordingly accept this appeal with costs throughout, set aside the order of the District Judge and restore that of the executing Court.

M.N. *Appeal allowed.*

A. I. R. 1933 Lahore 759

JAI LAL AND ABDUL RASHID, JJ.

Jiwan Khan and *others*—Plaintiffs—Appellants.

v.

Habib and *others*—Defendants—Respondents.

Second Appeal No. 495 of 1928, Decided on 15th May 1933, from decree of Dist. Judge, Jhelum, D/- 3rd December 1927.

(a) Mahomedan Law—Wakf—Mosque does not belong to any particular sect—Every Mahomedan has right to enter and perform devotion irrespective of sect to which he belongs.

It is a well-recognized principle of Mahomedan law that a mosque does not belong to any particular sect, and when a mosque is built and consecrated by public worship, it ceases to be the property of the builder and vests in God in such a manner as subject it to the rules of Divine property; the appropriator's right in it is extinguished, and it becomes the property of God by the advantage of it resulting to his creatures. A mosque once consecrated cannot in any case revert to the founder, and every Mahomedan has the legal right to enter it and perform devotion according to his own tenets, so long as the form of worship is in accord with the recognized rules of Mahomedan Ecclesiastical Law. Further, when a mosque is consecrated and it is purported to be reserved for the people of a particular locality or sect the reservation is void and persons not belonging to that locality or sect are entitled to worship in it, for every person who believes in the unity of God and the mission of Muhammad as a prophet is a Mussalman to whatever sect he may belong: 13 *All* 419 (*F B*); *A I R* 1920 *Lah* 384 and *AIR* 1933 *Lah* 80, *Rel on.* [P 760 C 1, 2]

(b) Specific Relief Act (1877), S. 42—Persons having undoubted right to say prayers—Court should not refuse declaration of such right merely because of anticipated breach of peace—Mahomedan law—Wakf.

If a person has an undoubted legal right to say his prayers in a mosque the Courts cannot refuse to recognize that legal right by refusing a declaration prayed for merely because an anticipated breach of the peace is to be committed by the other side: *A I R* 1926 *Lah* 683 and 695 and 35 *Cal* 294, *Ref.* [P 761 C 1]

Barkat Ali, *Aslam Khan* and *S. R. Sawhney*—for Appellants.

Ghulam Mohiuddin and *Muharram Ali Chishti*—for Respondents.

Abdul Rashid, J.—This second appeal has arisen out of a suit instituted by 18 Shias of Pind Dadan Khan to obtain a declaration that the plaintiffs and all other Shias are entitled to worship in the Khajurwali mosque and also a permanent injunction restraining the defendants from obstructing the plaintiffs in performing worship in this mosque according to the tenants of their sect. The defendants pleaded inter alia that the plaintiffs were Sahih Shias and as they indulged in abusive language towards the Ashabs, Hazrat Abubakar, Hazrat Umar and Hazrat Usman, they were heretics and could not be regarded as true Muslims, that there were two separate Shia mosques in the town, that the plaintiffs had never used this mosque for worship, that there was a danger of breach of the peace if the plaintiffs were allowed to worship in this Sunni mosque, that the granting of a declaratory decree was entirely within the discretion of the Court and that in the peculiar circumstances of this case the Court should not exercise this discretion in favour of the plaintiffs. The trial Court passed a decree in favour of the plaintiffs in the following terms:

> "It is ordered that the declaratory decree is hereby passed in favour of the plaintiffs against the defendants to the effect that they have a right to worship and say their prayers in the mosque known as Khajurwali and the defendants have no right to stop them from doing so and an injunction is passed in their favour that the defendants have no right to stop the plaintiffs from doing so. The plaintiffs' right will be exercised in such a manner as not to disturb the rightful exercise by the defendants of their right of prayer and worship in the mosque according to their rituals and if the plaintiffs commit such act they can be turned out by the Muttawali of the mosque. The rest of the plaintiffs' suit about a declaration in favour of the whole community of Shias is dismissed "

The defendants appealed to the District Judge who held that the Khajurwali mosque was a public mosque, that once a building had been dedicated as a public mosque every Mahomedan had a right to enter it for the purpose of worship and to join in the congregational prayer in any manner sanctioned by the Muslim Ecclesiastical Law. In spite of these findings, however he accepted the appeal of the defendants on two grounds: (1) that all the rulings cited by the learned counsel for the Shias in support of their right to say prayers in this mosque related to disputes between the different sects of Sunnis inter se and did not deal with disputes between Shias and Sunnis, and (2) that the theory that every Mussalman has a right to say prayers in a mosque has never been practised in the Khajurwali mosque of Pind Dadan Khan and that if a decree is passed in favour of the plaintiffs it will lead to periodical fights between the two sects. Against this decision the plaintiffs have now come up in appeal to this Court. It is a well-recognized principle of Mahomedan Law that a mosque does not belong to any particular sect. The Sunnis are divided into four main sects, the Hanafis, the Shafais, the Malakis and the Hanbalis and some of the differences between these sects of Sunnis are as great as between the Shias and and Sunnis. The authorities cited before the learned District Judge therefore did not become inapplicable to the present case simply because they related to disputes between the different sects of Sunnis inter se and not to dispute between Sunnis and Shias. In the Full Bench ruling of the Allahabad High Court, *Jangu* v. *Ahmadullah* (1), Mahmud, J., remarked that it is a

> "fundamental principle of the Mahomedan law of wakf, too well-known to require the citation of authorities, that when a mosque is built and consecrated by public worship, it ceases to be the property of the builder and vests in God (to use the language of the Hedaya) in such a manner as subjects it to the rules of divine property, the appropriator's right in it is extinguished, and it becomes the property of God by the advantage of it resulting to his creatures. A mosque once so consecrated cannot in any case revert to the founder and every Mahomedan has the legal right to enter it and perform devotions according to his own tenets, so long as the form of worship is in accord with the recognized rules of Mahomedan Ecclesiastical law."

Further it seems clear that when a mosque is consecrated and it is purported to be reserved for the people of a particular locality or sect the reservation is void and persons not belonging to that locality or sect are entitled to worship in it. It was held in *Maula Baksh* v. *Amiruddin* (2) that where a wakf had been validly made exclusively for the use of a particular sect the wakf is good and the condition attached to it is void. It was contended on behalf of the respondents that the appellants came into Court alleging that the Khajurwali mosque had been built on land belonging to Raja Muhammad Afzal Khan who was a Shia, that Shias had contributed to the building of the mosque and that they had been saying their prayers in it and that as the learned District Judge had found that the above allegations of the plaintiffs had not been established he acted rightly in dismissing their suit. In my view this contention cannot prevail for if it be conceded that the mosque has not been built on a land belonging to the Shias, that the Shias have not contributed anything towards the cost of the building nor have they ever said prayers in this mosque in the past, even then the Shias have a right to say prayers in this mosque so long as they are to be regarded as Mussalmans. Realizing this difficulty it was contended half-heartedly by counsel for the respondents that Shias were not Mahomedans. This argument has merely to be mentioned to be rejected. It has been laid down in numerous authorities that every person who believes in the unity of God and the mission of Muhammad as a prophet is a Mussalman to whatever sect he may belong. The Shias undoubtedly satisfy this test and that is why even the learned Dis-

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1. (1891) 13 All 419 (F B).
2. A I R 1920 Lah 384=57 I C 1000=1 Lah 317.

trict Judge did not regard the Shias as non-Muslims. In *Mt. Iqbal Begum* v. *Mt. Syed Begum* (3), it has been held by a Division Bench of this Court that all mosques are open to all sects of Islam and there is no such thing as a Sunni or a Shia mosque though the majority of the worshippers at any particular mosque may belong to one or the other sect either generally or at various times.

It was vehemently urged on behalf of the respondents that a declaratory decree should not be passed in this case as it would lead to periodical fights between the Shias and the Sunnis. In 1924 the Shias presented a petition under S. 145, Criminal P. C., with respect to this mosque. Malik Allah Bakhsh, Magistrate, First Class, dismissed their petition on 28th November 1924, holding that as there was no danger of the breach of the peace they should seek their remedy in a Civil Court. It does not therefore seem to be established on the present record that there is any imminent danger of fights between the Shias and the Sunnis if the plaintiffs' suit is decreed. Be that as it may, it is a well-recognized principle that if a person has an undoubted legal right to say his prayers in a mosque the Courts cannot refuse to recognize that legal right merely because an anticipated breach of the peace is to be committed by the other side. Under such circumstances those Mahomedans would bring themselves within the grasp of the Criminal Law who for the purposes of disturbing others engaged in their prayers make any demonstration in a mosque and thereby create a disturbance. Reference may be made in this connexion to *Khazan Chand* v. *Emperor* (4), *Tharar Singh* v. *Emperor* (5) and *Abdus Subhan* v. *Qurban Ali* (6).

Reliance was placed on behalf of the respondents on *A. I. R.* 1930 *Lah.* 728, *Ma Htay* v. *U Tha Hline* (7) and *Jaipal Kunwar* v. *Indar Bahadur Singh* (8). These cases however are distinguishable as they merely lay down that the granting of a declaratory decree is discretionary with the Court and that this discretion should not be exercised in favour of a plaintiff whose conduct has been fraudulent. In the present case the trial Court exercised a wise discretion in giving the plaintiff a decree subject to certain proviso to the effect that the plaintiffs in the exercise of their right of worship should not interrupt or disturb the worship of others. I am of the opinion that the judgment of the learned District Judge reversing the decree of the trial Court is unsustainable. I would therefore accept the appeal with costs, set aside the decree of the learned District Judge and restore the decree of the trial Court in favour of the plaintiffs.

Jai Lal, J.—I agree.

K.S. *Appeal accepted.*

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3. A I R 1933 Lah 80=140 I C 829.
4. A I R 1926 Lah 683=97 I C 39=27 Cr L J 1063=7 Lah 482
5. A I R 1926 Lah 695=97 I C 358=27 Cr L J 1094=8 Lah 98.
6. (1908) 35 Cal 294=7 C L J 433=12 C W N 289.
7. A I R 1925 Rang 134=88 I C 66=2 Rang 649.
8. (1904) 26 All 238=31 I A 67=8 Sar 625 (P C).

A. I. R 1933 Lahore 761

JAI LAL AND ABDUL RASHID JJ.

Gurdit Singh and *others* — Defendants —Appellants.

v.

Fakir Chand—Plaintiff—Respondent.

First Appeal No. 2321 of 1929, Decided on 30th May 1933, from decree of First Class Sub-Judge, Amritsar, D/- 10th June 1929.

Tort—Deliberate and wanton assault and consequent loss of eyesight—Suit for damages — Substantial and exemplary damages should be awarded—Principles in estimating damages stated.

Where owing to a deliberate and wanton assault by the defendent the plaintiff loses his eyesight and has suffered considerable pain and loss of earning and he files a suit for damages, substantial and exemplary damages should be awarded. [P 762 C 2]

The principles which guide the Courts in estimating damages in a case of this kind are as follows: The injured person is entitled to damages for personal suffering and for loss of enjoyment of life and also to actual pecuniary loss resulting to and the expenses reasonably incurred by him. If he is engaged in a profession, trade or other occupation, he must be compensated for the probable future loss by reason of incapacity or diminished capacity to work: *AIR* 1914 *Bom* 218, *Ref.* [P 762 C 1]

Din Dayal Khanna—for Appellants.

M. C. Mahajan—for Respondent.

Abdul Rashid, J.—This appeal has arisen out of an action brought by the plaintiff, Fakir Chand, against the defendants, Gurdit Singh, Thakar Singh, Achhar Singh and Kishan Singh, for recovery of Rs. 15,000 on account of damages for assault and battering. It is beyond dispute that the plaintiff was brutally assaulted by the defendants on 8th November 1927. Both his eyes were pierced by some sharp pointed weapon, the ulna bone of his left forearm was fractured, a grievous injury was inflicted on his right leg and nine simple hurts on other parts of his body. The defendants were convicted under Ss. 326,394 and 397, Penal Code, with respect to this incident and sentenced to ten years' rigorous imprisonment and Rs. 1,000 fine each. It was ordered out that out of the fine Rupees Rs. 2,000 should be paid to the plaintiff. In the present suit the plaintiff claimed Rs. 10,000 for the total loss of his eye-sight and the pain and suffering caused thereby, Rs. 6,500 for the loss of earnings and Rupees 500 for medical expenses incurred by him. After deducting Rs. 2,000 allowed to him as a result of the criminal trial a decree for Rs. 15,000 was prayed for. The trial Court has granted a decree for Rs. 13,400 and proportionate costs and the defendants, Gurdit Singh, Kishan Singh and Thakar Singh, have instituted this appeal. It was urged on behalf of the appellants that it had not been proved that the respondent had spent Rs. 400 as medical expenses on his treatment, that the sum of Rs. 10,000 awarded as damages for the loss of eye-sight, pain and suffering was excessive and that the loss of earnings would not amount to Rs. 6,500 as the respondent was already 45 years of age when he was assaulted.

I am of opinion that the evidence of Ram Singh, P. W. 4, Jagat Singh, P. W. 7, Amritsaria, P. W. 8, and Fakir Chand, P. W. 9, establishes the fact that the respondent incurred expenses exceeding Rs. 400 during the course of his treatment. As far as damages for the loss of eye-sight, pain and suffering are concerned, the sum of Rs. 10,000 awarded by the trial Court does not seem to be excessive. It was observed in *Sri Ram* v. *Delhi Electric Tramway & Lighting Co. Ltd.* (1), that:

> "the principles which guide the Court in estimating damages in a case of this kind are well established and do not admit of any controversy. The injured person is entitled to damages for personal suffering and for loss of enjoyment of life and also to actual pecuniary loss resulting to and the expenses reasonably incurred by him. If he is engaged in a profession, trade or other occupation, he must be compensated for the probable future loss by reason of incapacity or diminished capacity to work."

Dr. Ghulam Mohammad, P. W. 3, has deposed that the plaintiff must have suffered severe pain during the time that he was in hospital, i. e., from 8th November to 26th December 1927. The total loss of eye-sight has deprived the plaintiff of all enjoyment of life and will continue to cause acute suffering to him so long as he lives. In *Sorabji Hormusji* v. *Jamshedji Merwanji* (2), Rs. 10,000 were awarded for pain and suffering caused to a person who had lost one of his legs as a result of an accident caused by the negligence of the defendant. In the present case the assault on the respondent was deliberate and wanton. In such cases substantial and exemplary damages are awarded which is not the case when the injury is caused by a mere rash and negligent act. The law on this point is summoned up in Ramaswami Iyer's Law of Torts, pp. 55 to 58. It has been observed in Pollock's Law of Torts, p. 189 (12th edition) that:

> "where there is a great injury without the possibility of measuring compensation by any numerical rule, juries have been not only allowed but encouraged to give damages that express indignation at the defendant's wrong rather than a value set upon the plaintiff's loss. Damages awarded on this principle are called exemplary or vindictive. The kind of wrongs to which they are applicable are those which besides the violation of a right or the actual damage, import insult or outrage and so are not merely injuries but *iniuriae* in the strictest Roman sense of the term. . . . The tort is aggravated by the evil motive."

The respondent was waylaid by the appellants who deliberately proceeded to pierce his eyes so that there may be no chance of his regaining his eye-sight. In such a case I am of opinion that the trial Court acted rightly in fixing the amount of damages at Rs. 10,000. It has been established by the evidence on the record that the respondent was earning between Rupees 70 to Rs. 85 a month. The evidence of Sardar Jawahar Singh, P. W. 1, Manager Bedi Ramkishan and Lala Ishar Das, P. W. 2, a merchant of Amritsar, is cogent and convincing and I do not see any reason why this evidence should not be relied on. In the ordinary course of things it must be assumed that the respondent would have continued earning Rs. 70 to 85 a month till the age of 55. In case his income be taken to be only Rs. 45 a month even then he is entitled to Rs. 5,000 on account of loss of income and this is the amount that the trial Court has awarded under this head. For the reasons given above, I would affirm the decree of the trial Court

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1. AIR 1919 Lah 213=49 I C 435=75 P R 1919.

2. AIR 1914 Bom 218=21 I C 705=38B om 552.

and dismiss this appeal with costs.

Jai Lal, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 763 (1)

SHADI LAL, C. J. AND ABDUL QADIR, J.

Mam Raj—Appellant.

v.

Chhotu and *others*—Respondents.

Second Appeal No. 1472 of 1931, Decided on 31st May 1933.

Cosharer—Sale of portion of share by cosharer — Vendor and vendee continuing as cosharers — Vendor or his representatives cannot claim adverse possession as against vendee unless title of vendee is repudiated—Adverse possession.

The possession of one cosharer is the possession of all the cosharers and a cosharer will not be permitted to claim adverse possession unless it clearly appears that he has repudiated the title of the cosharer to his knowledge and is holding adversely to him. Hence where a cosharer sells a portion of share, both he and his vendee become cosharers from the moment of the sale and as such neither the vendor nor his representatives can assert adverse possession against the vendees unless there has been an overt act showing adverse possession to the knowledge of the vendee: *A I R* 1924 *Lah* 682, *Doubted* and *Dist*; *A I R* 1932 *All* 393, *Ref.* [P 763 C 1, 2]

Shamair Chand—for Appellant.

Fakir Chand and *Chandra Gupta*—for Respondents.

Shadi Lal, C. J.—On 8th July 1879, Allah Dia, a cosharer in a joint holding, sold 1/7th share in that holding to the predecessors-in-interest of the defendants. Mutation was duly effected in respect of the sale and the vendees were recorded in the revenue papers as cosharers in the holding. It appears however that they did not obtain actual possession of the land; and that when proceedings for partition of the land were taken, the descendants of the vendor, who, after the sale referred to above, retained a share in the joint holding claimed that, by adverse possession, they had acquired ownership of the share sold by Allah Dia.

Now, the rule of law is finally established that, in the case of cosharers, the possession of one cosharer is the possession of all the cosharers and that a cosharer will not be permitted to claim the protection of the statute of limitation unless it clearly appears that he has repudiated the title of this cosharer to his knowledge and is holding adversely to him. In other words there must be an overt act showing adverse possession, and that act must be brought home to the cosharer against whom adverse possession is claimed. In the present case Allah Dia did not sell the whole of his share in the joint holding, but only a portion thereof, and both he and his vendees became cosharers from the moment that the sale took place in favour of the latter. I cannot understand how the vendor's representatives can assert adverse possession against the vendees. Our attention has been invited to a judgment of a Single Judge in *Udi* v. *Maru Mal, A. I. R.* 1924 *Lah.* 682, where it was held that a transferee from a cosharer cannot by the mere fact of transfer become a cosharer, if his rights as such are denied by the other cosharers. The correctness of this ruling is open to doubt, because it has been repeatedly held that there can be no adverse possession by one co-owner against another co-owner, and that the same principle applies to the case of a transferee from a co-owner: vide inter alia, *Subha Lal* v. *Fateh Muhammad* (1). It is however unnecessary to discuss the matter any further, because in *Udi's* case, *A. I. R.* 1924 *Lah.* 682, other cosharers were claiming adversely to the transferee, and not the transferor. That case is therefore wholly inapplicable to the facts of the present case, where adverse possession is set up, not by the other cosharers, but by the vendor himself, who, after the transfer, continued to be a cosharer in the holding.

Mr. Fakir Chand, for the respondents however contends that there was an ouster of the vendees in the present case, but, as pointed out by the lower Court, his clients did not plead any overt act nor did they adduce any evidence to establish such an overt act. They have therefore wholly failed to establish adverse possession against their cosharers.

The result is that the appeal is allowed, the decrees of the Courts below are vacated, and the suit dismissed with costs throughout.

Abdul Qadir, J.—I agree.

K.S. *Appeal allowed.*

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1. AIR 1932 All 393=140 I C 653=54 All 628.

A. I. R. 1933 Lahore 763 (2)

SHADI LAL, C. J. AND ABDUL QADIR, J.

Mt. Hayat Bibi—Defendant — Appellant.

v.

Muhammad Amin and *others* — Plaintiffs—Respondents.

Second Appeal No. 935 of 1928, Decided on 30th May 1933.

(a) **Custom (Punjab) — Khoja of Kasur in Lahore District—Will—Property bequeathed to lady—Death of lady issueless subsequent to death of testator—Property does not revert to testator's heirs.**

There is no custom among the Khojas of Kasur in Lahore District by which, when property is bequeathed to a lady and she dies issueless soon after the death of the testator, such property reverts to the heirs of the testator. [P 764 C 2]

(b) **Principal and Agent — Bequest of property to lady and death of lady soon after death of testator — Suit by lady's husband against person in possession of property bequeathed—No relationship of principal and agent exists between parties—Plaintiff may be given decree for rents and mesne profits —Civil P. C. (1908), O. 20, R. 12.**

Certain property was bequeathed to a lady who died soon after the testator's death Her husband filed a suit against the person in possession of the property and wanted defendant to render accounts :

Held : that the parties did not stand in the relationship of principal and agent, that the defendant was not liable to render accounts but that the Court was, under O. 20, R. 12, empowered to pass a decree for rents and mesne profits which had accrued on the property prior to institution of suit. [P 764 C 2]

D. C Ralli and *M. L. Sethi*—for Appellant.

Shah Nawaz and *Feroze Din Ahmad*—for Respondents.

Shadi Lal, C. J.—On 26th October 1919, Haji Muhammad Farid, a Khoja of Kasur in the Lahore District, made a will, by which he disposed of his immovable property and his one-half share in a cotton factory to various persons mentioned therein. One of the persons favoured by him was Mt. Khadija Begam, to whom he bequeathed 2/50th share of one-half of the factory, which belonged to him. The testator died on 28th March 1921, and two months afterwards Mt. Khadija Begam also died. The plaintiff Muhammad Amin, the husband of the woman, has brought the present suit for the recovery of the possession of the property bequeathed to his wife, and also for the profits thereof for three years prior to the institution of the suit. The Courts below have concurred in decreeing the claim, and in this second appeal by the contesting defendant only two points have been argued before us.

The first contention urged by the learned counsel is that on the death of Mt. Khadija Begam the estate reverted to the testator's heirs in the absence of her issue. The learned District Judge holds that the special custom invoked by the appellant has not been established, but it is argued that the decision in the former suit brought by the appellant against the husband of Mt. Khadija Begam operates as res judicata. That suit was brought in the Court of a Subordinate Judge of the Third Class, for the recovery of Rs. 1,993-9-3, which was alleged to have been given in cash and dresses, etc., to Mt. Khadija Begam as her dowry. The defendant Muhammad Amin denied the existence of the custom set up by the then plaintiff, but no decision was arrived at on that point because the whole dispute between the parties was referred to arbitration. The arbitrators too did not decide any matter, as the parties agreed that a sum of Rs. 1,000 should be paid by Muhammad Amin to the plaintiff. Now, there are several reasons why the rule of res judicata does not operate as a bar to the present suit. In the first place, there was no decision, express or implied, on the question of custom set up in that case. In the second place the present suit is beyond the pecuniary jurisdiction of the Court which dealt with the former case. Lastly, as the learned District Judge points out the former suit related to gifts made by way of dowry, and if there was any decision in that case, it related to the custom that presents given as dowry are returnable on the death of the person to whom they were made. In the present case, no question of gift by way of dowry arises; and there can be no doubt that the bequest of the two shares in the factory which were given by the testator to Mt. Khadija Begam, cannot be treated as a gift which was to revert on the death of the lady without any issue. It is to be observed that that testator made similar gifts to other persons who were not in any way related to him, and it would be absurd to suggest that, while the bequest to strangers should be absolute, that made to Mt. Khadija Begam was subject to the rule of reversion. I have, therefore, no hesitation in endorsing the decision of the learned District Judge on this point. There is, however, some force in the the second contention that the parties do not stand in the relationship of principal and agent, and that the defendant is not liable to render accounts to the plaintiff. The latter, however, wants profits attributable to his share of the factory for the three years prior to the institution of the suit, and as laid down in O. 20, R. 12, Civil Procedure Code, the Court is empowered to pass a decree for the rents and mesne profits which have accrued on the property during the period prior to the institution of the suit, and can direct an enquiry as to such rents or mesne profits.

I would, therefore, direct the lower appellate Court to enquire into those profits which the defendant, who must be deemed to be in wrongful possession of the plaintiff's share actually received or might with ordinary diligence have received therefrom, and to determine the amount which as a result of the enquiry should be awarded to the plaintiff. The appeal is accordingly allowed pro tanto and the decree of the lower appellate Court modified accordingly. The parties are directed to bear their own costs in this Court.

Abdul Qadir, J.—I agree.

K.S. *Decree modified.*

A. I. R. 1933 Lahore 765 (1)

HARRISON AND ADDISON, JJ.

Mt. Ratno—Plaintiff—Appellant.

v.

Jaimal and *others*—Defendants—Respondents.

Second Appeal No. 998 of 1927, Decided on 10th April 1933, from decree of Dist. Judge, Ludhiana, D/- 18th January 1927.

Civil P. C. (1908), S. 100—Finding that land in suit is ancestral is one of fact.

A finding that certain portion of the land in suit is ancestral is one of fact and cannot be challenged in second appeal. [P 765 C 1, 2]

Chiranjiva Lal and *J. G. Sethi*—for Appellant.

Muhammad Amin and *Balkishan Mehra*—for Respondents.

Harrison, J.—This second appeal is disposed of by a preliminary objection taken by counsel for the respondents. It has been decided by the lower appellate Court that certain portion of the land in suit is ancestral. This decision is challenged by counsel for the appellant. Counsel for the respondents in urging his preliminary objection contends that this is a finding of fact and cannot be challenged on second appeal and as there is no other point, the appeal must fail. This is so. Right or wrong, the decision stands. It cannot even be truly urged that, it is based on no evidence, whatever the quality of the evidence may be considered to be. Whatever view might have been taken by us or any other Bench, had the matter been open and before it, it is quite immaterial; the evidence is there. The decision is one of fact based on evidence. It cannot be challenged or questioned.

The appeal must fail and is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 765 (2)

DALIP SINGH, J.

Hakam Ali and *others*—Defendants—Appellants.

v.

Shiv Narain and *others* — Plaintiffs—Respondents.

Second Appeal No. 1944 of 1931, Desided on 19th May 1933, from decree of Dist. Judge, Ferozepur, D/- 20th June 1931.

(a) Limitation Act (1908), S. 5—Death of sole appellant — Delay in filing application and affidavit on behalf of minor heirs of appellant — Time was extended and abatement set aside — Civil P. C. (1908), O. 22, R. 9.

The sole appellant defendant in the suit died on 12th January 1932. On 9th April 1932 one *B*, guardian-ad-litem of the minors, came to Lahore to put an affidavit as to the death of appellant, heirship of his minor sons and his freedom from any interest. The affidavit was actually drawn up but there was nobody at Lahore to indentify *B* and he had therefore to go back to Ferozepore on the 10th which was Sunday and returned to Lahore on the 11th after 4 o'clock. The 12th was a holiday and the affidavit with the application was put on the 13th :

Held : that in the circumstances it was a fit case for extending time, and setting aside abatement and abatement was set aside. [P 766 C 2]

(b) Civil P. C. (1908), O. 22, R. 4 (3)—One legal representative already on record though in different capacity—No application is necessary to avoid abatement.

Where a legal representative of the deceased person is already on record though in a different capacity, no application is necessary to avoid abatement. [P 766 C 2]

(c) Civil P. C. (1908), O. 22, R. 4 (3)—Whether all legal representatives must be brought on record—(*Quaere*).

Whether all the legal representatives of a deceased person must be brought on record or the suit must be held not to abate as long as one of the legal representatives has been brought on the record (*Quaere*). [P 766 C 2]

Mohammad Amin Khan — for Appellants.

Amar Nath Chona — for Respondents.

Judgment.—The facts of this case are as follows: By a mortgage-deed dated 16th July 1887, one Rahiman, deceased, father of Hakim Ali, defendant 1, and appellant here, mortgaged 309 kanals, 16 marlas to one Kanshi Ram, father of Prabhu Dial, defendant

2. The principal amount of the mortgage was Rs. 99 and the mortgagor was to remain in possession as tenant of the mortgagee and pay Rs. 24-12-0 per annum by way of rent and if he failed to do so, to pay interest on the rent at the rate of Rs. 25 per cent. per annum. In 1908 a suit was instituted by One Gurmukh Singh on behalf of Prabh Dial, then alleged to be a minor, for possession of 309 kanals, 16 marlas of land, as mortgagee for Rs. 660 nearly. The suit was instituted on 11th August 1908 and was compromised on 25th August 1908 on behalf of the minor by one Nihal Chand who claimed to be a Mukhtariam of Gurmukh Singh. A decree was passed, giving possession of 73 kanals, 5½ marlas to the minor in lieu of Rs. 200. It appears however from the order and the compromise that what was meant by this decree was that the claim to take possession of the whole 309 kanals as mortgagee was given up and the mortgagee was put in actual possession of 73 kanals for a principal amount of Rupees 200. Subsequently in 1923 Prabh Dial sold his mortgagee rights to the present plaintiffs. Subsequently the present defendant 1, Hakim Ali, brought a suit for redemption of 104 kanals before the revenue authorities. It appears that this 104 kanals was a pure arithmetical mistake and the suit was really for possession by redemption of 73 kanals, 5½ marlas. On the basis of the compromise which according to revenue authorities had been followed by a mutation, the suit was decreed. The plaintiffs then brought the present suit, alleging that the total charge on the property was over Rs. 2,000 but they were satisfied to receive Rs. 1,000 in redemption of the mortgage for 104 kanals and 2 marlas. The trial Court decreed the suit and learned District Judge dismissed the appeal and Hakim Ali, defendant 1, brought the present appeal.

The preliminary objections have been raised by the learned counsel for the respondents. In the first place he contends that Hakim Ali died on 12th January 1932, and the application to bring his legal representatives on the record was not made until 13th April 1932 and that the appeal has therefore abated. It appears that what happened was that on 9th April 1932, the guardian ad litem of the minors came to Lahore and wished to put up an affidavit as to the death of Hakim Ali and the heirship of his minor sons and his own freedom from any interest. This affidavit was actually drawn up but as there was nobody here to identify the deponent, Bulanda, he had to go back to Ferozepure on 10th which was a Sunday. On 11th he returned to Lahore after 4 o'clock with the affidavit duly attested. The 12th was a holiday and the affidavit with the application was put in on the 13th. I have no hesitation in extending time in the circumstances and setting aside the abatement of the appeal arising on this ground.

The next point urged is that Mula Mal, one of the respondents, a co-mortgagee, died on 7th May 1931, and no legal representatives have so far been brought on the record at all. This fact was brought to the notice of the counsel's munshi on 9th January 1933. The learned counsel contended that Mula Mal had five sons one of whom was already on the record, namely, Maharaj Mal, as a party in his own right and the others not having been brought on the record the appeal abated in toto as the interest of the mortgagees was not separable. The rulings of this Court lay down that where the legal representative of a deceased person is already on the record, no application is necessary to avoid abatement. In a Division Bench ruling of this Court I have expressed a different view, but my learned colleague in that case, Jai Lal, J., did not agree with my view. It must be taken then for the present that the view of this Court is as stated above. The question then arises whether all the legal representatives of a deceased person must be brought on the record or the suit must be held not to abate so long as one of the legal representatives has been brought on the record. Now in the case when an application has been made, the point is free from difficulty, because the section only says that abatement takes place where there is no application, but in this case there is no application but by a fiction of law the necessity of an application is dispensed with because one of the legal representatives is already on the record, though in a different capacity. Even assuming however that the appeal abates, I would be prepared in the circumstances to extend time for bringing these persons on the record. But in view of the rulings of this Court and as Maharaj Mal is not shown to have any divergent interest from the other representatives and fully represents the estate of Mula Mal, I do not consider that the appeal abates and the case accordingly shall proceed.

Coming to the merits, the facts are perfectly simple and the Courts below appear to have confused themselves on the question of validity of the decree as against Prabh Dial. It appears that Kanshi Ram died in 1889 and therefore in 1908 Prabh Dial was probably more than 18 years old. He was shown as a minor in all probability because, as asserted by the defendant-appellant. Gurmukh Singh had been appointed his guardian by the Court. It is also said that there is nothing to show that Nihal Chand was Mukhtariam of Gurmukh Singh but surely the presumption should be that the Court in that case was satisfied of the authority of Nihal Chand to carry on the suit on behalf of Gurmukh Singh and in the absence of anything to show that there was a fraud, that Nihal Chand was duly authorised by Gurmukh Singh. In all probability the power of attorney has been destroyed or lost, because it was on what is called "nathi be." In any event, even if the decree against Prabh Dial was voidable, I do not see how it was void and up till 1923 when Prabh Dial sold his mortgagee rights to the present plaintiffs, he never attempted to dispute the decree or have it set aside and even in the present case, though impleaded as a defendant, he never cared to appear. I do not see how it is open to the present plaintiffs to contest the validity of this decree. I therefore accept the appeal and dismiss the plaintiffs' suit with costs throughout.

V.B. *Appeal allowed.*

A. I. R. 1933 Lahore 767

TEK CHAND AND MONROE, JJ.

Chandgi Ram and *others*—Plaintiffs—Appellants.

v.

Ram Sukh and *others*—Defendants—Respondents.

Second Appeal No. 1632 of 1932, Decided on 16th May 1933, from decree of Dist. Judge, Delhi, D/- 25th July 1932.

(a) Punjab Courts Act (1918), S. 39—Suit for pre-emption—Decree for possession subject to encumbrance—Value of encumbrance exceeding pecuniary jurisdiction of the Court —Decree is not ultra vires.

The value of the suit for purposes of jurisdiction in suits for pre-emption of sales of agricultural land is thirty times the land revenue assessed on land and the valuation of the original suit determines the forum of appeal; and merely that the Court passes a decree for possession subject to an encumbrance which exceeds the pecuniary jurisdiction will not make the decree so passed ultra vires of the Court. [P 768 C 1]

(b) Court-fees Act (1870), S. 7—Suit for pre-emption—Valuation.

In a suit for pre-emption, the court-fee payable is to be calculated on ten times the land revenue assessed on land and the amount of court-fee has nothing to do with the consideration of the sale or the amount of encumbrance on the property. [P 768 C 1]

Kishan Dial—for Appellants.

M. C. Mahajan and *N. C. Mehra*—for Respondents.

Tek Chand, J.—Nathan and Daya Ram, defendants 1 and 2, sold 46 bighas of agricultural land in village Qamaruddin Nagar, Delhi Province, to Ram Sukh Das, Kishan Lal, Kanwar Singh and Umrao Singh, defendants 3 to 6, for Rs. 7,500. The plaintiffs brought a suit to pre-empt the sale on payment of Rs. 750 only, which they alleged was the real consideration for the sale transaction and represented the market value of the property sold. The land was assessed to revenue at Rs. 14-8-0 and the value of the suit for purposes of jurisdiction under the rules framed by the Local Government under the Suits Valuation Act was Rs. 435, and the value for payment of court-fee under S. 7, Court-fees Act, was Rs. 145. The consideration recited in the deed consisted of the following terms:

1.	Left with the vendee for payment to Harphul, the previous mortgagee,	Rs. 3,500.
2.	Due to the vendees as mortgagees by means of oral mortgages on behalf of Nathan,	Rs. 1,700.
3.	Paid to Chhatar, a creditor of Nathan,	Rs. 1,000.
4.	Paid to Bahadur, a creditor of Daya Ram, vendor,	Rs. 113.
5.	Paid to the vendors before execution of the sale-deed for the purchase of cattle and grain, etc.,	Rs. 237.
6.	Paid to the vendors for the expenses of the execution and registration of the sale-deed,	Rs. 200.
7.	Paid before the Sub-Registrar,	Rs. 750.

The trial Judge did not go into the genuineness of the prior mortgages, but held the other debts to be fictitious and passed a decree in favour of the plaintiffs for possession on payment of Rs. 862-8-0. The vendees appealed to the District Judge and prayed that the plaintiffs be given a decree for pre-emption on payment of Rs. 4,000 "subject to the mortgage in favour of Harphul." The District Judge accepted the appeal and modified the decree of the trial Court granting the plaintiffs a "decree for possession of the land by way of pre-emption subject to the mortgage in favour of Harphul on payment of Rs. 4,000 on or before 1st September 1932,"

failing which the pnlaintiffs' suit was to stand dismissed. It was also directed that before the decree could be executed the plaintiffs must make up the court-fee in the trial Court on Rs. 7,500. On second appeal before us the principal point urged by Mr. Kishan Dial on behalf of the plaintiffs-appellants is that the decree passed by the District Judge was ultra vires as it was beyond the maximum limit of his pecuniary jurisdiction. In my opinion this contention is devoid of force and I have no hesitation in overruling it. The value of the suit for purposes of jurisdiction in suits for pre-emption of sales of agricultural land is admittedly thirty times the land revenues assessed on land, and in this case this was Rs. 435. Under S. 39, Punjab Courts Act, the forum of appeal is determined by the "value of the original suit," and it is not denied the learned District Judge had jurisdiction to entertain the appeal. It is however contended that the decree passed by him was beyond the maximum limit of his appellate pecuniary jurisdiction. But as has been stated already, in this case the decree actually passed by the learned District Judge was for possession of the land in suit, subject to the mortgage in favour of Harphul, on payment of Rs. 4,000. This was obviously within the learned District Judge's pecuniary jurisdiction and therefore the decree cannot be said to be ultra vires.

Mr. Kishan Dial very properly did not argue the other grounds of appeal which dealt with the findings of fact recorded by the learned District Judge. The decree of the learned Judge was therefore correct and must be affirmed. There is however one point which has been brought to our notice by Mr. Kishan Dial and on which the learned District Judge has obviously gone wrong. He has ordered the plaintiffs to make up the court-fee in the trial Court on Rs. 7,500, apparently on the ground that in this suit the plaint should have been valued for purposes of court-fee at Rs. 7,500. The learned District Judge is obviously wrong on this point as under S. 7, Court-fees Act, in suits of this kind, the court-fee payable is to be calculated on ten times the land revenue assessed on the land. I would therefore hold that this portion of the learned District Judge's order is erroneous. The appeal has failed on the merits and is dismissed, except to this extent that the order of the District Judge requiring the plaintiffs to make up the deficiency in court-fee on the plaint on Rs. 7,500 is set aside. The vendee-respondent will get his costs of this appeal from the appellants.

R.K. *Order accordingly.*

A. I. R. 1933 Lahore 768

TEK CHAND AND MONROE, JJ.

Jowala Das—Defendant—Appellant.

v.

Wazir Chand and *another*—Plaintiffs—Respondents.

Second Appeal No. 1508 of 1932, Decided on 30th May 1933, from decree of Dist. Judge, Jhang, D/- 21st June 1932.

Hindu Law — Joint family — Mortgage or family property by father not for family necessity — Mortgagee can obtain personal decree against father and in execution bring entire family estate to sale unless debt is illegal or immoral—Civil P. C. (1908), O. 34, R. 6.

Where a Hindu, who is the manager of a joint family, consisting of himself and his sons, alienates joint property, not for family necessity or for payment of a just antecedent debt, the mortgage *qua* mortgage is not binding on the sons, but it is open to the mortgagee to obtain a personal decree against the father and, in execution of that decree, bring the entire family estate, including the mortgaged property, to sale unless, of course, the sons are able to show that the debt in question was tainted with immorality or illegality.

A mortgagee who obtained a mortgage-decree on a mortgage executed by the father of a joint Hindu family had reserved liberty to apply for a personal decree against the mortgagor in the event of the sale proceeds being found insufficient to pay off the decretal amount. The property was sold in execution of the decree, but before the confirmation of the sale, the sons of the mortmortgagor filed a suit for a declaration that the mortgage was not binding on them as there was no necessity for it and that the sale should not be confirmed. The declaration was granted and the sale price was refunded to the auction-purchaser:

Held: on appeal by the mortgagee that the conditional clause in the decree regarding the personal decree became operative, that the mortgagee was entitled to move the executing Court for passing a personal decree under O. 34, R. 6 and that the declaration granted to the sons did not bar the mortgagee from applying for a personal decree and proceeding against his property. [P 769 C 2]

M. C. Mahajan and *Hem Raj Mahajan*—for Appellant.

Badri Das and *Ganesh Datta*—for Respondents.

Tek Chand, J. — By a registered deed, dated 29th June 1923, Kashi Ram, defendant 2, mortgaged the property in dispute to Jowala Das, defendant 1, for Rs. 4,000. The mortgage was without possession, and carried interest at Re. 0-12-6 per cent per mensem. On 6th January 1931, Jowala Das, mortgagee brought a suit praying that the amount due on foot of the mortgage be realized by sale of the mortgaged property, and in the event of the sale-proceeds being found insufficient to discharge the decretal amount, liberty be reserved to him to apply for a personal decree against the mortgagor. In the plaint it was expressly stated that the claim for a personal decree against the mortgagor was within time by reason of certain payments having been made within six years of the institution of the suit. The sole defendant in that suit was Kashi Ram, mortgagor, his sons, Wazir Chand and Shadi Lal (who are the plaintiffs in the present litigation and who claim to be members of a joint Hindu family with Kashi Ram) were not made parties. A decree was passed in favour of the mortgagee against the mortgagor declaring that Rs. 4,000 was due and ordering that if that amount, together with interest at the stipulated rate from the date of institution till realization and costs was not paid within three months from the date of the decree the mortgaged property shall be sold, and that if the mortgaged property was found insufficient to discharge the amount of decree and interest due thereon, it would be open to the mortgagee to apply for a personal decree against the mortgagor under O. 34, R. 6. The question whether the claim for a personal decree was or was not within limitation was reserved for decision "till such time as the plaintiff made an application" under that rule.

The mortgagee took out execution of the decree and had the mortgaged property sold on 11th April 1932. The auction-purchaser was one Ram Lal, and he duly deposited the purchase-price Rs. 2,925, in the Court. The sale in favour of Ram Lal, was however not confirmed, for in the meantime Wazir Chand and Shadi Lal, who are the sons of the mortgagor, Kashi Ram, had brought a suit for a declaration that the property in question was joint of themselves and Kashi Ram, that the latter had mortgaged it without family necesssity and that the mortgage was not binding on them. The suit was dismissed by the trial Judge and the plaintiffs appealed to the District Judge. While this appeal was pending the mortgagee, as stated already, got the mortgaged property sold in execution of his mortgage decree and a date was fixed for confirmation of the sale. Before this could be done however the present plaintiffs got a prohibitory order issued by the District Judge to the executing Court directing that the auction-sale be not confirmed till the decision of the plaintiffs' appeal by him. The proceedings in the executing Court were accordingly stayed. A few days later, the plaintiffs' appeal was accepted by the District Judge and a decree passed in their favour declaring that the mortgage of 29th June 1923 was ineffectual in respect of the property comprised in the mortgage-deed. This decree was interpreted by the Court in which the proceedings in execution of the mortgage decree were pending as having the effect of cancelling the auction-sale in favour of Ram Lal, and on 9th July 1932 it refunded the sale price to him. No appeal was filed against that order by the auction-purchaser or any other party.

The mortgagee, Jowala Das has now preferred a second appeal to this Court against the decree of the District Judge, dated 21st June 1932, granting the plaintiffs the declaration above mentioned. The finding that the mortgage by Kashi Ram was not effected for family necessity or payment of a just antecedent debt is not assailed by the appellant's learned counsel, and there is no doubt that on this finding the mortgagor's sons are entitled to have it declared that the mortgage *qua* mortgage is not binding on them. To this extent therefore the decree of the learned District Judge is correct. But this does not mean, as seems to have been understood by the executing Court and faint-heartedly urged by Mr. Badri Das before us, that the mortgagee can under no circumstances bring the mortgaged property to sale. It is settled law that where a Hindu, who is the manager of a joint family, consisting of himself and his sons, alienates joint property, not for family necessity or for payment of a just antecedent debt, the mortgage *qua* mortgage is not binding on the sons, but it is open to the mortgagee to obtain a personal decree against the father and, in execution of that decree, bring the entire family estate, including the mortgaged property, to sale unless, of course, the sons are able to show that the debt in question was tainted with immorality or illegality. In the present case, as stated already, the mortgage decree had reserved to the mortgagee liberty to apply for a personal decree against the mortgagor, in the event of the sale-proceeds being found insufficient to pay off the decretal amount. As shown above, the mortgaged property was in fact brought to sale and the auction-purchaser had deposited the sale price, but this amount could not be made available for discharge of the decree by reason of the prohibitory order issued at the instance of the plaintiffs themselves. The conditional clause in the decree has therefore become operative and the mortgagee is entitled to move the executing Court for passing a personal decree under O. 34, R. 6: When he makes the application under that rule, two questions will arise for decision: (1) whether his claim for a personal decree is within time, and (2) whether the debt in question was illegal or immoral. If these points are decided in his favour he can bring the entire family estate, including the mortgaged property, to sale. It must therefore be clearly provided in the decree that the declaration granted by the District Judge to the plaintiffs does not bar the mortgagee from applying for a personal decree and proceeding against the property, if his claim is found to be within time and the sons are unable to prove that the debt was tainted with illegality or immorality.

Mr. Mehr Chand has referred us to *Jagdish Prasad* v. *Hoshyar Singh* (1), where the majority of the Judges held that the word "debt" in proposition (2) in Lord Dunedin's judgment in *Brij Narain Rai* v. *Mangal Prasad* (2), includes a "mortgage debt." We do not however think it necessary to go into that question in this case, as the appellant can obtain the relief, which he seeks, by proceeding under O. 34, R. 6, subject, of course, to proof of his claim being within time. This appeal must accordingly be accepted to this extent: that to the decree granted by the learned District Judge a clause will be added, stating that the declaration granted to the plaintiffs shall not prejudice the right of Jowala Das, defendant 1, to apply under O. 34, R. 6, Civil P. C., for a personal decree against Kashi Ram, defendant 2, and if he obtains a decree under that rule, to realize the decretal amount from the entire property of the joint family of defendant 2 and the plaintiffs, including the mortgaged property. Having regard to all the circumstances I would leave the parties to bear their own costs throughout.

Monroe, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 770

ADDISON AND AGHA HAIDAR, JJ.

Sardara Singh—Plaintiff—Appellant.

v.

Chanan Singh and *another* — Defendants—Respondent.

Second Appeal No. 1925 of 1927, Decided on 8th June 1933, from decree of Dist. Judge, Ludhiana, D/- 9th May 1927.

Fatal Accidents Act (13 of 1855), S. 1—It is not necessary that death must be direct result of injury caused by neglect or default or wrongful Act.

Under Act 13 of 1855, in order that damages may be claimed, it is sufficient if a person by his wrongful act, neglect or default shall have caused the death of another person. These words do not mean that death must be the direct result of the injury caused. [P 770 C 2]

Shamair Chand—for Appellant.

Addison, J.—This suit was instituted by Sardara Singh, son of Naranjan Singh, who was then 10 years old, under Act 13 of 1855, against Chanan Singh for recovery of Rs.4,000 as damages on account of the death of his father Naranjan Singh which was caused by Chanan Singh. The trial Court decreed a sum of Rs. 1,500, but the lower appellate Court dismissed the suit. Against this decision this second appeal has been preferred. On 18th March 1924, Chanan Singh, struck Naranjan Singh on the head with a chhavi, causing a wound 7×1½ inches. Naranjan Singh was taken to hospital but he died there on 25th April 1924 on account of this severe injury having become septic. Chanan Singh was convicted of culpable homicide not amounting to murder, punishable under S. 304, Penal Code, and was sentenced to four years' rigorous imprisonment and a fine of Rs. 200. It seems to me that this second appeal must be accepted. The lower appellate Court has relied on certain evidence given by two doctors in the criminal case. This was obviously wrong. The lower appellate Court also seems to have been of the opinion that the death of Naranjan Singh must be the direct result of the injury. Whatever may be the meaning of these words, under Act 13 of 1855, it is sufficient if a person by his wrongful act, neglect or default shall have caused the death of another person. These words do not

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1. A I R 1928 All 596=115 I C 775=51 All 186 (F B).
2. A I R 1924 P C 50=77 I C 689=51 I A 129=46 All 95 (P C).

mean that death must be the direct result of the injury caused.

The lower appellate Court has held that Chanan Singh did inflict the severe incised wound on the head and that Naranjan Singh died of the injuries sustained by him. He seems however to have thought that this was quite different from saying that he died of the injuries inflicted by Chanan Singh. I am unable to understand this remark as the only injury which could have caused death was this incised wound which undoubtedly was caused by Chanan Singh. It does not matter that death resulted from the injury turning septic. Had it not been inflicted he would not have died. The injury thus was the cause of death, and it must be held that Chanan Singh by his wrongful act caused the death of Naranjan Singh. In these circumstances I would accept this appeal and restore the decree of the trial Court with costs throughout on the sum decreed. There will be a decree against Chanan Singh for Rs. 1,500 with costs to the plaintiff on that sum payable by Chanan Singh.

Agha Haidar, J.—I agree.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 771

TEK CHAND AND MONROE, JJ.

Amar Singh—Plaintiff—Appellant.

v.

Bhagwan Das and *others*—Defendants—Respondents.

First Appeal No. 2792 of 1925, Decided on 27th April 1933, from preliminary decree of Senior Sub-Judge, Lahore, D/- 24th July 1925.

Transfer of Property Act (1882), Ss. 64 and 70 (b)—Mortgage of undivided share—Partition—Share allotted to mortgagor on partition takes place of security and mortgagee can enforce his mortgage against share so allotted — Subsequent improvements on property are accession to property within S. 70 (b).

A mortgagee of an undivided share which under a partition has been allotted to another cosharer, cannot in the absence of fraud be enforced by the mortgagee against the share originally mortgaged, the mortgagee's sole remedy being to proceed against the share which has been allotted to his mortgagor in lieu of the share mortgaged. In such a case the pledge assumes a new form and the security is shifted, as a result of the partition, from the undivided share of the mortgagor on to the property which has fallen to his share. If the property as allotted to the mortgagor is subsequently transferred by him to third parties, that transfer will make no difference as far as mortgagee's rights, are concerned, for such transfer will only operate as far as right, title and interest of mortgagor, and the transferee does not and cannot acquire higher rights than those of the mortgagor. Further the improvements effected and new buildings constructed onsuch properties allotted, by the mortgagor or his transferees must be treated as accessions to mortgaged properties and as such available for the satisfaction of the mortgagee's mortgage debt under S. 70 (b): 1 *I A* 106; 101 *P R* 1894; 20 *Cal* 533; 26 *Cal* 434; 24 *All* 483; 35 *Cal* 388; 6 *C L J* 46 and 98 *I C* 1039, *Foll.* [P 773 C 2; P 774 C 1]

Durga Das and *Bhagwan Das*—for Appellant.

Nawal Kishore, Niamat Rai and *Kirpa Ram Bajaj*—for Respondents.

Tek Chand, J.—Lala Harnam Das of Lahore died on 11th April 1911, leaving him surviving three sons, Bhagwan Das, defendant 1, Ram Rattan, defendant 5 and Hans Raj, defendant 6. At the time of his death he was possessed of proprietary and mortgagee rights in several house properties, described as Nos. (1) to (10). Of these properties No. (3) had been mortgaged by Lala Harnam Das to Dr. Mool Chand, father of Prem Lal, (P. W. 1). Harnam Das also held a number of shares in the Sugar Manufacturing Company, Gujranwala (in liquidation), on which he owed Rs. 2,400. On his death, his property devolved jointly on his three sons, defendants 1, 5 and 6, subject to rights of certain female relations. By a registered deed dated 20th November 1915, Bhagwan Das, defendant 1, mortgaged his undivided 1/3rd share in properties Nos. (6), (8), (9) and (10), to Bhai Amar Singh plaintiff for Rs. 3,000, bearing interest at Rs. 1-8-0 per cent per mensem. Out of the consideration for the mortgage, Rs. 1,000 was paid in cash to the mortgagor and the balance was left with the plaintiff for payment to prior mortgagees as follows:

> "Rupees 500 to Allah Bakhsh mortgagee of Bhagwan Das's one-third share in property No. 6 under mortgage-deed dated 28th July 1915, executed by Bhagwan Das in his favour: Ex. P C. Rupees 1,500 to Shib Das, mortgagee of Bhagwan Das's one-third share in property No. 5 and a tawela and baithak (not in dispute in this litigation) under registered deed dated 7th January 1914 by Bhagwan Das: Ex. P B."

Under a private award, the property left by Lala Harnam Das was partitioned among his heirs and a decree in accordance with the award was passed on 7th April 1916, which was affirmed by the Chief Court on 7th March 1917. By this decree properties Nos. (6), (8), (9) and (10), one-third of which had been mortgaged by Bhagwan Das to the plaintiff on 20th November 1915, were allotted some to his brothers, defendants 5 and 6, and others to the ladies of the family, while Bhagwan Das was given properties mentioned in the plaint as II (1) to (5), which for brevity's sake will be described as Nos. (1) to (5) in this judgment. A brief description of these properties as given in the award, is as follows:

1. "One-third share in a house in Kucha Mul Chand. Mohalla Mohlian; 2, a plot of vacant site with Kothries and roofed shed in Mohalla Mohlian; 3, a house in Kucha Harnam Das, which had been mortgaged to Dr. Mul Chand; 4, mortgagee-rights in a shop, known as Bossawala, situate in Kucha Ghumandi Bhagat, which had been mortgaged by the owners Tilok Chand and others in favour of Harnam Das by registered mortgage-deed dated 6th February 1901; and 5, one-third share in a bungalow on railway road."

On 15th January 1924, the plaintiff brought the present suit for recovery of Rs. 5,250 with future interest on foot of the mortgage of 20th November 1915, recoverable from properties Nos. (1) to (5), as well as from his person and other property. By various transfers made by Bhagwan Das (which will be described in detail later) property No. (1) has since passed to Nathu Ram, defendant 2; property No. (2) to Utam Chand and Sons, defendant 3; property No. (3) to Jiva Ram, defendant 4; property No. (4) to Ram Rattan and Hans Raj, defendants 5 and 6; and property No. (5) to Mohammad Hussain, defendant 7. Consequently these persons were impleaded as defendants in the suit along with the mortgagor, Bhagwan Das, defendant 1. Bhagwan Das did not appear at the trial and proceedings were ex parte against him. The other defendants denied knowledge of the plaintiff's mortgage, and pleaded that they were transferees in good faith and for valuable consideration of properties Nos. (1) to (5), which had not been made liable for the plaintiff's mortgage debt. The learned Senior Subordinate Judge, held that Rs. 6,030 was due to the plaintiff on foot of his mortgage, but that he had a prior charge for Rs. 177 only on property No. (4) and for Rs. 433 on property No. (5). He accordingly passed a preliminary decree under O. 34, R. 4, declaring that Rs. 6,030 was the amount due by defendant 1 to the plaintiff on the date of the decree (24th July 1925), and directing that if defendant 1 did not pay the amount within six months from that date, properties Nos. (4) and (5) be sold and Rs. 177 out of the sale-proceeds of property No. (4) and Rs. 433 out of the sale-proceeds of property No. (5) paid to the plaintiff, and for the balance Bhagwan Das, defendant 1 personally and his other property shall be liable. The suit was dismissed against defendants 2, 3 and 4 in respect of properties Nos. (1), (2) and (3).

The plaintiff has appealed to this Court praying that the properties which are in possession of defendants 2 to 6 be held liable for an additonal charge of Rs. 2,681. No relief is sought in the appeal against Mohammad Hussain, defendant 7, and accordingly he has not been impleaded as respondent. Before discussing the points which have been argued before us it seems necessary to set out in chronological order the various transfers by Bhagwan Das, defendant 1. After so stating,his Lordship proceeded). From the above narrative of events the following facts are clar: (a) that the mortgage, which the plaintiff is trying to enforce in this suit, was of the undivided 1/3rd share of defendant 1 in certain properties; (b) that by a partition decree, subsequently passed the mortgaged properties were allotted in their entirety to other coshares, free from all encumrances; (c) that by the same partition decree properties Nos. (1) to (5) fell to the share of defendant 1; and (d) that defendant 1 has transferred his right, title and interest in properties Nos. (1) to (5) to defendants 2 to 6, who have effected extensive improvements on them at considerable cost.

On these facts the plaintiff seeks to enforce his mortgage against properties Nos. (1) to (5) in the hands of the transferees, and I have no doubt that he is entitled to do so. The proposition of law is firmly established that a mortgage of an undivided share which under a partition has been allotted to another cosharer cannot, in the absence of fraud, be enforced by the mortgagee against the share originally mortgaged, the mortgagee's sole remedy being to proceed against the share which has been allotted to his mortgagor in lieu of the share mortgaged. In such a case "the pledge assumes a new form" and the security is shifted, as a result of the partition, from the undivided share of the mortgagor on to the property which has fallen to his share. The leading case on the subject is *Byjnath Lal* v. *Ramoodeen Chowdry* (1), where their Lordships of the Privy Council held that the mortgagees of the undivided share of one cosharer, who has no privity of contract with the other cosharers, would have no recourse against the lands allotted to such cosharers, but must pursue their remedy against the lands allotted to the mortgagor, and, as against him, would have a charge on the whole of such lands. This decision has been followed in numerous cases in India and counsel for the respondents has not been able to cite any authority to the contrary: see, e. g., *Beli Ram* v. *Mt. Shahzada Begam* (2), *Hem Chunder Ghosh* v. *Thako Moni Debi* (3), *Joy Sankari Gupta* v. *Bharat Chandra* (4), *Amolak Ram* v. *Chandan Singh* (5), *Shahebzada Mohomed Kazim Khan* v. *Hills* (6) and *Hakim Lal* v. *Ram Lal* (7). It is no doubt true that in this case the property which was allotted to the mortgagor in the family partition has been subsequently transferred by him to third parties, but that makes no difference, for in each case that transfer is of the right, title and interest of the mortgagor, and the transferee does not, and cannot, acquire higher rights than those of the mortgagor: *Lachhman Prasad* v. *Mohammad Ali Mohammad* (8).

It is clear therefore that the plaintiff can realize the amount due to him on foot of the mortgage in suit from the properties which were allotted to defendant 1 on partition of the family estate. It is also beyond doubt that the improvements effected, and new buildings constructed, on these properties by the mortgagor or his transferees must be treated as accessions to the mortgaged property

"and as such available for satisfaction of the plaintiff's mortgage-debt: see Illus. (b), S. 70, T. P. Act."

But his mortgage can have no priority over debts which could have been realized from the undivided share of the mortgagor in the family estate at the time of the creation of the mortgage in his favour on 20th November 1915. (Here his Lordship considered the mortgagor's indebtedness and after stating the priority of charges on property in suit proceeded). The proper order to pass therefore was to direct the sale of the properties Nos. (1) and (5) and apply the sale proceeds towards payment of the various charges in order of priorty given above, and to pay the surplus, if any, to the present owner or owners of the properties concerned. The learned Subordinate Judge has exonerated properties Nos. (1), (2) and (3) altogether and has considered the sale of properties Nos. (4) and (5) unnecessary, as he has assumed that they were sold to present transferees for their full market value. There can be no doubt that he was in error on both these points and counsel for the respondents could not put forward any cogent argument to support this conclusion. S. 82, T. P. Act, lays down the principle to be followed in determining the liability of several properties for rateable contribution towards discharging the debt secured on them in one and the same mortgage, and this would have been a matter of some difficulty in this case. But we are relieved from the necessity of making these calculations by the circumstances that in his appeal the plaintiff-appellant has not asked for any relief against properties Nos. (4) and (5) and has limited his claim against properties Nos. (1), (2) and (3) to Rs. 850, Rs. 1,250 and Rs. 581, respectively. The amount claimed from each of these properties is admittedly less than the amount which on our findings each property was liable to contribute to the debt secured by the mortgage. For the foregoing reasons I would accept the appeal and modify the decree of the Senior Subordinate Judge by substituting the following for para. 2 of his decree that if such payment is not made on or before the date fixed, the properties No. II (1) to (5) shall be sold and the sale proceeds applied to the satisfaction of the aforesaid decretal amount as follows:

"(a) Rs. 850 shall be paid to the plaintiff out of the sale proceeds of property No. (1) and the surplus (if any) paid to defendant 2. (b) Out of the sale proceeds of property No. (2) Rs. 600 shall be first paid to defendants 5 and 6, Rs. 1.250 to defendant 3, and out of the balance (if any) Rs. 1,250 shall be paid to the plaintiff. defendant 3 being entitled to the surplus (if any). (c) Out of the sale proceeds of property No. (3) Rs. 2,700 shall be paid first to defendant 4, and out of the balance (if any) Rs. 581 shall be paid to the plaintiff; defendant 4 being entitled to the surplus (if any). (3) If the amount paid to the plaintiff in accordance with para. (2) above is insufficient to satisfy the decree in full, the balance shall be recovered from the person or other property of defendant 1."

The plaintiff-appellant will get his costs in both Courts on Rs. 850 from property No. (1) on Rs. 1,250 from property No. (2) and on Rs. 581 from property No.

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1. (1874) 1 I A 106=21 W R 233 (P C).
2. (1894) 101 P R 1894.
3. (1893) 20 Cal 583.
4. (1899) 26 Cal 434=3 C W N 209.
5. (1902) 24 All 483=(1902) A W N 137.
6. (1908) 35 Cal 388=12 C W N 373.
7. (1907) 6 C L J 46.
8. (1926) 98 I C 1039.

property No. 3. Defendants 5 and 6 shall bear their own costs throughout.

Monroe, J.—I agree.

V.B. *Appeal allowed.*

A. I. R. 1933 Lahore 774 (1)

DALIP SINGH, J

Rulia Ram—Defendant—Appellant.

v.

Ram Chandar Das and *others*—Plaintiffs—Respondents.

Second Appeal No. 1682 of 1932, Decided on 6th June 1933, from order of Dist. Judge, Ambala, D/- 20th July 1932.

Pre-emption—Pre-emption suit should contain ground on which pre-emption is claimed—Amendment of plaint by inserting new ground of claim after limitation had expired for suit should not be allowed—Civil P. C. (1908), O. 6, R. 17.

A pre-emption suit should state the ground on which right is claimed; and though the Court has discretion to allow amendment in all cases where it may be just and proper to do so, where the effect of the amendment of the plaint by which plaintiff seeks to change the ground on which his right is claimed is to take away from the defendant a legal right which has accrued to him by lapse of time, such amendment should not be allowed: 83 *P R* 1917, *Rel on.* [P 774 C 2]

Fakir Chand—for Appellant.

J. G. Sethi—for Respondents.

Judgment.—The plaintiff in this case brought a suit for pre-emption on 16th June 1931, the sale having taken place on 15th July 1930. The right to pre-empt was claimed on the basis of contiguity only. The defendant pleaded that he also had property contiguous to the property sold and upon the defendant so pleading the plaintiff made a statement on 26th February 1932 that his property also had a common entrance from the lane. On 29th February 1932, the plaintiff applied for amendment of the plaint. The trial Court framed an issue as to whether the amendment should be allowed at that stage and disallowed it on the ground that the new ground of claim was put in after limitation had expired for the suit. The other issue being found in favour of the defendant, the suit was dismissed. In appeal the learned District Judge accepted the appeal, holding that in a suit for pre-emption all that was necessary in the plaint was that the right to pre-empt should be urged and not the ground on which the right should be claimed and that therefore no question arose of the amendment of the plaint and he therefore accepted the appeal and remanded the case back to the trial Court for a decision on all the issues.

Gora Singh v. *Jagta Singh* (1) is clear authority for the proposition that a pre-emption suit should state the ground on which the right is claimed. The learned counsel for the respondents has however pointed out that so long as the cause of action was not changed and so long as the character of the suit was not altered, amendment could be allowed at any time, and the learned District Judge had really in substance allowed the amendment which should not have been refused by the trial Court. It seems to me that this argument is incorrect. Under O. 6, R. 2, Civil P. C., the pleading must contain the material facts on which a party relies for his claim. It is not enough therefore to plead a right to pre-empt without stating the basis of the right. Then O. 6, R. 7, Civil P. C., lays down that no new ground of claim can be raised except by way of amendment. O. 6, R. 17, Civil P. C., gives a Court discretion to allow amendment in all cases where it may be just and proper to do so. Now, there are many rulings laying down that amendment should not be allowed except in very special cases where the effect of amendment is to take away from the defendant a legal right which has accrued to him by lapse of time. It seems to me therefore that the Court of first instance was not wrong in exercising its discretion in refusing to allow amendment. I therefore accept the appeal and dsimiss the suit with costs throughout.

K.S. *Appeal accepted.*

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1. (1917) 83 P R 1917=42 I C 263.

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* A. I. R. 1933 Lahore 774 (2)

SHADI LAL, C. J. AND ABDUL QADIR, J.

Tirath Ram—Plaintiff—Appellant.

v.

Dina Nath and *others*—Defendants—Respondents.

Second Appeal No. 908 of 1927, Decided on 30th May 1933, from decree of Addl. Dist. Judge, Amritsar, D/- 21st December 1926.

*** Pre-emption — Pre-emptor cannot pre-empt part of property sold — But where vendee himself breaks up bargain and sells to two pre-emptors, principle has no application.**

A pre-emption suit was filed in respect of a sale; but the vendee sold the property in equal shares to two other persons who also claimed to be pre-emptors thereof. The sub-vendees were also impleaded in the pre-emption suit and it was contended by the plaintiff that as the pre-emptor, sub-vendees, had not each pre-empted the whole property, and as the bargain was split up they should be deemed to have waived their right of pre-emption :

Held : that the principle that a pre-emptor whose right extends over the entire property sold must take over the whole of the bargain and that he is not entitled to pre-empt only a part of the property has no application to this case as the vendee himself had broken up the bargain and sold the whole property to two pre-emptors and that a sale of this character did not involve a breaking as contemplated by the general rule : *A I R* 1924 *Lah* 431, *Ref.* [P 775 C 1,2]

Badri Das—for Appellant.

J. N. Agarwal, S. M. Sikri and *Hukum Chand*—for Respondents.

Shadi Lal, C. J.—On 8th January 1923, one Ram Ditta sold the house in dispute for Rs. 3,000 to Karam Bakhsh. In respect of this sale, Tirath Ram brought a suit for pre-emption on 2nd January 1924, and on the following day Karam Bakhsh sold the property in equal shares for Rs. 3,500 to Dina Nath and Chhajju Ram, who claimed to be the pre-emptors thereof. The plaintiff, thereupon, impleaded the subsequent vendees as defendants in this pre-emption suit. The question for determination is, whether he has succeeded in proving that his right of pre-emption is superior to that of the two sub-vendees. Now, it is common ground that Dina Nath has a right of pre-emption superior to that of the plaintiff as well as that of his co-vendee Chhajju Ram. It is, however, urged on behalf of the plaintiff that Dina Nath was entitled to pre-empt the whole of the property, and that as he split up the bargain by purchasing only one-half of the house, he should be deemed to have waived his right of pre-emption. As regards Chhajju Ram, it is admitted that his right of pre-emption is equal to that of the plaintiff, and that the latter cannot succeed unless he proves that he has a superior right of pre-emption. But it is urged that Chhajju Ram also has forfeited his right of pre-emption, because he purchased only a moiety of the property, though he was entitled to the whole of it, when Dina Nath had waived his right of pre-emption in its entirety by splitting up the bargain.

There can be no doubt that a pre-emptor, whose right extends over the entire property sold, must take over the whole of the bargain; and that he is not entitled to pre-empt only a part of the property. The principle, upon which the rule is founded, is that by breaking up the bargain the pre-emptor may seek to take the best part of the property and leave the worst part of it with the vendee. This principle has obviously no application when the vendee himself breaks up the bargain by parting with only a portion of it to a person who has a right of pre-emption. He can have no grievance, if the plaintiff sues him for the remainder of the property: vide *Ude Ram* v. *Atma Ram* (1). Nor is he in any way injured, if he sells the whole of the property to two pre-emptors, even though the right of pre-emption of one may be superior to that of the other. A sale of this character does not involve a breaking up of the bargain as contempleted by the rule enunciated above. It must be remembered that the rule forbiding the splitting up of the transsaction is not embodied in any statute, but proceeds upon general principles; and it cannot be extended to a case to which the reason underlying it is wholly inapplicable.

I cannot, therefore, accede to the the contention that both the sub-vendees should be deemed to have waived their right of pre-emption. It appears that the price paid by them exceeded the amount for which the house was originally sold, and it is contended that the purchase of the property by them cannot, therefore, be treated as having been made in exercise of their right of pre-emption. The short answer to this argument is that the additional amount represented the cost of the sale-deed and the compensation paid to the first vendee for the improvements effected by them.

For the foregoing reasons I would affirm the decree of the lower appellate Court and dismiss the appeal with costs.

Abdul, Qadir, J.—I agree.

K.S. *Appeal dismissed.*

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1. A I R 1924 Lah 431=80 I C 960=5 Lah 80.

A. I. R. 1933 Lahore 775

SHADI LAL, C. J. AND ABDUL QADIR, J.

Muhammad Alam and *another*—Plaintiffs—Appellants.

v.

Taj Din and *others*—Defendants—Respondents.

Second Appeal No. 1326 of 1922, Decided on 16th May 1933, from decree of Addl. Dist. Judge, Jhelum, D/- 15th March 1928.

(a) Custom (Punjab) — Gujral clan of Mahomedan Jats in Gujrat District — Custom of Khanadamad exists.

Among the Gujral clan of the Mahomedan Jats of Gujrat District, the custom of Khanadamad exists. [P 776 C 1]

(b) Riwajiam—Entry is sufficient to shift onus of proof.

Where an entry in a riwajiam of a district lays down that a certain custom prevails in every principal tribe of the district, the onus of proving that the particular custom does not prevail in a particular tribe lies on the person who denies the prevalence of such custom. [P 776 C 1]

Dharam Bhushan—for Appellants.

Assadullah Khan—for Respondents.

Judgment.—The question, which we have to determine on the certificate granted by the District Judge, is whether the custom of khanadamad exists in the Gujral clan of the Mahomedan Jats of the Gujrat District. Now, the answer to question 65 printed in the Compendium of the Customary Law of the Gujrat District compiled by Mr. Williamson shows that the institution of khanadamad prevails in every principal tribe of the District. This entry in the riwaj-i-am of the District places upon the appellants the onus of proving that the institution of khanadamad does not prevail in their tribe, and they have wholly failed to discharge the onus. The appeal accordingly fails and is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 776

TEK CHAND, J.

Mohammad and *others* — Plaintiffs—Appellants.

v.

Makhu—Defendant—Respondent.

Second Appeal No. 34 of 1933, Decided on 5th June 1933, from decree of Senior Sub-Judge, Gujrat, D/- 1st November 1932.

Landlord and Tenant—Mere non-payment of rent is not sufficient for adverse possession—Adverse possession.

Where the relationship of landlord and tenant is not established and no rent has been paid, possession for the statutory period gives adverse possession; but where the relationship of landlord and tenant is created, the tenant in order to claim adverse possession, must have done something more to deny the landlord's title than mere non-payment of rent for a number of years: 97 *P R* 1915, *Dist.* [P 777 C 1]

L. M. Dutta—for Appellants.

Mohammad Din Jan—for Respondent.

Judgment.—The plaintiffs-appellants brought a suit for recovery of possession of 57 kanals 3 marlas of land bearing khasra Nos. 2261, 2262, 2217, 2213, 2814, 2253, 2812, 2813, 2119 and 2578, on the allegation that the defendant had been a tenant under the plaintiffs for a long time, but had recently repudiated the tenancy. The defendant denied the plaintiffs' title and also pleaded adverse possession. The trial Judge dismissed the suit so far as khasra Nos. 2119 and 2578 were concerned, but decreed it in respect of the remaining land. The plaintiffs appealed to the Senior Sub-Judge urging that the suit should have been decreed with regard to khasra Nos. 2119 and 2578 also, while the defendant appealed for the dismissal of the suit relating to khasra Nos. 2262, 2814, 2253, 2812 and 2813. No appeal was filed against the decree in respect of khasra Nos. 2261, 2217 and 2213. The learned Senior Sub-Judge dismissed the plaintiffs' appeal. In the defendant's appeal he affirmed the trial Court's decree relating to khasra No. 2262, but disagreed with its finding relating to khasra Nos. 2814, 2253, 2812 and 2813 and dismissed the suit for possession of these fields. On second appeal the plaintiffs ask for a decree in respect of khasra Nos. 2119, 2578, 2814, 2253, 2812 and 2813 also.

The Courts below have concurrently found that the plaintiffs were owners of the entire land. It has also been found that there was litigation between the parties in 1898 which ended in a compromise by which the defendant was allowed to remain in possession of khasra Nos. 2814, 2253, 2812 and 2813 for a period of six years as a non-occupancy tenant under the plaintiffs, and possession of khasra Nos. 2119 and 2578 was to be given to the plaintiffs forthwith. It appears however that the defendant continued to be in possession of khasra Nos. 2119 and 2578 without attorning to the plaintiffs or otherwise holding permissively under them. The revenue entries make it clear that no rent was ever paid by the defendant to the plaintiffs for these numbers, and there is nothing to show that the relationship of landlord and tenant has subsisted between them, so far as these numbers are concerned. In these circumstances the defendant has been rightly held to have been in adverse possession of khasra Nos. 2119 and 2578 for more than 12 years and the plaintiffs' appeal must fail in respect thereto.

As regards khasra Nos. 2814, 2253, 2812 and 2813, however there is no doubt that the defendant entered into possession as a tenant of the plaintiffs in 1898. As stated already, that is clear from the terms of the compromise and the respondent's counsel has not attempted to controvert this position. The onus therefore lay heavily on him to prove that his possession has been adverse for the statutory period. No overt act is alleged or proved, and it is conceded that mere non-payment of rent is not sufficient to destroy the landlord's title. The learned Senior Sub-Judge has relied on *Umar Bakhsh* v. *Baldeo Singh* (1), but the facts of that case were entirely different. A reference to the compromise of 1898 does not show that a tenancy for a fixed period was created. All that was agreed to was that the defendant would remain in possession of the land as a tenant without payment of any rent for that period. The relationship of landlord and tenant having been created, the defendant must have done something more to deny the plaintiffs' title than mere non-payment of rent for a number of years. In my opinion the suit in respect of these four numbers is not barred by limitation. The result is that this appeal must be partially accepted, the decision of the Senior Sub-Judge set aside and that of the trial Judge restored. Having regard to all the circumstances the parties shall bear their own costs throughout.

K.S. *Appeal partly accepted.*

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1. (1916) 97 P R 1915=32 I C 35.

A. I. R. 1933 Lahore 777 (1)

DALIP SINGH, J.

Mt. Janki—Defendant—Appellant.

v.

Mt. Sattan—Plaintiff—Respondent.

Second Appeal No. 178 of 1933, Decided on 12th June 1933, from decree of Dist. Judge, Delhi, D/- 15th November 1932.

Hindu Inheritance Act (1929)—Act is not retrospective—Hindu law—Inheritance.

Act 2 of 1929 is not retrospective and a sister is not an heir where the Hindu male through whom she claims died before the passing of the Act. [P 777 C 2]

Kishan Dayal—for Appellant.

M. L. Batra—for Respondent.

Judgment.—The facts of the case are quite simple and are clearly given in the judgment of the learned District Judge. Learned counsel for appellant contends that the statements made by the learned District Judge that the other properties were sold "for charity" are incorrect, and the house in Chera Khana, was sold after and not previous to the present alienation. After taking both these facts into consideration, I do not think that the finding of the District Judge on the question of bona fides or otherwise of the gift need be disturbed. The other point raised by the learned counsel for the appellant is that Act 2 of 1929 is not restrospective and the sister was no heir at all previously and is not an heir under the Act as Channu, the Hindu male, through whom she claims died before the passing of the Act. This contention seems correct and learned counsel for respondent urges that his client should have a further opportunity to prove a right to succeed based on Hindu Law modified by custom. This was not pleaded and in the circumstances no useful purpose would be served by remanding the case for this point. I accept this appeal and dismiss the plaintiff's case. In the circumstances I leave the parties to bear their own costs throughout.

K.S. *Appeal allowed.*

A. I. R. 1933 Lahore 777 (2)

DALIP SINGH, J.

Fateh Mohammad—Plaintiff — Appellant.

v.

Amar Nath and *others*—Defendants—Respondents.

Second Appeal No. 1135 of 1932, Decided on 8th June 1933, from decree of Dist. Judge, Ludhiana, D/- 19th March 1932.

(a) Civil P. C. (1908), Sch. 2, Para. 10—Whether oral award is good—*Quaere*.

Quaere.—Whether an oral award is good. [P 779 C 2]

(b) Civil P. C. (1908), Sch. 2, Para. 10—Oral award—Whether can extinguish decretal debt.

The question whether an oral award can extinguish a decretal debt depends on the terms of the reference and the terms of the award. [P 779 C 2]

Shujauddin—for Appellant.

J. C. Sethi and *Daulat Ram*—for Respondents.

Judgment.—The facts of this case are very curious and the orders passed in connected proceedings from time to time are also curious. The facts are that one Jamna Das had got a decree against one Jafar Hussain. He had also got a mortgage from the said Jafar Hussain. On 14th June 1926, Jamna Das sold the decree to one Fateh Muhammad and on 26th June 1926, Fateh Muhammad applied for execution of the same. Jamna Das and Jafar Hussain, i. e., the decree-holder and the judgment-debtor were summoned in the case. Jafar Hussain pleaded that the decree was inexecutable and the assignment invalid because on 22nd March 1926, the dispute about the decretal debt and the mortgage debt between himself and Jamna Das had been referred to the arbitration of one Lala Mukand Lal and till decision no assignment could be made or the decree executed. Jamna Das admitted that the matter had been so referred and indeed he could not do otherwise as there was a written agreement to refer. He pleaded however that the arbitrator had refused to act. Upon this the executing Court framed two issues: (1) Has the arbitrator refused to act ? Onus on the decree-holder. (2) If so, how is the assignment invalid ?

The sole witness in the case was the arbitrator himself, Lala Mukand Lal. This gentleman appeared and stated that he had not refused to act and far from so refusing he had actually made an oral award in the first week of June 1926. He stated that his decision was that the decretal debt and the mortgage debt should be considered discharged by a mustajri for 20 years of 9 Ghumaons of land belonging to Jafar Hussain. 4½ Ghumaons of this land was land situated at Kalel the rest 4½ Ghumaons was to be according to choice (presumably of decree-holder). He further stated that the parties had agreed to this award, but subsequently modified it by stating that Jamna Das had stated at the time that his "Taya" would not agree to this award. From his evidence it is quite impossible to determine whether his decision was that the decretal debt and the mortgage debt were to be considered discharged provided a mustajri of the 9 Ghumaons of land was duly executed in favour of Jamna Das or whether his decision was that the decretal debt and the mortgage debt were to be considered discharged and a fresh obligation undertaken by Jafar Hussain to give mustajri of 9 Ghumaons of land for 20 years. The matter is important because in the one case the decree would only be discharged provided the mustajri was executed and in the other case the decree would be discharged and a right remain to enforce specific performance of the new agreement to give mustajri. It is admitted no mustajri was ever given or taken. In any event the Court decided that the arbitrator stated that he had given the award and therefore the assignment was wholly invalid as the decree had merged into a new contract. It is not clear whether the Court meant that the decree had merged in the award or whether the Court meant to hold in accordance with the pleading of Jafar Hussain that the decree had merged in the agreement to refer to arbitration.

The use of the word "contract" rather seems to support the latter interpretation. This order was passed on 11th November 1926, and the pleading of Jafar Hussain is dated 11th August 1926. No further steps were taken by anyone in the matter. In 1928, Fateh Mohammad sued Jafar Hussain on the mortgage debt which had also been assigned to him on the same date and as part of the assignment of the decretal debt and he obtained a decree against Jafar Hussain. For some unknown reason no pleading about the award or the agreement to refer appears to have been raised by Jafar Hussain in that suit. Now in the present suit Fateh Mohammad has sued the heirs of Jamna Das and Jafar Hussain, pleading that as Jamna Das's contract with him had been held to be void, he was entitled to recover the amount he gave to Jamna Das, namely, Rs. 300 with interest, etc. The trial Court framed various issues on the pleadings of the parties, but the only issue that concerns us in this appeal is issue 2, namely, "whether the decree, which was sold was not executable at the time of sale. Hence it could not be executed." The onus was on the plaintiff. The trial Court decided on the issues in favour of the plaintiff and gave him a decree against the heirs of Jamna Das for Rs. 1,250 with costs against the property of Jamna Das deceased in possession of defendants 1 and 2, his heirs. The sum was to carry interest from the date of suit till realization at 6 per cent per annum. On appeal the learned District Judge, while agreeing with the decision of the trial Court on most of the issues, held that the alleged award had not been acted on. He did not decide the question raised by the pleadings of Jamna Das's heirs that as a matter of fact there was no award, but he held that even if there was an award, the award could not extinguish the decretal debt, because the arbitration was without the intervention of the Court and no application was made to have the award filed in Court, nor could such an application be made because the Civil Procedure Code did not contemplate an oral award, but only written awards.

Further he held that as the award was not acted on, it could only be pleaded as an adjustment of the decree under O. 21, R. 3, Civil P. C., or a suit might have been brought for specific performance of the contract on the basis of the award. No application had been made by the judgment-debtor under O. 21, R. 3, Civil P. C., and such an application would be time-barred now. He further held that the Lahore High Court has held that an award without the intervention of a Court in a pending suit could not be regarded as an adjustment unless all parties agreed thereto. In view of this ruling he held that the executing Court had erred in dismissing the application of Fateh Mohammad to execute the decree and the assignment of the decree was not invalid. Therefore, Fateh Mohammad, he held, had no cause of action against Jamna Das or his legal representatives. He further held that Fateh Mohammad ought to have appealed against the order dismissing his application for execution. That remedy was now time-barred, but as it would be a great hardship on Fateh Mohammad to be precluded from executing the decree owing to the wrong order of the executing Court, he therefore gave Fateh Mohammad a declaration against Shabir Hussain, minor, legal representative of Jafar Hussain in the appeal, namely, that the plaintiff, Fateh Mohammad, should be granted the declaration of the validity of the assignment and of his right to execute the decree against Jafar Hussain's property in spite of the order of the executing Court, dated 11th November 1926. Shabir Hussain minor, who was represented by Ahlmad of the Senior Subordinate Judge's Court has not appeared and has not appealed against this somewhat curious order passed against him.

Fateh Mohammad has come in appeal and his counsel urges that the order of the District Judge is wrong because the award could be pleaded by the judgment-debtor in execution as a complete bar to the same, it being a complete satisfaction of the decree. He urges that there is nothing in any law to show that an award cannot be oral and the award had therefore extinguished the debt. There was no pending suit at the time when the award was made and the decision of the learned District Judge on the point is incorrect. The learned counsel for the respondents does not challenge the last proposition and I do not know to what ruling the learned District Judge was referring or how it applies to the facts of this case. The questions that arise before me for decision are first, whether there was an oral award at all or not. I would have decided this question of fact, which the learned District Judge has not decided, but the learned counsel for the appellant stated that he had not read the evidence in the case as this was a second appeal, and urged that if the decision on the point of law went in his favour, the case should be remanded to the District Judge for a decision on this point. The next question that arises is whether the law knows of such a thing as an oral award at all. On principle I am unable to see that there is anything against the award being oral. At the same time the Civil Procedure Code clearly contemplates that in the case of an award through the intervention of the Court the award should be in writing under para. 10 of the Schedule to the Civil Procedure Code, which provides that where an award has been made, the persons who made it shall sign it and cause it to be filed in Court. I do not see how an oral award could be signed. Nothing is said about an award without the intervention of the Court. At the same time nothing has been shown me that there can be such a thing as an oral award, but on a reference to Russel on Awards, I find that a parol award has been held good in England in certain cases. The matter is not entirely free from difficulty, but it is not necessary to decide this point here.

The next question that arises is whether such an oral award could extinguish the decretal debt. This would turn on the terms of the reference and the terms of the award. As I have already pointed out, it is impossible from the evidence of Lala Mukand Lal either in the execution case or in the present case to determine exactly whether Lala Mukand Lal's oral award extinguished the decretal debt provided a mustajri was given or whether the debt was anyhow extinguished and a fresh obligation incurred. The point does not appear to have been present to the mind of the counsel conducting the case. But be that as it may, I hold that it is not shown in the circumstances of this case that the award extinguished the decretal amount. This being so, it is clear that the order of the executing Court holding that the decree could not be executed either because of the existence of the award or by the existence of the agreement to refer to arbitration was incorrect and the learned District Judge was right in holding that this order could not give a cause of action against Jamna Das. I therefore dismiss the appeal, but in the circumstances I leave the parties to bear their own costs of this appeal.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 780 (1)

TEK CHAND AND MONROE, JJ.

Darbar Patiala—Plaintiff—Appellant.

v.

(*Firm*) *Narain Das-Gulam Singh*—Defendants—Respondents.

First Appeal No. 25 of 1932, Decided on 17th May 1933, from decree of Senior Sub-Judge, Ambala, D/- 16th October 1931.

Civil P. C. (1908), S. 34—Interest on decretal amount is generally allowed at 6 per cent unless special reason exists for giving higher rate.

Though the granting of interest on the decretal amount is in the discretion of the Court, it is the practice of the Courts generally to allow interest at 6 per cent unless some special reason is shown why a higher rate should be given. A proper exercise of the discretion by the lower Court Judge will not be interfered with. [P 780 C 1]

Tek Chand—for Appellant.

M. L. Puri and *J. R. Agnihotri* — for Respondents.

Monroe, J.—The Senior Subordinate Judge, Ambala, has granted a decree dated 16th October 1931, to the plaintiff for the sum of Rs. 4,14,000-6-1, on account of principal and interest due on a promissory note dated 5th April 1929. He has also ordered that the plaintiff should have future interest from the date of the decree at 6 per cent on the decretal amount inclusive of costs and interest. The plaintiff has appealed and demands interest at the rate of 9 per cent, being the contract rate as against the 6 per cent allowed by the decree. The learned Judge's discretion to award interest on the decretal amount is conferred on him by S. 34, Civil P. C., and this section leaves the matter in the learned Judge's discretion. It is the practice of the Courts generally to allow interest on the decretal amount at 6 per cent unless some special reason is shown why a higher rate should be given. In the present case the learned counsel has failed to show that the learned Subordinate Judge has not properly exercised the discretion conferred on him. Nor has he shown that special circumstances exist in this case why we should interfere with the decree of the learned Judge, and accordingly I would dismiss this appeal with costs.

Tek Chand, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 780 (2)

JAI LAL AND ABDUL RASHID, JJ.

Mt. Hajaran—Defendant— Appellant.

v.

Muhammad Shafi Khan—Plaintiff—Respondent.

First Appeal No. 2924 of 1927, Decided on 23rd May 1933, from preliminary decree of Senior Sub-Judge, Amritsar, D/- 11th August 1927.

(a) Court-fees Act (1870), Sch. 2, Article 17 (6)—Plaintiff in joint possession of part of proparty in dispute—Suit for possession by partition.

A person who was in joint possession of a part of the property in dispute filed a suit against the defendant for possession of half the property by partition :

Held : that a court-fee stamp of Rs. 10 was sufficient : *A I R* 1930 *Lah* 889, *Foll* ; *A I R* 1932 *Lah* 421, *Dist.* [P 781 C 1, 2]

(b) Partition—Suit for possession of share of property by partition—Plaintiff should include all properties admitted by him to be joint property.

Ordinarily in a suit for possession by partition of a share in joint property. the plaintiff is bound to bring into the hotch pot the entire joint property, but when he abandons his claim in respect of a certain item which is admitted by him to be joint, it is not necessary that he should include it also. [P 781 C 2]

Ferozuddin and *Muhammad Amin*—for Appellant.

Muhammad Hussain—for Respondent.

Jai Lal, J.—The respondent, Muhammad Shafi Khan, instituted a suit for possession by partition of one-half share in two houses situate at Amritsar, against Mt. Hajaran, appellant, on the allegation that the houses in suit were owned by his deceased wife, Mt. Shah Begam, who died leaving the plaintiff, her husband, and the defendant, her sister, heirs entitled to equal shares in her estate according to Mahomedan Law. He also stated in the plaint that there was movable property worth Rs. 2,000 left by the deceased which was in possession of the defendant about which he would file a separate suit later. He paid a court-fee stamp of Rs. 10 on his plaint. The suit was contested by the defendant on the ground that the court-fee stamp payable on the plaint should have been ad valorem on the value of the share of the plaintiff which according to him was Rs. 8,000 and that the suit was not maintainable because the plaintiff had not included in his prayer for partition of the entire property left by the deceased. This property was alleged to be ornaments worth Rs. 2,000 mentioned in the plaint, Rs. 5,000 due from the plaintiff to his deceased wife on account of dower, ornaments pawned by the deceased and subsequently redeemed by the plaintiff. It was also pleaded that the defendant was entitled to be reimbursed in respect of the expense incurred by her in the funeral rites of the deceased.

The trial Judge held that as the plaintiff was in possession of a part of the property in dispute a court-fee stamp of Rs. 10 was sufficient especially because it was admitted by the defendant that he had a half share in the houses in dispute. He held that Rs. 5,000 had not been proved to be due from the plaintiff to his deceased wife as her dower and that in any case it could not be held to be the property of the deceased, as, at best, it would be an actionable claim and therefore the plaintiff was not bound to include it in his suit for partition of the two houses. With regard to the claim for ornaments and the other items claimed by the defendant the learned Judge held that their existence had not been proved. He consequently passed a preliminary decree for partition of the two houses and the defendant has lodged an appeal against this decree. At the time of passing the preliminary decree the trial Judge appointed a commissioner for the purpose of effecting the partition and on receipt of his report time was given to the parties to raise objections to it, but the parties agreed before him that, subject to the decision of the appeal against the preliminary decree, the mode of partition suggested by the Commissioner was acceptable to them and consequently a final decree was passed by the trial Judge in accordance with the report. As a matter of form the defendant-appellant has presented an appeal against the final decree also.

It is contended on the authority of *A. I. R.* 1932 *Lah.* 421, a judgment of a Judge in Chambers of this Court that in a case like the present the proper court-fee is ad valorem on the value of the share of the plaintiff in the property in suit. That case however is distinguishable from the present case because in that case the title of the plaintiff in the property then in dispute was denied and the plaintiff was not found to be in possession of any part of the alleged joint property. The ruling that governs the present case is *A. I. R.* 1930 *Lah.* 839, a judgment of a Division Bench of this Court. The facts of that case are almost similar to the present case. In that case also, as found in this case by the learned trial Judge, the plaintiff in the suit for partition was found to be in possession of a part of the property which was the subject-matter of the suit. His title to the share in the property was admitted by the defendants, and it was held that a court-fee stamp of Rs. 10 was sufficient under the circumstances. In the present case also it had been found by the trial Judge that the plaintiff was at the time of the suit in possession of a kotha in one of the houses in dispute and this finding is supported by the evidence of two witnesses and two rent-deeds, Exs. P-3 and P-4. In my judgment therefore the decision of the trial Court on the question of court-fee is correct.

With regard to the second objection, it is no doubt true that ordinarily in a suit for possession by partition of a share in joint property the plaintiff is bound to bring into the hotch-pot the entire joint property. In the present case however with the exception of ornaments valued at Rs. 2,000 no other joint property was admitted to exist by the plaintiff. With regard to the ornaments of the value of Rs. 2,000 the plaintiff's counsel has abandoned his claim to them before us and therefore it is no longer necessary to decide whether the plaintiff was bound to include a prayer for the partition of these ornaments in his plaint. Probably he was, but it becomes unnecessary to consider this question in view of the statement of respondent's counsel before us. No other joint property has been proved to exist as found by the trial Judge, though there is a dispute as to the existence of a debt due from the plaintiff to the estate of the deceased on account of her dower and also as to the amount that would be due in this respect. As the plaintiff denied the existence of any dower debt due from him to his wife he could not be expected to include a claim for partition thereof in his suit.

In my opinion, in the present case, the suit of the plaintiff is not open to the objection that he has not brought the entire property into the hotch-pot. At the same time it is open to the defendant-appellant to establish her right to recover her share, in the alleged dower debt if any, from the plaintiff-respondent, if she is advised to bring a separate suit to recover it. In the present case I hold that the decree passed by the trial Judge is correct except that in view of this decision on the legal point involved he need not have given a finding as to the genuineness or otherwise of the document relied upon by the defendant to prove the existence of the dower debt. This is a matter which must be left to be decided in subsequent proceedings, if any, which may be instituted by the defendant. I would therefore uphold the decree of the trial Judge and dismiss the appeal with costs.

Abdul Rashid, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 782 (1)

DALIP SINGH, J.

Ram Singh and *others*—Plaintiffs—Appellants.

v.

Pat Ram and *others* — Defendants — Respondents.

Second Appeal No. 1050 of 1932, Decided on 30th May 1933, from decree of Dist. Judge, Delhi, D/- 24-3-1932.

Evidence Act (1872), S. 65—Document tendered in evidence and exhibited but not found on record — Party can produce copy or secondary evidence of contents.

Where a document is produced in Court and tendered in evidence and exhibited, the Court is responsible for its safe keeping; and if it is lost the party must be given another chance of producing a copy or giving secondary evidence of contents. [P 782 C 1]

Shamair Chand—for Appellants.

Manohar Lal—for Respondents.

Judgment.—The evidence of Ramji Lal, P. W. 8, clearly proves Ex. P-1; it also clearly proves the production of Ex. P. W. 8-1. The fact that the document is not found on the record, does not send the plaintiff out of Court. Once a document is produced in Court and tendered in evidence and exhibited, the Court is responsible for its safe keeping and if the document is lost, the plaintiff must be given another chance of producing a copy or giving secondary evidence of the contents. The learned counsel for the respondent does not defend the District Judge's judgment, but contends that Ex. P-1 is inadmissible because according to the examination of Ramji Lal, the document is a copy of a copy, and the book produced in Court is a copy and not an original. I do not think it is clearly shown from the examination that the book though partly copied from an older book is not an original book in the sense in which the word is used in the Evidence Act. There is nothing to show that the older book is still existing or that if it is that the new book has not been substituted for it as an original record. I therefore accept the appeal and remand the case back to the learned District Judge for decision on the merits after taking Exs. P-1 and P. W. 8-1 into consideration. Costs will be costs in the case.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 782 (2)

JAI LAL AND ABDUL RASHID, JJ.

Gapi Chand — Defendant—Appellant.

v.

Fakir Chand—Plaintiff—Respondent.

First Appeal No. 1375 of 1928, Decided on 25th May 1933, from decree of Senior Sub-Judge, Attock, D/- 1st March 1929.

Vendor and Purchaser—Vendee dispossesser by pre-emptor and consequent loss to vendee—Held indemnity clause in sale-deed was wide enough to cover such loss.

A sale-deed contained the following indemnity clause:

"*Kisi nuqs qanuni ya waqiati ke bais se, babt arazi mazkura bai shuda ke, mustri ko khalal pauche.*"

The vendee was dispossessed by the pre-emptor and had to suffer loss as the pre-emptor was ordered to pay only a smaller amount than what the vendee paid. In a suit by the vendee against his vendor:

Held: that the words in the sale-deed in question were wide enough to cover any loss that may be sustained by the vendee as a result of a pre-emption suit: *A I R* 1926 *Lah* 455; 3 *P R* 1908 *Ref*; 4 *All* 257, *Dist.* [P 783 C 1]

Asa Ram for *J. N. Agarwal*—for Appellant.

Shamair Chand, *Mehr Chand Sud* and *Mohammad Amin*—for Respondent.

Abdul Rashid, J.—The appellant, Gopi Chand, purchased land measuring 3 kanals, 10 marlas from his mother-in-law, Mt. Wazir Devi, for Rupees 6,000 by means of a registered-deed, dated 6th March, 1922. He sold this land to the respondent, Fakir Chand, for Rs. 6,250 on 18th May 1922, by means of a registered sale-deed. One Mul Chand brought a suit for pre-emption against Mt. Wazir Devi, Gopi Chand and Fakir Chand in respect of the sale by Mt. Wazir Devi to Gopi Chand and obtained a decree for possession by pre-emption, on payment of Rs. 1,070 only. The plaintiff, Fakir Chand, who had paid the defendant, Gopi Chand, Rs. 6,250 claims in the present suit to recover from the latter the sum of Rs. 5,191-12-0 being the difference of the amount actually paid by him to the defendant and the amount realised from the pre-emptor. The sale-deed in favour of Fakir Chand contains the following idemnity clause: "Kisi nuqs qanuni ya waqiati ke bais se, babt arazi mazkura bai shuda ke, mushtri ko khalal pauche . . . . ." The learned Senior Subordinate Judge has decreed the claim and the defendant has come to an appeal to this Court. The only point that has been urged on behalf of the appellant is that the words of indemnity clause in the sale-deed, dated 18th May 1922 do not amount to a covenant on the part of the defendant that he would indemnify the plaintiff for any loss that might arise by reason of the bargain being annulled at the instance of the pre-emptor. It was contended that the appellant merely granted a good title to the vendee and the sale-deed did not contain a covenant granting quiet and undisturbed possession.

I am of opinion that the words in the sale-deed in question are wide enough to cover any loss that may be sustained by the vendee as a result of a pre-emption suit. It was held in *Kalian Singh* v. *Fazal Din* (1), that the words "nuqsan paunche" cover such a loss. The words: "Khalal paunche," which have been used in the sale-deed in this case, have even a wider significance than the words: "nuqsan paunche." To my mind, the Urdu word "khalal," connotes less as well disturbance and the vendor can therefore be said to have guaranteed good title as well as undisturbed possession of the property to the vendee. The defendant in the present case had himself a very precarious title as he had purchased this property from his mother-in-law a few months before he sold it to the plaintiff. As observed by Rattigan, J., in *Nanak Chand* v. *Bashashar Nath* (2), the title of the defendant was found to be defeasible at the instance of the pre-emptor. The words "nuqs qanuni ya waqiati" do not in any way reduce the extent of the liability of the defendant or restrict the meaning of the words "khalal paunche" in any manner. *Ghulam Jilani* v. *Imdad Husain* (3), cited by the counsel for the appellant, is clearly distinguishable. For the reasons given above, I agree with the conclusions arrived at by the learned Senior Subordinate Judge, and I would therefore dismiss the appeal with costs.

Jai Lal, J.—I agree.

K.S. *Appeal dismissed.*

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1. A I R 1926 Lah 455=94 I C 1055.
2. (1908) 8 P R 1908=94 P L R 1908=16 P W R 1908.
3. (1882) 4 All 357=(1882) A W N 67.

A. I. R. 1933 Lahore 783

CURRIE, J.

Mengha Ram and *others* — Defendants —Petitioners.

v.

Dhoma Ram-Ram Chand and *another* —Plaintiffs—Opposite Parties.

Civil Revn. Petn. No. 45 of 1933, Decided on 16th June 1933, from decree of Senior Sub-Judge, Lyallpur, D/- 26th October 1932.

Punjab Courts Act (6 of 1918), S. 44—Decision by lower Court on question which it has jusisdiction to determine—No revision lies.

Where the lower Court decides a question which is has jurisdiction to determine, no revision lies from such decision irrespective of the fact whether the decision is right or wrong: 11 *Cal* 6 (*PC*), *Ref.* [P 783 C 2]

Nanak Chand—for Petitioners.

Kidar Nath Chopra — for Opposite Parties.

Judgment.—This is an application for revision of an order of the Senior Subordinate Judge, Lyallpur, dismissing an appeal, preferred before him, on the ground that it was barred by limitation. For the applicants it is urged that the interpretation put upon the rules for the supply of copies contained in rules and orders of High Court, Vol. 4, Ch. 17 (c), para 5, is erroneous. For the respondent it is urged that no revision lies and reference is made to *Amir Hossain* v. *Sheo Baksh* (1), in which it was held that the only question in the case is whether the lower Courts, in the exercise of their jurisdiction, acted illegally or with material irregularity. It is clear in the present case that the learned Subordinate Judge had jurisdiction to determine whether the appeal was barred by limitation or not. Whether this decision was right or wrong is immaterial. I therefore hold that I am unable to interfere and dismiss the application. In view of the peculiar nature of the case, I leave the parties to bear their own costs.

K.S. *Application dismissed.*

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1. (1885) 11 Cal 6=11 I A 237 (P C).

A. I. R. 1933 Lahore 784 (1)

ABDUL RASHID, J.

Khurshed Alam—Plaintiff—Petitioner.

v.

Asa Ram—Defendant—OppositeParty.

Civil Revn. Petn. No. 644 of 1932, Decided on 9th June 1933, from decree of Addl. Sm. C. C. Judge, Lahore, D/- 1st August 1932.

Contract Act (1872), S. 219—Brokerage—Person acting as broker is entitled to reasonable commission.

Where a person is proved to have acted as a broker, he is entitled to his commission; and even if he fails to prove the rate of commission agreed upon, a reasonable amount ought to be awarded to him as such commission. [P 784 C 2]

Shiv Dayal—for Petitioner.

Prem Nath—for Opposite Party.

Judgment.—The plaintiff, who is a broker, sued the defendant for recovery of Rs. 98-15-6. The Additional Judge of the Small Cause Court, Lahore, has dismissed the suit and plaintiff has preferred a petition for revision to this Court under S. 25, Provincial Small Cause Court Acts. The plaintiff's case is that the defendant had asked him to sell his land situated on Hotu Singh Road, Lahore, and had promised to pay commision at 2 per cent, that he had sold this land to Wali Mohammad for Rs. 4,000 on 15th February 1931, and had taken Rs. 400 as earnest money which he had made over to the defendant. This transaction fell through as the defendant did not have the sale-deed executed and registered within one month in accordance with the conditions of the sale. The defendant came to Lahore on 18th March 1931, and asked the plaintiff to secure another customer for him and he succeeded in selling this land to his brother, Fida Hussain for Rs. 4,000. Rs. 80 is claimed ascommission, Rs. 18-15-6 as railway fare and incidental charges incurred by the plaintiff. The defendant denied the claim alleging that the plaintiff meant to purchase the land for himself and that therefore no commission was due to him.

The plaintiff has produced four witnesses including Wali Mohammad, the first vendee, and his brother, Fida Hussain, the second vendee. He also relies on a receipt dated 15th February 1931, Ex. P-1, and a letter of the defendant to Fida Hussain, Ex. P-2. I am of the opinion that this evidence conclusively establishes that Wali Mohammad was a bona fide purchaser and that he had agreed to purchase the land of the defendant for Rs. 4,000 and that the plaintiff had acted as a broker in this transaction. The notices and the telegrams sent by the plaintiff to the defendant at Ludhiana requesting him to reach Lahore before 15th March 1931, point to the same conclusion. The defendant has not produced any evidence to rebut the case set up by the plaintiff and his mere denial of liability cannot exonerate him. The fact that the second vendee is a brother of the plaintiff does not in any way affect the merits of the case. If it is proved that the plaintiff acted as a broker he is presumably entitled to his commission, and even if he had not produced evidence to show the rate of commmission a reasonable amount ought to have been awarded to him as such commission; 2 per cent, would not be an unreasonable claim in this respect. Wali Mohammad deposes that commission had been fixed at 2 per cent. and I see no reason why the testimony of this perfectly disinterested witness should not be relied upon in this respect. The statement of the plaintiff and the postal receipts prove that the plaintiff incurred an expense of Rs. 18-15-6 while he was acting as broker for the defendant. For the reasons given above, I accept this petition for revision, set aside the judgment and the decree of the lower Court, and decree the claim of the plaintiff with costs throughout.

K.S. *Petition accepted.*

A. I. R. 1933 Lahore 784 (2)

JAI LAL AND ABDUL RASHID, JJ.

Mt. Ghulam Bibi and *another*—Plaintiffs—Appellants.

v,

Mt. Sarwar Bibi and *another* — Defendants—Respondents.

First Appeal No. 1082 of 1928, Decided on 27th May 1933, from decree of First Class Sub-Judge, Shahpur, D/- 12th March 1928.

(a) Custom (Punjab)—Succession—Qureshis of Bhera town migrated to Lahore are governed by personal law and not custom—Punjab Laws Act (4 of 1872), S. 5.

Where the parties were Qureshis of Bhera town and the deceased lived originally in Bhera but subsequently migrated to Lahore and worked as an Imam of a mosque and also carried on Piri muridi:

Held: that under S. 5, Punjab Laws Act, the onus of proving that in matter of succession the parties are not governed by their personal law but by custom was on the person who so asserted. [P 785 C 1]

Held further: that as no custom was established by the evidence on the record, the parties were governed by their personal law. [P 785 C 2]

(b) Limitation Act (1908), Arts. 123 and 144—Suit to recover share by one of heirs against co-heir on death of Mahomedan intestate—Art. 144 applies and not Art. 123—Mahomedan Law—Inheritance.

Where a Mahomedan dies intestate, his estate vests in his heirs as tenants-in-common and no one is charged by law with its distribution and if a suit is brought by one of the heirs to recover his share, Art. 123, Lim. Act, does not apply but Art. 144 will apply in the case of immovable property: *AIR* 1929 *Lah* 549 and *AIR* 1928 *All* 467, (*FB*), *Rel on*; *AIR* 1916 *P C* 145, *Expl* and *Dist*; *AIR* 1922 *Mad* 457 and *AIR* 1918 *Bom* 54, *Dist.* [P 786 C 1]

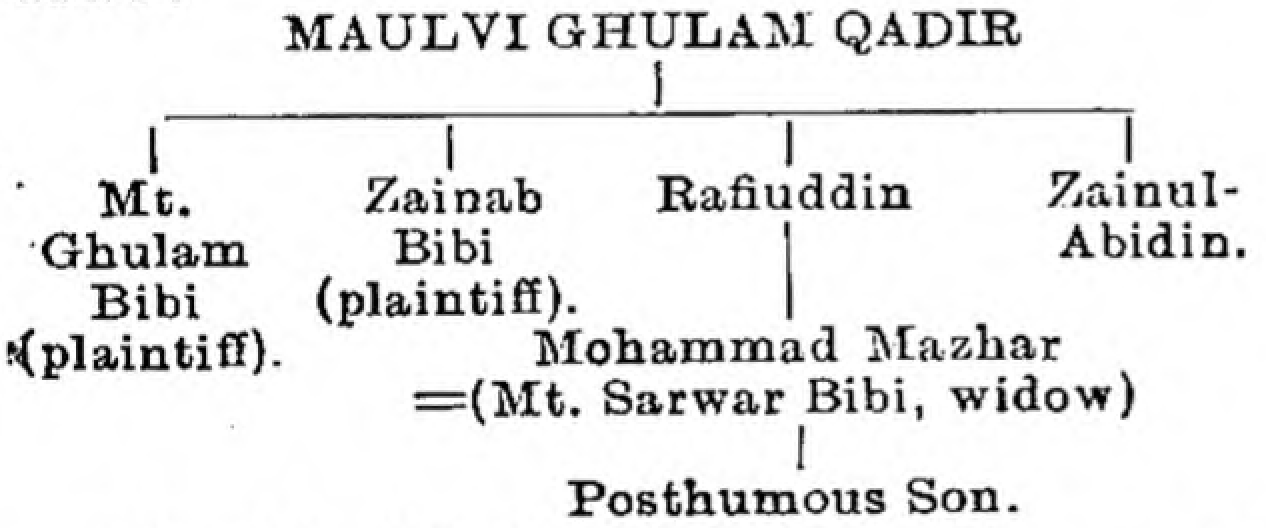
(c) Adverse Possession—Possession by one co-owner is possession of all and there is no adverse possession without ouster.

Possession of one co-owner is in law possession of all the co-owners and nothing short of an ouster or something equivalent to an ouster will convert the same into adverse possession: *AIR* 1929 *Lah* 549, *Rel on.* [P 786 C 1]

Nanak Chand and *M. C. Mahajan*—for Appellants.

R. C. Manchanda and *S. C. Manchanda*—for Respondents.

Abdul Rashid, J.—The parties to this litigation are Qureshis of Bhera Town and are related as follows:



Maulvi Ghulam Qadir, who was Imam of the Begam Shahi mosque at Lahore, died in 1907 and the land in suit situated in villages, Chak Qazi and Alipur was mutated in the name of his grandson, Muhammad Mazhar. Rafiuddin and Zainulabidin had predeceased their father and Muhammad Mazhar was only 13 years old when his grandfather died. His aunts, the plaintiffs, looked after him, and the nephew and the aunts continued to live jointly at Lahore and whenever they visited Bhera they all stayed at the house in dispute. Muhammad Mazhar died six months before the institution of this suit and a week after his death his widow gave birth to a posthumous son who however lived for eight or ten days only. On the death of Muhammad Mazhar the entire property left by Maulvi Ghulam Qadir was mutated by the revenue authorities in favour of his widow, Mt. Sarwar Bibi, defendant 1, The plaintiffs have instituted this suit for possession on the ground that their family is governed by Mahomedan Law in matters of succession, and they as Maulvi Ghulam Qadir and also as aunts of Muhammad Mazhar are entitled to a three-fourth share in the property in dispute.

There are three main points for determination in this appeal: (1) Are the parties governed by custom or Mahomedan Law? (2) Is the suit barred by limitation? (3) What is the share of the plaintiffs in the property in dispute? The trial Court has held and, in my opinion, rightly, that the parties are governed by Mahomedan Law. Maulvi, Ghulam Qadir was a Qureshi by caste, lived in the town of Bhera originally, and then migrated to Lahore, where he worked as an Imam of Begam Shahi mosque and also carried on Piri muridi. In these circumstances and in view of the provisions of S. 5, Punjab Laws Act, the burden of proving that the parties are governed by Customary Law lay heavily on the defendants and, in my opinion, they have utterly failed to discharge it. In support of their contention the defendants produced two witnesses, Pir Chan Pir (D. W. 4) and Pir Kamar Zaman (D. W. 5). These witnesses are Qureshis and state that in their families the Customary Law is followed and the daughters do not succeed to the estate of their fathers. Each one of them has quoted two instances of the exclusion of daughters. No documentary evidence has been produced to corroborate their testimony as regards the instances given by them and I am not prepared to hold that any case of exclusion of a daughter by the sons has been established on the present record. The plaintiffs have produced several Qureshi witnesses of Bhera who depose that in matters of succession they are governed by Mahomedan Law. The instances given by them, also are not supported by any documentary evidence and I am of the opinion that the entire oral evidence produced by the parties is worthless. As no custom has been established by the evidence on the record it must be held that the parties are governed by their personal law.

The lower Court has held that the suit of the plaintiffs is barred by limitation as it was brought twenty years after the death of Maulvi Ghulam, Qadir. It is abundantly clear however that the plaintiffs and Muhammad Mazhar continued to live jointly till about five years before the institution of the suit. Muhammad Mazhar was one of the heirs and in view of his joint residence with his aunts, his possession must be regarded as the possession of all the co-heirs. It has been laid down by a Division Bench of this Court in *Mt. Jano* v. *Narsingh Das* (1), that where a Mahomedan dies intestate, his estate vests in his heirs as tenants-in-common and no one is charged by law with its distribution and if a suit is brought by one of the heirs to recover his share, Art. 123, Limitation Act, does not apply but Art. 144 will apply in the case of immovable property. It is further laid down in the same ruling that possession of one co-owner is in law the possession of all the co-owners and nothing short of an ouster or something equivalent to an ouster will convert the same into adverse possession. On the present record there is no indication that Muhammad Mazhar ever denied the title of his aunts more than twelve years before the institution of the suit. A Full Bench of the Allahabad High Court has laid down in *Rustam Khan* v. *Janki* (2) that a suit by one of the heirs of a deceased Mahomedan against his co-heirs for recovery of possession of his share out of the joint property left by the deceased is governed by Art. 144, Limitation Act. Mr. Manchanda for the respondents relied on *Parthasarathy Appa Rao* v. *Venkatadri Appa Rao* (3), *Shrinbai* v. *Ratanbai* (4) and *Maung Tun Tha* v. *Ma Thil* (5), and contended that limitation began to run against the plaintiffs from the time of the death of Maulvi Ghulam Qadir and that their suit for possession had became barred after the lapse of twelve years from his death under Art. 123, Limitation Act. The Madras and the Bombay rulings referred to by the counsel for the respondents are based on the Privy Council ruling in *Maung Tun Tha* v. *Ma Thil* (5). All these rulings have been discussed in the Full Bench ruling of the Allahabad High Court quoted above, and therein it has been pointed out that the Privy Council ruling in *Maung Tun Tha* v. *Ma Thil* (5) referred to a peculiar Burmese Law and that in that case both parties conceded that Art. 123 governed the case. Art. 144 was not relied upon by either party and was therefore neither mentioned nor discussed. The Privy Council ruling proceeds on its own peculiar facts and is clearly distinguishable from the present case. I am therefore of the opinion that the suit of the plaintiffs is clearly within time.

It was contended on behalf of the respondents that on the death of Ghulam Qadir the appellants inherited a two-third share in his property, and that on the death of Muhammad Mazhar and his posthumous son the appellants did not become entitled to any further share, as Muhammad Mazhar's widow and sister are still alive. I am of the opinion however that it has not been established by any any reliable evidence that Muhammad Mazhar ever had any sister or that she was alive at the date of the institution of the suit. The appellants' share in Maulvi Ghulam Qadir's property would therefore be 62/72 and respondents, Sarwar Bibi's share would be 10/72. The appellants have instituted the suit for possession of three-fourth share of the property left by Ghulam Qadir, and obviously they cannot be given a decree for a greater share than they have claimed. I would therefore accept this appeal, set aside the order of the Court below, and decree plaintiffs' claim in full. As the parties are closely related to each other and as the plaintiffs did not institute their suit during the lifetime of Muhammad Mazhar, I would leave the parties to bear their own costs throughout.

Jai Lal, J.—I agree.

K.S. *Appeal accepted.*

A I. R. 1933 Lahore 786

SHADI LAL, C. J. AND ABDUL QADIR, J.

Hussain Ali Shah—**Plaintiff — Appellant.**

v.

Sardar Ali Shah **and** *others* — **Defendants—Respondents.**

First Appeal No. 1088 of 1928, Decided on 31st May 1933, from decree of Senior Sub-Judge, Montgomery, D/- 23rd December 1927.

(a) Deed—Construction of—Lease or mortgage—Test indicated.

In construing a document as to whether it is a lease or a mortgage the following test may be applied: If it is not a security for the payment of any money or for the performance of any en-

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1. AIR 1929 Lah 549=117 I C 803=11 Lah 29.
2. AIR 1928 All 467=111 I C 809=51 All 101 (FB).
3. AIR 1922 Mad 457=70 I C 689=46 Mad 190.
4. AIR 1918 Bom 54=51 I C 209=43 Bom 845.
5. AIR 1916 P C 145=38 I C 809=44 I A 42=44 Cal 379 (PC).

gagement, if no accounts are to be rendered or required, and if there is no provision for redemption, express or implied, it is simply a lease even though it may be described as a mortgage : 25 *All* 109 (*P C*), *Foll* ; *AIR* 1928 *Mad* 35, *Ref*.

[P 788 C 1]

(b) Registration Act (1908), S. 68 (2)—Registration of document, execution of which is not denied cannot be cancelled by Registrar.

Section 68 (2) does not confer upon the Registrar the power of cancelling the registration of a document, the execution of which is not denied and which has been already registered by a Sub-Registrar : *AIR* 1932 *Lah* 495 (*F B*), *Dist.*

[P 788 C 1, 2]

(c) Adverse Possession—*A* shown in revenue papers consistently as owner to full knowledge of *B*—*B* remaining in possession but not making efforts to have entry changed in his name—*B* cannot set up adverse possession.

In the revenue papers *A* was consistently shown as owner, within the knowledge of *B* who was in cultivating possession of the property ; and *B* did not make the least effort to have the entry in the column of ownership corrected. Further *B* had described himself before the Revenue Officer that he was the manager of the property :

Held : that under the above circumstances *B* could not set up any adverse possession.

[P 789 C 1]

Nawal Kishore and *Fayyaz Hassan*—for Appellant

Barkat Ali, *Abdul Aziz* and *M. Aslam Khan*—for Respondents.

Abdul Qadir, J.—One Sardar Ali Shah, who is recorded as owner of 1,656 kanals, 15 marlas of land, situated in village, Kaure Jaure, in Montgomery District, and ordinarily works as a petition-writer at Bahawalnagar, in Bahawalpur State, executed a deed in favour of Hussain Ali Shah, son of Shah Din Shah, of Chunian, on 9th March 1925, by virtue of which he leased his land to the plaintiff for six years. This deed, which begins by describing itself as a lease and by reciting the annual amount of the lease money, was also described towards the end of the document as a mortgage for six years. It was presented for registration and was registered on 18th March 1925. A Muharrir working under the Sub-Registrar, subsequently, pointed out to him that there were certain flaws in the document and that it should not have been registered. The Sub-Registrar, thereupon, made a report to the Ragistrar on 30th March 1925, explaining that as, in his opinion, there were no legal flaws in the document and its registration could not be refused he had registered it, but if it was to be treated as a mortgage-deed, an additional fee should be ordered to be received from the executant. On this report the Registrar passed the following order on 25th April 1925:

"Acting under S. 68 (2), Registration Act, I cancel the registration made by the Sub-Registrar."

It appears that the higher authorities were moved against the order passed by the Registrar and the matter went to the Financial Commissioner, who referred it to the Inspector-General of Registration. The latter passed an order that the action of the Registrar in cancelling the deed under para. 68 (2) was without authority and invalid and should therefore be treated as null and void. It may be mentioned that, though the document, dated 9th March 1925, stated that Sardar Ali Shah had delivered possession to Hussain Ali Shah, yet as a matter of fact, possession did not pass to him, because at that time Altaf Ali Shah and others, step-brothers of Sardar Ali Shah, were in actual cultivating possession of the land. On 23rd January 1926, Hussain Ali Shah brought a suit for the possession of land, impleading Sardar Ali Shah, defendant, and his brothers and nephews, who had refused to deliver possession to him in spite of having been repeatedly asked to do so. Defendants 2 to 8, who are the contesting defendants, urged in their written statement that the documents, on the basis of which the plaintiff was suing, was not formally registered, nor was it written on an adequately stamped paper. They also added that defendant 1 had not been in possession of the property within twelve years, that the document was received from him without consideration and that he was not a man of sound mind. The trial Court held that there was no sufficient evidence to show that Sardar Ali Shah, defendant 1, was of unsound mind, when he executed the document in question. It was also held that the document should be considered as not having been registered, that it was a mortgage-deed and contravened the provisions of S. 6, Punjab Alienation of Land Act, as the plaintiff was not a member of a notified agricultural tribe in Montgomery district. On the question of registration, the opinion expressed by the trial Court was that the documents should be considered as not having been registered. The Court also found that the defendants had failed to prove their adverse possession. It however refused to decree the claim of the plaintiff, as it was based on a document that was unregistered and therefore the suit was dismissed and the parties were left to bear their own costs, on the ground that the main issues had been decided in favour of the plaintiff. The plaintiff has preferred an appeal to this Court, which has been argued before us by Mr. Nawal Kishore, while we have been addressed by Mr. Barkat Ali on behalf of the respondents.

The main questions for decision now are: (1) Whether the deed dated 9th March 1925, was a lease or a mortgage? (2) Whether it was duly registered, and also whether the registration could be cancelled by the Registrar? (3) Whether there was any adverse possession of the defendants for more than twelve years? Mr. Nawal Kishore contends, that, in spite of the fact that the words "lease" and "mortgage" were both used in the body of the document, it is really a lease because the features that characterize a mortgage are not present. He says that, in the words of their Lordships of the Privy Council in *Tassaduq Rasul Khan* v. *Kashi Ram* (1):

> "It is not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption, express or implied. It was simply a grant of land for a fixed term . . . . in consideration of a sum made up of past and present advances."

In the said case, though the document was described as a mortgage their Lordships held that it was a lease. Reference is also made to a Division Bench decision of the Madras High Court: ***Sundara Raju Dikshutulu*** v. ***Archaka Seshadri Dikshutulu, A. I. R.*** 1928 ***Mad.*** 35, where the question was, whether the document was a mortgage or a lease and the learned Judges applied to it the tests mentioned above, and held that it was a lease. Applying the same tests to the document before us, I have no doubt that it is a lease, and it was duly registered as such. The question as to any deficiency in stamp on account of its being described as a mortgage does not arise, but it may be mentioned that in the Court below the extra fee and penalty have been paid and, even if it were to be treated as a mortgage-deed, the deed in question is now properly stamped. The order of the Registrar, dated 25th April 1925, cancelling the registration was, in my opinion, absolutely unauthorised. He purported to act under S. 68 (2), Registration Act, but that section does not confer upon him the power of cancelling the registration of a document, the execution of which is not denied and which has been already registered by a Sub-Registrar.

Counsel for the appellant draws our attention to a Full Bench decision of this Court: *Thakar Das* v. *Emperor* (2). This was a case in which a document which was on the face of it a deed of dissolution of partnership and stamped as such, was registered by the Sub-Registrar and returned to the executants. Subsequently, in the course of inspection, the Registrar considered the document to be a deed of partnership and as such defectively stamped. He called upon the executants to produce the deed and referred the matter to the Collector, who ordered the deficiency in the stamp to be made good with penalty, but the executants appealed to the Financial Commissioner, who referred the question to the High Court. It was held by the Full Bench that the Registrar had no power to order the production of a document, after it had been registered and delivered to the party concerned, and his action in referring the matter to the Collector was held to be ultra vires. This authority has no direct bearing on the question before us, but the counsel for the appellants has referred to it, by way of analogy, to show that the Registrar had no power, under the Registration Act, to cancel a registration already completed. I think the registration of the document on 9th March 1925, must be held to be valid and subsisting.

On the question of adverse possession, the case of the contesting defendants-respondents is that Sardar Ali Shah has been out of possession for a period of more than 12 years and that his attempt to obtain possession by executing a lease of this land in favour of one Jiwan Lambardar failed in 1916 and the execution of a lease by him in favour of Hussain Ali Shah, the present plaintiff, was a repetition of the same attempt to gain possession through a lessee, which he could not secure otherwise. Reference to Ex. P-3, at pp. 40 to 43 of the printed record, shows that in 1915 Sardar Ali Shah executed a lease in favour of Jiwan Lambardar. The patwari entered a mutation in his favour, but, on 31st March 1916, Jiwan appeared before the Assistant Collector and Sardar Ali Shah was absent. Ji-

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1. (1903) 25 All 109=30 I A 35 (P C).

2. AIR 1932 Lah 495=138 I C 758=13 Lah 745 (S B).

wan stated that he was not in possession and the mutation was disallowed. In this document the name of Sardar Ali Shah, alias Sardar Shah, is shown in the column of owner. This was followed by another entry in the register of mutations, a copy of which is on the record and is marked, Ex. P-4, in which Altaf Ali Shah is said to have appeared in person and stated that he had taken the land on lease from Jiwan. This mutation was also entered by the patwari, but was disallowed by the Assistant Collector on the ground that Jiwan produced no lease and that Altaf Ali Shah, the step-brother of Sardar Shah, was in possession and cultivating the land and enjoying the produce. He ordered the name of Altaf Ali Shah to be entered as manager of the property in the column of remarks. In the body of the document Sardar Ali Shah is shown as owner and Altaf Ali Shah is shown in the column of tenants as a lessee.

It is argued by Mr. Barkat Ali, on behalf of the respondents that the statement of Altaf Ali Shah has not been duly proved, that he was not summoned as a witness to explain it and that, in any case, it cannot be binding on his brothers. All this may be true and yet the fact remains that in the revenue papers the name of Sardar Ali Shah has been consistently shown as owner, within the knowledge of the defendants, and they have contented themselves with remaining in cultivating possession, presumably with his permission, without making the least effort to have the entry in the column of ownership corrected either by admitting the names of the other brothers to that of Sardar Ali Shah or by substituting their names for his. According to the mutation entry, Ex. P-4, when one of the contesting defendants personally appeared before the revenue officer, his position was described as that of a manager of the property, which itself implies management on behalf of someone else. Under the circumstances I do not see how the contesting defendants can set up any adverse possession and I have no hesitation in holding that no adverse possession of the defendants has been proved. As I have held that the lease in favour of the plaintiff was validly registered, there is no reason why the suit of the plaintiff should not be decreed.

I would therefore accept this appeal with costs and decree the suit of the plaintiff on the basis of the lease dated 9th March 1925.

Shadi Lal, C. J.—I concur.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 789

JAI LAL AND ABDUL RASHID, JJ.

Ghulam Dastgir and *others*—Plaintiffs—Appellants.

v.

Mohan Lal and *others*—Defendants—Respondents.

Second Appeal No. 2739 of 1928, Decided on 1st June 1933, from decree of Dist. Judge, Hissar, D/- 2nd November 1928.

Provincial Insolvency Act (1920), S. 4 — Proceedings under S. 4 need not necessarily be initiated by plaint or regular application for their validity.

It is not necessary that proceedings under S. 4, in order that they may be valid, should be initiated by a plaint or a regular application.

Certain property was claimed by the receiver to have vested in the insolvent; but the insolvent's father objected that the property did not belong to the judgment-debtor. Subsequent to the death of the father, one of the creditors applied to sell the property which had descended to the insolvent from his father and to distribute the proceeds and on the report of the receiver, the property was ordered to be taken possession of by the receiver and sold. Objection was raised by the sons of the insolvent that their grandfather had bequeathed the property to them by a will. The Judge held that the will had not been proved. The sons then instituted a suit for a declaration that the property was theirs by virtue of a will and could not vest in the receiver. The trial Judge held that the suit did not lie in view of the order of the Insolvency Judge. It was contended on appeal that the proceedings before the Insolvency Judge were not under S. 4 as they were not initiated by an application and that the suit was not barred :

Held : that it was open to the Court to take proceedings suo motu under S. 4, that in this case it was moved by one of the creditors and also by the receiver, that the proceedings of the Insolvency Judge were under S. 4 and binding on parties to litigation and that the present suit did not lie : *AIR* 1928 *Lah* 556, *Expl.* [P 790 C 1, 2]

Muhammad Amin Khan — for Appellants.

Nawal Kishore—for Respondents.

Jai Lal, J.—Fateh Muhammad was adjudicated an insolvent. When the insolvency proceedings were pending some immovable property was claimed by the Receiver to have vested in him, but the father of Fateh Muhammad, who was alive, raised an objection that the property did not belong to the judgment-debtor. It was released. Subsequent to the death of Fateh Muhammad's father one of the creditors applied to the Insolvency Court to sell the property which had descended to the insolvent from his father, and to distribute the proceeds in the insolvency proceedings. The learned Judge of the Insolvency Court sent the application for report to the Receiver who supported the prayer of the creditor and consequently the Judge of the Insolvency Court directed that the property be taken possession of by the Receiver and sold. An objection to this course was taken by the sons of the insolvent who claimed that their grandfather, i. e., the father of the insolvent, had bequeathed the property to them by means of a will. The Judge accordingly proceeded to adjudicate on this objection and finally held that the will had not been proved to be genuine and consequently the property descended to the insolvent on the death of his father and vested in the Receiver. An appeal against this order to this Court was dismissed.

The sons of the insolvent then instituted the suit out of which this second appeal has arisen for a declaration that the property in dispute was theirs by virtue of the will and could not vest in the Receiver. The trial Judge held that the suit did not lie in view of the decision of the Insolvency Judge in the previous proceedings which, according to him, were taken under S. 4, Provincial Insolvency Act. The suit was accordingly dismissed. An appeal to the District Judge has also been dismissed. The sons of the insolvent have consequently presented this second appeal to this Court. An attempt was made by the learned counsel on their behalf to show that the proceedings before the Insolvency Judge were not under S. 4, Provincial Insolvency Act, because according to the counsel, those proceedings must be initiated by an application and otherwise must follow the procedure provided for regular suits. Reliance was placed in support of this on *A. I. R.* 1928 *Lah.* 556. I do not understand the judgment in that case to lay down that proceedings under S. 4, Provincial Insolvency Act, should be initiated by a plaint or a regular application and that in the absence of either of these they are invalid. The section is so worded that it is open to the Court to take proceedings suo motu. In this case it was moved by one of the creditors and also by the Receiver. Evidence of both the parties was recorded and a finding was given. It is not open to the learned counsel to contend that the proceedings were irregular, even if they were irregular. The case cited came up to this Court on appeal from an order under S. 4 of the Act, and the learned Judge held that the proceedings had not taken the form contemplated by S. 4. If the plaintiffs in this case were dissatisfied with the procedure of the Insolvency Judge they could have raised the objection before the appellate Court, but they did nothing of the sort. The view of the Courts below therefore is correct that the proceedings were under S. 4 of the Act and are binding on the parties to this litigation.

The next objection of the learned counsel is devoid of force. He contended that by virtue of *Jagdip Singh* v. *Narayan Singh* (1) the property could not be attached and sold in execution of a decree obtained against the insolvent. *Jagdip Singh* v. *Narayan Singh* (1), lays down that, after the death of a judgment-debtor who is governed by the Customary Law of the Punjab, his ancestral land vests in his reversioners and is not liable to sale after his death, unless the decretal amount is charged on it. In the present case the insolvent is alive and the property has not descended or reverted to the appellants. Then some attempt was made to urge that, under the Customary Law of this Province, the father could not sell the property and a suit by his sons to set aside the sale for want of consideration and necessity would lie. The sale in the present case however is not by the father of the appellants, that is to say the insolvent, but by the Receiver under the orders of the Court. This appeal therefore fails and I would dismiss it with costs.

Abdul Rashid, J.—I agree.

K.S. *Appeal dismissed.*

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1. (1913) 4 P R 1913=15 I C 866.

A. I. R. 1933 Lahore 790

SHADI LAL, C J.

Mt. Taj Bibi and *others* — Defendants —Petitioners.

v.

Muhammad Hussain and *others*—Plaintiffs—Opposite Parties.

Civil Misc. Petn. No. 297 of 1933 and Civil Appeal No. 551 of 1933, Decicided on 2nd June 1933, from decision of Senior Sub Judge, Gurdaspur, D/- 20th February 1933.

Civil P. C. (1908), O. 41, R. 5 — Partition suit—Appeal from preliminary decree—Pro-

ceedings for partition by metes and bounds should be stayed pending decision of appeal.

The usual practice of the Lahore High Court is to stay proceedings for the partition of property by metes and bounds pending the decision of the appeal preferred from the preliminary decree. [P 791 C 1]

Shamair Chand—for Petitioners.

Ram Lal Malik—Opposite Parties.

Order.—The question for determination is whether proceedings for the partition of the property by metes and bounds should be stayed pending the decision of the appeal preferred from the preliminary decree. The usual practice of this Court is to stay the proceedings, and, after considering the matter carefully, I am of opinion that that practice should be followed in this case. I accordingly stay further proceedings in pursuance of the preliminary decree during the pendency of the appeal.

K.S. *Order accordingly*.

A. I. R. 1933 Lahore 791

BHIDE, J.

Natha Singh and *others* — Judgment-debtors—Appellants.

v.

Fateh Khan and *another* — Decree-holders—Respondents.

Misc. Second Appeal No. 738 of 1933, Decided on 16th June 1933, from order of Dist. Judge, Hoshiarpur, D/- 8th March 1933.

(a) Pre-emption — Pre-emptor depositing amount in Court becomes entitled to land from date of such payment—Civil P. C. (1908), O. 20, R. 14.

When a pre-emptor has deposited the amount in Court in accordance with the terms of the decree he becomes entitled to the land from the date of such payment and the mere fact that the amount deposited by the decree-holder is erroneously attached and taken away by some of the creditors of the decree-holder is no ground for refusing delivery of possession to him: 21 *P R* 1902, *Foll*; 61 *P R* 1890 and 27 *P R* 1915, *Dist*. [P 791 C 2; P 792 C 1]

(b) Civil P. C (1908), S. 144 — Possession obtained by pre-emptor on deposit of amount —Suit by vendees for possession on ground that deposit was not in time and dispossession of pre-emptor ordered by trial Court—Pre-emptor succeeding in appeal is entitled to be restored to possession under S. 144.

A pre-emptor obtained possession of the property on the deposit of amount mentioned in the decree. The vendees filed a suit for possession on the ground that the deposit was not made within the time allowed and the trial Court upholding that objection dispossessed the pre-emptor and gave possession to the vendees. The pre-emptor succeeded in appeal:

Held; that he was entitled to be restored to possession as it was incumbent on the Courts to restore the parties to the status quo. [P 792 C 1]

(c) Punjab Pre-emption Act (1 of 1913), S. 11—Money deposited is not liable to be attached.

According to provision of S. 11, money deposited by the pre-emptor is not liable to be attached at all [P 792 C 1]

Homi Rustomji—for Appellants.

Barkat Ali—for Respondents.

Judgment. — The plaintiffs in this case obtained a decree for possession of certain land on payment of Rs. 3,000. The money was to be deposited by 10th November 1923. It was actually deposited on 12th November 1923. However the decree-holders got possession of the land on 3rd January 1924. The vendees subsequently applied to the Court and pointed out that the money had not been deposited by the date fixed in the decree and the suit was therefore liable to be dismissed. This contention of the vendees was accepted by the Court and the suit was dismissed. An appeal was preferred to the District Judge, but he upheld the decision of the trial Court. The vendees then applied for possession of the land being restored to them and this prayer was granted. The vendees were accordingly put in possession of the land. The plaintiffs filed a further appeal to this Court and it was then held that there being intervening holidays the plaintiffs had sufficiently complied with the terms of the decree and that they were entitled to possession of the land. Thereafter the plaintiffs put in an application under S. 144, Civil P. C., for possession of the land being restored to them. The vendees raised an objection that part of the sum deposited by the plaintiffs had been attached and taken away by some of the creditors and that the plaintiffs were therefore not entitled to obtain possession of the land without making up the deficiency. This objection was however overruled by the trial Court and possession of the land was ordered to be restored to the plaintiffs. The vendees appealed to the District Judge who confirmed the order of the trial Court.

A second appeal has now been preferred to this Court and it is contended on behalf of the vendees that the decison of the Courts below was not correct. In support of the contention reliance has been placed on *Sandha Khan* v. *Jandhu Khan* (1). This ruling was however dissented from in *Sant Singh* v. *Ghasita* (2) in which it was held that when a pre-emptor had deposited the amount in Court in accordance with

1. (1890) 61 P R 1890.
2. (1902) 21 P R 1902=179 P L R 1901.

the terms of the decree he became entitled to the land from the date of such payment and the mere fact that the amount deposited by the decree-holder was erroneously attached and taken away by some of the creditors of the decree-holder was no ground for refusing delivery of possession to him. The learned counsel for the appellants further relied on *Panna Lal* v. *Natha Singh* (3), but the facts of that case are distinguishable inasmuch as the amount deposited in that case was attached and taken away during the pendency of the suit.

In the present case it must be remembered that the application with which we are dealing was for restitution under S. 144, Civil P. C. The plaintiffs had already obtained possession of the land in pursuance of the decree and the land was taken back by the vendees only on account of an order of the Courts below which was held to be erroneous by the Court. According to the provisions of S. 144, Civil P. C., it was therefore incumbent on the Courts below to restore the parties to the status quo. In this aspect of the case the question as regards the attachment of the portion of the amount deposited after it was duly paid by the plaintiffs in Court does not appear to arise at all. I may however point out that as the title of the plaintiffs accrued from the date of payment they were clearly entitled to the possession of the land: see O. 20, R. 14, Civil P. C. According to the provisions of S. 11, Punjab Pre-emption Act, the money deposited by the plaintiffs was not liable to be attached at all and it was only through an unfortunate error that a portion of it was allowed to be attached and taken away. There seems to be no reason, when the title of the plaintiffs is beyond any dispute, they should not be restored possession of the land, the vendees must in the circumstances be left to seek their remedy according to law. I dismiss the appeal, but in view of all the circumstances leave the parties to bear their own costs.

K.S. *Appeal dismissed.*

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3. (1915) 27 P R 1915=29 I C 354.

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* A. I. R. 1933 Lahore 792

JAI LAL AND ABDUL RASHID, JJ.

Zulfikar Ali—Defendant—Appellant.

v.

D. A. V. College Managing Committee, Lahore—Plaintiff—Respondent.

First Appeal No. 1394 of 1928, Decided on 29th May 1933.

*** Civil P. C. (1908), O. 34, R. 6—Preliminary and final decree for sale of mortgaged property obtained by mortgagee—Sale stopped owing to execution of final decree for sale of same property obtained by prior mortgagee—Sale proceeds insufficient to pay even prior mortgagee—Subsequent mortgagee is entitled to apply for personal decree.**

A mortgagee after obtaining the preliminary and final decree for sale of the mortgaged property, proceeded to sell the property. The sale was stayed owing to execution of a final decree for sale of the same property obtained by a prior mortgagee. The property was sold but the sale-proceeds were insufficient even to pay the amount due to the prior mortgagee. Thereupon the subsequent mortgagee, who had reserved the right to apply for personal decree, applied for the same. It was objected on the ground that he could not do so without at first bringing the property to sale:

Held: that the mortgaged property was not available for sale owing to circumstances for which he was not responsible, and that there was no bar to obtain a personal decree for the whole of the amount due to him: *A I R* 1928 *All* 71, *Foll*; *A I R* 1920 *All* 155; *A I R* 1924 *Cal* 209 and *A I R* 1930 *Oudh* 377, *Ref.* [P 793 C 1]

Mohammad Akbar Khan—for Appellant.

M. C. Mahajan and *Hargopal*—for Respondent.

Jai Lal, J.—The respondent, D. A. V. College Managing Committee, Lahore, obtained a preliminary decree for sale of mortgaged property against the appellant Mohammad Nathoo and thereafter a final decree for sale of the mortgaged property. The decree-holders then proceeded to sell the mortgaged property but the judgment-debtor presented an application in answer to a notice to him under O. 21, R. 66, Civil Procedure Code, objecting to the sale of the property at that satge on the ground that a prior mortgagee had obtained a final decree for the sale of the same property and the property was being sold in execution of that decree. The sale in execution of the decree of the respondents, therefore, was stayed.

It appears that the respondents were parties to the suit for sale of the property brought by the prior mortgagee and it subsequently transpired that on the property being sold in execution of that decree the sale proceeds were insufficient even to satisfy the prior mortgage. The sale was confirmed and the property given over to the auction-purchaser. The respondents then applied for a personal decree against the appellant. It is to be noted that in the preliminary decree passed against the appellant liberty has been reserved to the mortgagee decree-holder to apply for a personal decree in case the sale-proceeds be found to be insufficient to pay the mortgage money. The judgment-debtor admitted that the sale-proceeds in the decree of the prior mortgage had been insufficient even to satisfy the mortgage in his favour i. e., the prior mortgagees. The Court thereupon passed a personal decree against him. No objection was raised in the trial Court that a personal decree could not be passed. The objection was, however, taken by an application for review which was rejected. The judgment-debtor has consequently presented this appeal against the personal decree passed against him in favour of the respondents.

Reliance is placed on O. 34, R. 6, which provides that where the net proceeds of any sale held in pursuance of the final decree are found to be insufficient to pay the amount due to the plaintiff, the Court may on application by him, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree from such balance. It is not denied that the balance is legally recoverable from the mortgagor in this case. It is not even denied that the right to cover the balance was not barred by time. The only objection to the course adopted by the trial Court is that the preliminary decree and a final decree having been passed the decree-holder mortgagee was not competent to apply for a personal decree without first putting the property to sale. Reliance in support of this contention is placed on *Darbari Mal* v. *Mula Singh* (1), *A. I. R.* 1924, *Cal.* 209 and *A. I. R.* 1930 *Oudh* 377. In *Biseshar Nath* v. *Chandu Lal* (2), however, it was held that where subsequent to a preliminary and a final decree for sale of the mortgaged property the property is not available for sale in execution of the decree owing to the circumstances for which the decree-holder is not responsible, there is no bar in his way to obtain a personal decree for the whole of the mortgage amount due to him. Most of the cases in which a contrary view was alleged to have been taken and particularly *Darbari Mal* v. *Mula Singh* (1), were cited before the learned Judges in that case and in spite thereof they came to the conclusion mentioned above. I respectfully agree with the view taken in *Biseshar Nath* v. *Chandu Lal* (2) and do not consider it necessary to repeat the reasons given therein in support of it. In this case there are additional grounds in support of the course adopted by the trial Court. The sale of the mortgaged property in execution of the decree for sale obtained by the respondents was not held owing to an objection taken by the appellant. It is not now open to him to say that the property should have been put to auction before a personal decree could be passed in favour of the respondents. It was no longer available to be sold because the lien of the prior mortgagee even had not been satisfied out of the sale-proceeds. There is no force, in my opinion, in this appeal and I would dismiss it with costs.

Abdul Rashid, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 793

ADDISON AND BHIDE, JJ.

Abdul Qadir—Defendant — Appellant.

v.

Mt. Bilas Kaur and *another*—Plaintiffs—Respondents.

First Appeal No. 1097 of 1928, Decided on 30th March 1933, from decree of Senior Sub-Judge, Amritsar, D/- 21st March 1928.

Limitation Act (1908), Arts. 116, 111 and 83 — Registered sale-deed containing contract to indemnify in case sale is not completed—Limitation is six years and runs from date when vendor is damnified.

Where a registered sale-deed contains a contract by which the vendor is to be indemnified in case the vendee fails to complete the sale, limitation for a suit by the vendor against the vendee is six years from the time when the vendor is damnified. [P 794 C 2]

Badri Das and *Acchru Ram* — for Appellant.

Mehr Chand Mahajan and *D.R.Sawhney*—for Respondents.

Addison, J.—Nathu Mal sold a house to Ganga Bishan, Lalu Mal and Sain Das, for Rs. 18,500 by a registered deed dated 28th February 1919. Rs. 12,000 were left in trust with the vendees who agreed that they would pay that sum with interest at 6 per cent per annum within a year. If they did not do so, the vendor had the right to realize the same by selling the property and by enforcing his claims against the vendees personally. If the vendees were to part with the property before the period fixed they had to pay to the vendor the above sum with interest out of the sale price realized by them. If this condition was violated the original vendor Nathu Mal had the right to re-

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1. A I R 1920 All 155=56 I C 139=42 All 519.
2. A I R 1928 All 71=108 I C 459=50 All 321.

alize the money from the property sold or enforce his claim personally against the vendees, or the vendees' transferees and their successors-in-interest.

Ganga Bishan, Lalu Mal and Sain Das, the first vendees, themselves sold the property by a registered sale-deed, dated 29th June 1919, in favour of Abdul Kadir, defendant 1, for Rupees 22,500. Of this sum Rs. 12,000 were left with Abdul Kadir in trust to pay to the original vendor Nathu Mal, subject to the conditions given in the first sale-deed executed by Nathu Mal. Abdul Kadir, defendant, himself sold the property by a registered sale-deed dated 1st December 1919, to Jamna Das for Rs. 26,000. Of this sum Rs. 12,000 were left with Jamna Das in trust for payment to the original vendor Nathu Mal. Abdul Qadir admitted in the sale-deed that this sum of Rs. 12,000 had been left with him by his vendors in trust for payment to Nathu Mal.

The sum of Rs. 12,000 and interest were not paid to Nathu Mal and he sued for the amount. He obtained a decree against the original vendees, Ganga Bishan, Lalu Mal and Sain Das, for Rs. 13,051-12-0 together with Rupees 1,010 costs. In execution of this decree the property was sold and realized a very small amount, Rs. 7,000, being still left due under the decree after the auction-sale. Nathu Mal in these execution proceedings, entered into a compromise with Mt. Bilas Kaur, widow of Ganga Bishan, and Lalu Mal, on 19th December 1926. Sain Das, the third joint vendee, was not present and did not take part in these proceedings. The compromise was that Nathu Mal accepted from the two persons named the sum of Rs. 5,000 in full satisfaction of his decree. Lalu Mal also died and was succeeded by his widow, Mt. Ratan Kaur. · The two widows, Mt. Ratan Kaur and Mt. Bilas Kaur, then brought the present suit against Abdul Kadir on 22nd July 1927, for Rs. 5,175, principal and interest, on the ground that he was liable to repay to them what they had been compelled to pay to the original vendor. Abdul Kadir pleaded that the suit was timebarred and that he was not personally liable to pay the amount of Rs. 12,000, left in trust with him. Both his pleas were repelled and the suit decreed. Against that decision he has appealed. It was again argued that he was not personally liable. There is no force in this argument as it is clear from the wording of the documents which I have given above that he is personally liable.

The next contention was that the suit was barred by time as it should have been brought according to Art 111, Sch. 1, Limitation Act, within three years from the time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance. This argument cannot be accepted. The document is a registered one and the period of limitation must therefore be computed in accordance with Art. 116, Limitation Act, as the document contains an express contract to indemnify. It has been held by this Court in *Abdul Aziz Khan* v. *Mahomed Bakhsh* (1) that in such cases the combined effect of Art. 116 read with Art 83, Limitation Act, gives a period of six years for instituting a suit, time running from the date when the plaintiffs were actually damnified, i. e., in the present case when they entered into the compromise with Nathu Mal and had to pay him the sum of Rs. 5,000 which was considerably less than what was due under the contract. A similar view was taken by the Bombay High Court in *Ratanbai* v. *Ghasi Ram Gangabishan* (2). A contrary view was taken in *Raghubar Rai* v. *Jaij Rai* (3), but this decision is no longer accepted in Allahabad. This is clear from a perusal of *Sarju Misra* v. *Ghulam Husain* (4) and *Kedar Nath* v. *Har Govind* (5). Again, it was held in *Ram Rachhya Singh* v. *Raghunath Prasad* (6), that a suit such as the present is governed by Art. 116 and the terminus a quo is not the date of the execution of the sale-deed, but the date on which the contract is deemed to have been broken, this date being either when there was a repudiation of the liability under it ,or when the contract had become impossible of performance on account of the vendor's debt having been satisfied.

In some of the authorities S. 24, Limitation Act, has been applied along with Art. 116. In my judgment it might be more correct to say, as was held in *Abdul Aziz Khan* v. *Mahomed Bakhsh* (1), that Art. 116 governs the suit, and the starting point is given in the third column of Art. 83, viz., when the plaintiff is actually damnified. On the authorities therefore the appeal must

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1. **AIR 1921 Lah 260=64 I C 431=2 Lah 315.**
2. **AIR 1932 Bom 36=134 I C 1157=55 Bom 565.**
3. **(1912) 34 All 429=14 I C 244.**
4. **(1920) 63 I C 87.**
5. **AIR 1926 All 605=95 I C 913.**
6. **AIR 1930 Pat 46=122 I C 244=8 Pat 860.**

fail, and I would dismiss it with costs.

Bhide, J.—I agree.

K S. *Appeal dismissed.*

A. I. R. 1933 Lahore 795

BHIDE, J.

Rup Chand and *others* — Plaintiffs — Appellants.

v.

Har Nand and *others* — Defendants— Respondents.

Second Appeal No. 1274 of 1932, Decided on 26th January 1933, from decree of Dist. Judge, Delhi, D/. 2nd June 1932.

(a) Custom (Punjab) — Adoption — Rohtak District — Forms and ceremonies are necessary for adoption and adoptee does not succeed to natural father.

According to the custom prevailing in the Rohtak District forms and ceremonies are necessary for adoption and an adoptee under such adoption is not allowed to succeed to his natural father. [P 795 C 2]

(b) Record of Rights—Evidentiary value.

There is a presumption of correctness attaching to the revenue records as the entries are made by a public servant in the ordinary course of his duties and it is upon the person who disputes their correctness to show that the entries are not correct. [P 795 C 2]

Kanshi Nath Aggarwal — for Appellants.

Nand Lal—for Respondents.

Judgment.—This was a suit for a declaration that the plaintiffs were entitled to one-third share in the land which was the subject-matter of the suit. There had been an application for partition of the property. The plaintiffs claimed one-third share, but the Revenue Records showed that their share was only one-fourth. The plaintiffs were therefore directed to establish their claim in a Civil Court and thereupon instituted the present suit. The decision of the claim made by the plaintiffs rested on the question whether their father, Bhag Mal, was adopted by Ranjit as alleged by them: vide pedigree table attached to the judgment of the trial Court. The learned District Judge has held on appeal that the plaintiffs had failed to prove that Bhag Mal was adopted by Ranjit and has consequently declared that they are entitled to one-fourth share only in the land in suit. From this decision the plaintiffs have preferred a second appeal.

The learned District Judge's finding that Bhag Mal was not proved to be an adopted son is one of fact, but the learned counsel for the appellants has urged that the finding of the learned District Judge is vague, that it is based on inadmissible evidence and that he has misconstrued certain documents. After carefully considering the facts on the record I do not think that there is any force in these contentions. The learned District Judge has held after considering the entries in the Revenue Records and the conduct of Bhag Mal that no formal adoption had taken place. It is admitted before me that according to the custom prevailing in the Rohtak District forms and cermonies are necessary for adoption. It is also admitted that Bhag Mal has succeeded to the property of his natural father and that such succession is not allowed under custom when a formal adoption takes place. The learned counsel for the appellants has urged that the learned District Judge should not have relied on the later entries in the Revenue Records as there was nothing to show how the change in the entries had taken place, but there was a presumption of correctness attaching to these and it was, in my opinion, upon the plaintiffs to show that the later entries were not correct. The next contention of the learned counsel that the learned District Judge has misconstrued the judgments in two cases in which Bhag Mal was sued by the predecessors-in-interest of some of the defendants is also not borne out by the record. I have perused the judgments in those cases and it appears therefrom that Bhag Mal did claim therein that he was entitled to succeed to his natural father's property. The trial Court had taken the view that these judgments showed that Bhag Mal's claim was based only on adverse possession, but the judgments do not seem to me to support that view.

The learned counsel finally urged that there was no presumption of correctness attaching to the entry in the Revenue Records that Bhag Mal was the son of his natural father Birja. But even if the entry in question did not fall strictly within the purview of S. 44, Punjab Land Revenue Act, as contended by the learned counsel, it would still be a valuable piece of evidence as it is an entry made by a public servant in the ordinary course of his duties. Besides, if this entry were held to be of no value, the previous entries showing that Bhag Mal was an adopted son of Ranjit, on which the learned counsel for the plaintiffs wishes to rely, will have to be considered to be equally valueless. In my opinion, there is no good ground for interference with the findings of fact of the learned District Judge. There appears to be however a slight mistake in the judgment of the learned District Judge. In the end of his judgment the learned District Judge remarked that he accepted the appeal and granted the plaintiffs a declaration that they were entitled to a quarter share only of the land in suit, with costs in both Courts. The judgment reads as though the costs were awarded to the plaintiffs although in reality their suit was dismissed. This was however apparently only a clerical error and the decree rightly directs that the costs will by paid by the plaintiffs to the defendants who were the appellants before the District Judge. The decree, as it stands, is correct and therefore it is unnecessary for me to make any alteration. I dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 796

HARRISON AND ADDISON, JJ.

Hazara—Plaintiff—Appellant.

v.

Dina and *others*—Defendants — Respondents.

First Appeal No. 2440 of 1927, Decided on 4th April 1933, from decree of Senior Sub-Judge, Gurdaspur, D/- 31st March 1927.

Hindu Law—Alienation — Necessity —Suit to set aside alienation after many years—Vendee cannot be expected to give strict proof.

It is a general principle that after the lapse of a period of years a vendee cannot be expected to produce strict proof of necessity.

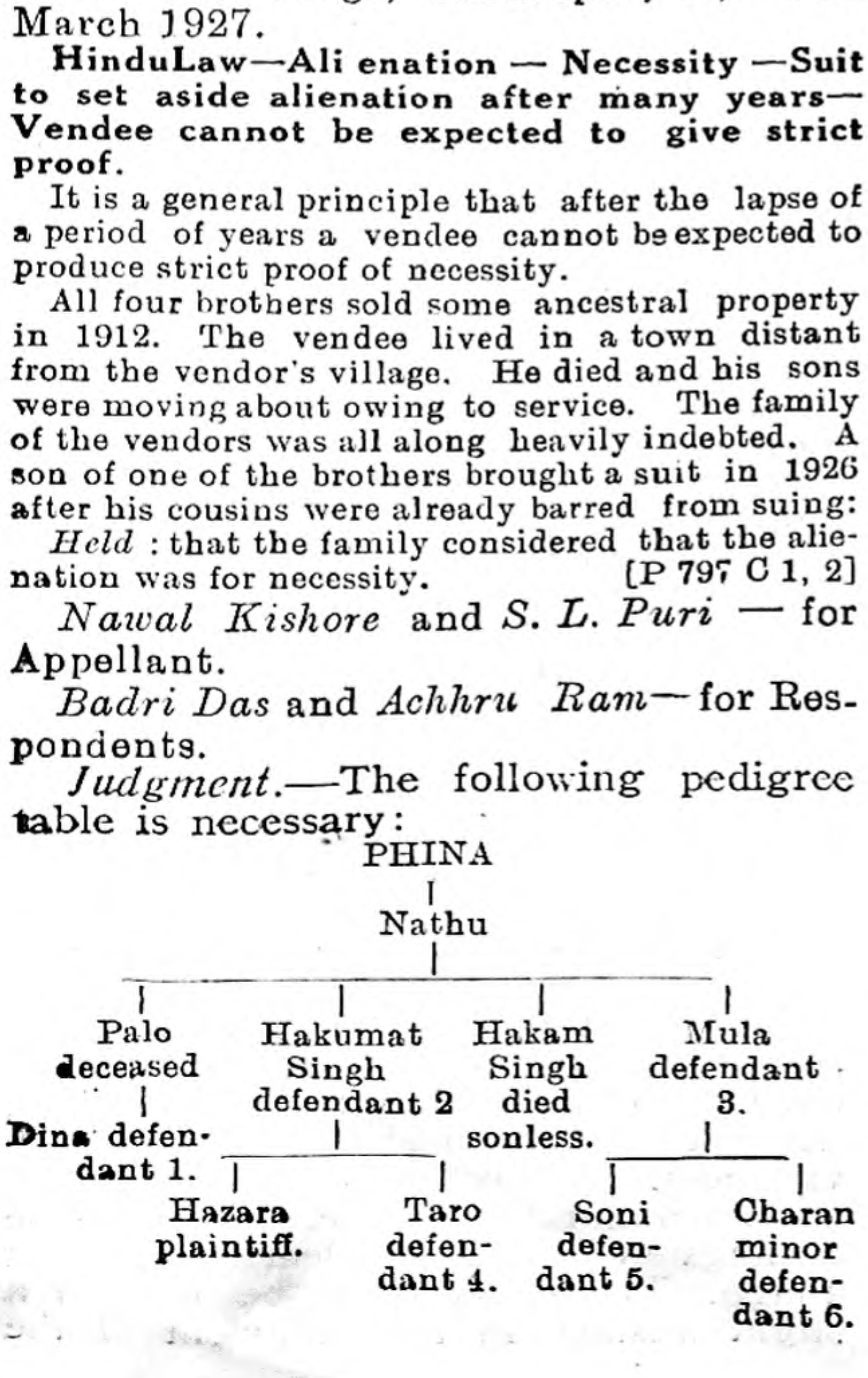
All four brothers sold some ancestral property in 1912. The vendee lived in a town distant from the vendor's village. He died and his sons were moving about owing to service. The family of the vendors was all along heavily indebted. A son of one of the brothers brought a suit in 1926 after his cousins were already barred from suing:

Held : that the family considered that the alienation was for necessity. [P 797 C 1, 2]

Nawal Kishore and *S. L. Puri* — for Appellant.

Badri Das and *Achhru Ram*—for Respondents.

Judgment.—The following pedigree table is necessary:



The four sons of Nathu sold 820 kanals 8 marlas of land on 28th March 1912, to the late Ghulam Farid Khan of Batala who is now represented by his sons, defendants 7 and 8. This suit has been instituted by Hazara, son of Hakumat Singh, alone and he asks for a declaration that the sale being without consideration and necessity should not affect his reversionary rights when succession opens out to him. The principal pleas taken were that the suit was barred by time and that the sale was for consideration and necessity. The trial Judge held that the suit was barred by time though instituted just before Hazara, plaintiff, reached the age of 21. He also held that the sale was for consideration and necessity. The suit was accordingly dismissed and the plaintiffs has appealed. It is doubtful whether it can be held that the suit is barred by time, but it is unnecessary to go into this question as we are of opinion that the suit was properly dismissed on the merits. It is not disputed that there was full consideration for the sale. The sum of Rs. 10,932-8-0 forming the consideration of the sale was made up as follows:

Due to previous mortgagees ...	Rs. 3,722-0-0
On account of a promissory note of 26th March 1912	,, 40-0-0
On account of a promissory note of 27th March 1912	,, 235-0-0
Cash paid before the Sub-Registrar	,, 2,375-0-0
Left with the vendee who executed a promissory note for the amount	,, 4,560-8-0

This latter sum was completely paid by 23rd September 1912.

It was admitted in the trial Court that there was necessity for the sum of Rs. 3,722, due to the previous mortgagees. The mortgaged land was about 400 kanals. The second and third items were held by the trial Judge to have been advanced for the cost of conveyance. This appears to be the case and they were also properly allowed. As regards the balance of Rs. 6,935-8-0 there is not much evidence to the effect that specific debts were repaid by means of the sum advanced, but there is considerable evidence pointing clearly to the conclusion that this family was heavily in debt and required the money to pay its debts. It is a general principle that after the lapse of a period of years a vendee cannot be expected to produce strict proof of necessity. The vendee in the present case belonged to the town of Batala at some distance from the village of the plaintiff's family with which he had no connexion. He is dead. His two sons who represent him are in service, moving about the Punjab. It would thus be nearly impossible for them now to be able to collect evidence from the village of the plaintiff as to the different items forming the necessity for the cash advanced. On the other hand the general circumstances indicate that the transaction was a bona fide one which must have been entered into for necessity. The family of the vendors was a large one. The plaintiff's father had twelve children though only four survived. The land is inferior in quality. The famly commenced to mortgage their land in the year 1883. There is some evidence, not of very good quality, to the effect that Palo, was a bad character, but there is no evidence that the other three brothers were bad characters. Some of the mortgages go back to Phina, the great-grand-father of the plaintiff, against whom nothing has been alleged. Hakumat Singh, the father of the plaintiff, admitted that at the time of the alienation he and his brothers had debts to pay though he added that they were not heavy. He did not state the exact amount. He further admitted that even now there was a decree for Rs. 2,000 standing against the family and that in that suit they pleaded for instalments on account of poverty. He also admitted that the family was able to obtain two instalments in a decree passed against it for the small sum of Rs. 100. It has thus been satisfactorily proved that the family has been heavily in debt since 1883 and still is. It was also admitted by the plaintiff's father that they had to pay off certain debts in 1912 though he did not state their amounts.

Again, the sale was by all four sons of Nathu. This in itself is a strong indication of bona fides as held by a Division Bench in 27 *P. W. R.* 1918. That ruling lays down that this circumstance goes to prove that the four brothers did not join to injure their own or their reversioners' interest and indicates that they required the money to pay their debts. Another very important circumstance in this connexion is that Dina, son of Palo, Soni, son of Mula, and Taru, son of Hakumat Singh and brother of the plaintiff, have not instituted a suit to set aside the alienation in question within the period of limitation allowed to them. The only other descendant, namely, Charan son of Mula, was born after the alienation in question. The suit was brought by the plaintiff within a month or so of the expiry of the period of limitation allowed to him when his brother and cousins were already debarred from suing. This points strongly to the conclusion that the family considered that the alienation was for necessity. For the reasons given there is sufficient evidence of necessity in the present case and the appeal must be dismissed. The contesting respondents will get half their costs of the appeal.

R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 797

DALIP SINGH, J.

Gul Mohammad — Plaintiff — Appellant.

v.

Mul Chand and *others* — Defendants— Respondents.

Misc. First Appeal No. 1576 of 1932, Decided on 31st May 1933, from order of Senior Sub-Judge, Dera Ghazi Khan, D/- 23rd June 1932.

(a) Legal Practitioner—Duty.

A legal practitioner cannot suppress the truth in the Court as to his own doings. [P 797 C 2]

(b) Civil P. C. (1908), O. 5, R. 15 and O. 41, R. 21—Service effected on son in father's absence—Son not residing with father—Summons is not duly served on father.

Where a service of summons to father was effected on his son in the father's absence but the son was not residing with the father:

Held: that the summons was not duly served on the father and that the appeal should be re-heard: *AIR* 1932 *Pat* 150 and 43 *Cal* 447, *Ref.* [P 798 C 1]

L. M. Datta—for Appellant.

A. N. Chona—for Respondents.

Judgment.—The only questions urged before me in this appeal are that the Court is wrong in holding that Gul Mohammad, appellant, had knowledge of the date of the hearing of the appeal. After reading the evidence, I see no reason to differ from the finding. I wish to point out that Mr. Dhanpat Rai's refusal to answer the question put to him was wholly unjustified and reflects grave discredit on him for a legal practitioner cannot suppress the truth in Court as to his own doings. The next point is that as the appellant was not served even if he did know of the date, he was not bound to appear. For this O. 5, R. 15 is cited. The service was effected on his son in appellant's absence. The son says he does not reside with his father: *A. I. R.* 1932 *Pat.* 150 is cited in this connexion and *Kasim Ibrahim* v. *Johurmal Khemka* (1). The terms of O. 41,

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1. (1917) 43 Cal 447=34 I C 799.

R. 21 are clear, and as it is shown that the summons was not duly served and the learned counsel admits it, I must accept the appeal and set aside the ex parte order and direct the appeal be re-heard. I have no sympathy with the appellant and the parties will bear their own costs of these proceedings.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 798

TEK CHAND, J.

Sahib Singh—Applicant — Appellant.

v.

Bhagat Singh and *others*—Respondents.

Misc. First Appeal No. 246 of 1931, Decided on 11th May 1932, from order of Senior Sub-Judge, Amritsar, D/- 13th June 1930.

(a) Punjab Sikh Gurdwaras Act (1925), S. 133—Committee can retain possession of Gurdwara property only and not with which it has no concern.

The Gurdwara Committee has no statutory power to hold possession of properties which do not belong to the particular Gurdwara under its management but which have been found to belong to a local Nirmala Dharamsala with which the Gurdwara has no concern whatever. [P 801 C 1]

(b) Punjab Sikh Gurdwaras Act (1925), Ss. 3 and 5 (1) — Tribunal deciding that certain land did not belong to Gurdwara—Properties claimed as such in "consolidated list" —Dismissal does not amount to declaration that property belonged to Gurdwara.

In its judgment the Tribunal decided in the clearest possible terms that certain properties do not belong to the Gurdwara Guru Sar Sutlani or any other Gurdwara to which the Act is applicable. It was contended however that these properties having been claimed by certain Sikhs as the property of Gurdwara Guru Sar Sutlani in the "consolidated list" which was submitted by them to the local Government under S. 3 of the Act and that Mahant's petition of claim in respect of these properties made under S. 5 having been dismissed by the Tribunal, the order of dismissal was tantamount to a declaration that they belonged to the Gurdwara:

Held: that the contention was without force and must be rejected. [P 801 C 1]

(c) Punjab Sikh Gurdwaras Act (1925), Ss. 37 and 5 (1)—Dismissal of Mahant's claim petition — No declaration that property belongs to Gurdwara—Jurisdiction of executing Court under S. 144, Civil P. C. is not taken away—Civil P. C. (1908), S. 144.

It is not the mere fact of dismissal of the Mahant's petition of claim under S. 5 (1) which entitles the Gurdwara Committee to retain possession of certain lands, but a declaration by the Tribunal that they belonged to the Gurdwara. Where no such declaration has been made by the Tribunal its decision does not debar the executing Court from carrying out the provisions of the ordinary law in making restitution of properties which had been improperly seized by it in execution of its decree, which has since been reversed. [P 801 C 2]

Dev Raj Sawhney—for Appellant.

Charan Singh—for Respondents.

Judgment.—The facts of the litigation, which has given rise to this appeal, are somewhat complicated and it is necessary to set them out in some detail. The appellant Kirpa Singh was the mahant of a religious instittion at Guru Sar Sutlani in the Amritsar District. On 26th July 1921, certain persons claiming to have an interest in the institution, brought a suit under S. 92, Civil P. C., against Kirpa Singh for his removal from the office of mahant and for framing a scheme of management. This suit was decreed by Lala Shibbu Mal, Senior Subordinate Judge, Amritsar, on 5th October 1922. The learned Judge passed a decree for the removal of mahant Kirpa Singh and appointed a committee for the management of the institution consisting of seven members, one of whom was to be the successor of the defendant chosen in accordance with the custom of the institution after consultation with the leading and representative sewaks. In accordance with this direction a committee of management (hereinafter described as the Court Committee) was constituted. One of the members of this Committee was Bhagat Singh lambardar and another Sadhu Singh who had been chosen as mahant in succession to Kirpa Singh.

In execution of this decree, Kirpa Singh was removed from the office and dispossessed from the gaddi of the institution, which was handed over to the Court Committee and a formal receipt was filed by Bhagat Singh on its behalf on 11th October 1922. In pursuance of this decree, possession of various parcels of land and immovable properties, which stood in the name of the institution or of mahant Kirpa Singh personally, was given to the "Court Committee" and in the revenue papers the name of Kirpa Singh was removed and that of Sadhu Singh substituted as the manager of the institution. From the decree of Lala Shibbu Mal, Kirpa Singh instituted an appeal in the High Court. While this appeal was pending, the Sikh Gurdwaras Act came into force and the institution at Guru Sar Sultani was notified under the Act, and in 1927 a committee of management (hereinafter called the Gurdwara Committee) was constituted in accordance with the provisions of the Act to look after its affairs and the appurtenant properties. Of this Committee, Sardar

Jawahar Singh was elected the President and Bhagat Singh lambardar (who was a member of the Court Committee also) one of the members, and under this Committee, Sadhu Singh, who had been elected mahant in accordance with the decree of Lala Shibbu Mal, was appointed "office holder" of the institution. It appears that Sadhu Singh and Bhagat Singh, who had entered into possession of the various properties of the institution in accordance with the decree of Lala Shibbu Mal, as representatives of the Court Committee, arranged to transfer possession of these properties to the Gurdwara Committee, and secured from the tenants rent-deeds in favour of the Gurdwara Committee. One of these rent-deeds related to certain lands in Mauza Ranian, and was executed by Muhammad Bakhsh, respondent 6, on 2nd March 1929, for a period of ten years, in favour of the Gurdwara Committee through Jawahar Singh and Sadhu Singh.

On 14th May 1929, the High Court accepted Kirpa Singh's appeal and set aside the judgment and decree of Lala Shibbu Mal, holding that the Gurdwara Guru Sar Sutlani was a Nirmala institution and the plaintiffs decree-holders who had brought the suit were not interested in it and had no locus standi to maintain the suit. Accordingly, on 26th July 1929, Kirpa Singh filed an application under Ss. 144/151 against the decree-holders for restitution of the properties, possession of which had been taken by the latter in pursuance of Lala Shibbu Mal's decree, and also prayed that an injunction be issued to the tenants not to pay any rent to any person till further orders of the Court. Mr. Lewis, who had succeeded Mr. Shibbu Mal, issued the injunction and summoned the decree-holders to show cause why restitution of the properties in question be not made to mahant Kirpa Singh. On 30th August 1929, Sardar Jawahar Singh, as President of the Gurdwara Committee, applied to the executing Court under O. 21, R. 99, Civil P. C., urging that the Gurdwara Committee was in lawful possession in accordance with the provisions of the Sikh Gurdwaras Act, that he should be made a party, that Kirpa Singh had no right to be restored in possession, and that the injunction issued by Mr. Lewis be vacated. An elaborate inquiry was held as to the circumstances in which Jawahar Singh and his Committee had got into possession of the various properties and Mr. Omkar Nath Zutshi, who had succeeded Mr. Lewis, passed an order on 13th January 1930, rejecting Jawahar Singh's application and holding that restitution could be claimed by Kirpa Singh against the Gurdwara Committee, as that Committee had no title in itself with respect to the properties in dispute, but was merely holding as a licensee from the Court Committee which had obtained possession in accordance with Lala Shibbu Mal's decree, and as that decree had been reversed by the High Court, S. 144 was applicable to the case. As however proceedings under S. 5, Gurdwaras Act, were pending at the time before the Sikh Gurdwaras Tribunal in respect of most of the properties in dispute, Mr. Zutshi ordered that the judgment-debtor, Kirpa Singh was entitled to keep possession of the properties entered in his claim before the Tribunal (with the exception of a certain Rakh with which we are not concerned in this appeal) till it was

> "decided by the Tribunal that the property belonged not to the judgment-debtor but to the Gurdwara Committee of Gurdwara Guru Sar Sutlani and that when such a declaration had been made the Gurdwara Committee would be entitled to get possession of the properties by a suit or with the mutual agreement of the judgment-debtor."

The injunctions issued to the various lessees were vacated and the lessees were directed to deposit in Court the lease money due from them for payment to mahant Kirpa Singh. It is important to note that no appeal against the order of Mr. Zutshi was preferred either by the Court Committee or the Gurdwara Committee. That order must therefore be taken to have become final and must be executed, except in so far as such execution may be prohibited by the provisions of the Gurdwaras Act. On 5th July 1930, the Sikh Gurdwaras Tribunal disposed of the various petitions of claim to the properties included in the "consolidated list" relating to this Gurdwara, including the petition of mahant Kirpa Singh. Some of the properties were found to belong personally to the mahant and he was declared the owner thereof. Some other properties were held to belong to the Gurdwara Guru Sar Sutlani and the Mahant's claim was dismissed in respect thereof. There was a third set of properties with regard to which the Tribunal held that they were neither the property of the Gurdwara Guru Sar Sultani nor had it been established that they were the personal property of the Mahant, but it was found that they were

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Vakil High Court,

attached to some other Nirmala institutions. As the Mahant had failed to establish his personal claim to these properties his petition under S. 5, in so far as it related to such properties, also, was dismissed. One of the properties of this last description is the land at Mauza Ranian which, the Tribunal held, belonged neither to the Gurdwara Guru Sar Sutlani nor to the Mahant personally, but was attached to a local Dharamsala of the Nirmalas.

In response to the notice issued to Muhammad Bakhsh to deposit in Court the lease money of the Ranian land for payment to Mahant Kirpa Singh in accordance with Mr. Zutshi's judgment, Muhammad Bakhsh appeared before Mr. Zutshi's successor, Bawa Kanshi Ram, and urged that as Kirpa Singh's claim in respect of that land had been dismissed by the Tribunal, restitution of possession of that land to the Mahant could not be made, as this would be inconsistent with the decision of the Tribunal. He therefore prayed that the order of Mr. Zutshi directing him to deposit the lease money in Court be vacated. The learned Subordinate Judge in a very brief order upheld the plea and cancelling the order of his predecessor "rejected the application of Mahant Kirpa Singh," and directed that "the execution file be consigned to the record room." It is not clear from the wording of the order whether the learned Judge intended to dismiss the Mahant's application for restitution of the Ranian land only, or of all the properties mentioned in his application under S. 144. But it is common ground between the parties that the order has been interpreted by the lower Court as dismissing the application for restitution of all the properties, possession of which had been delivered to the Court Committee under the decree passed by Lala Shibbu Mal.

From this order Mahant Kirpa Singh has appealed to this Court, and the first contention raised on his behalf is that the order of Mr. Kanshi Ram consigning the execution file to the record room is illegal and erroneous, as the Gurdwaras Tribunal had declared the Mahant to be the owner of some of the properties in his personal right and there is no reason why possession of these properties should not be made over to him. This position is not controverted by Mr. Charan Singh and it is obvious that this part of the order is manifestly wrong. It is equally clear that restitution cannot be granted to the Mahant of those properties which the Tribunal had declared to belong to the Gurdwara Guru Sar Sutlani, and Mr. Sawhney for the appellant says that he is not appealing against so much of the order as relates to such properties. The real controversy before me has centred round the third set of properties, title in which has been found to vest neither in the Mahant personally nor in the Gurdwara Guru Sar Sutlani, but which have been held by the Tribunal to be attached to various other institutions of the Nirmala sect, to which the Gurdwaras Act does not apply. As stated already, these properties were in possession of the Mahant at the time when Lala Shibbu Mal passed a decree against him in the suit under S. 92, Civil P. C. In pursuance of that decree the mahant was dispossessed from these properties on the assumption that they belonged to the institution at Guru Sar Sutlani, and possession was delivered by the executing Court to the Court Committee which was constituted under that decree. It has been found as a fact that during the pendency of the appeal in this Court against Lala Shibbu Mal's decree, the aforesaid Court Committee collusively handed over possession of these properties to the statutory Gurdwara Committee which had been formed in the meantime in accordance with the provisions of the Gurdwaras Act. The Gurdwara Committee therefore entered into possession of these properties under the decree-holders of Lala Shibbu Mal's decree, and when that decree was reversed on appeal the executing Court had the power, under S. 144, Civil P. C., to order the Gurdwara Committee to restore possession of the properties in question to the Mahant from whom it had been taken in execution, unless any provision of the Gurdwaras Act operated as a bar to its doing so. It is common ground between the parties that such a bar might be created either by the statutory powers conferred on the Gurdwara Committee under the Act or by a decision of the Tribunal.

Now, so far as the statutory powers of the Gurdwara Committee are concerned, there can be no doubt that it has no right to retain possession of the properties which do not belong to the particular institution for the management of which it has been brought into existence. S. 40 of the Act provides that

> "for the purposes of this Act there shall be constituted for every Notified Sikh Gurdwara a committee of management"

and S. 41 lays down that the [illegible]

> "management of every Notified Sikh Gurdwara shall be administered by the committee instituted therefor in accordance with the provisions of Part III."

In that part is to be found S. 133, according to which the Committee

> "has full powers of control over all properties and income of whatever description belonging to the Gurdwara or Gurdwaras under its management . . . ."

It is obvious therefore that the Committee has no statutory power to hold possession of the properties which do not belong to the Gurdwara Guru Sar Sutlani, but which have been found to belong to a local Nirmala Dharamsala with which the Gurdwara has no concern whatever. Mr. Charan Singh conceded before me, that under its statutory powers the Gurdwara Committee has no right to retain possession of the Ranian land and other properties of similar description. His sole reliance is on S. 37 of the Act which lays down that

> "except as provided in this Act no Court shall pass any order or grant any decree or execute, wholly or partly, any order or decree, if the effect of such order, decree or execution would be inconsistent with any decision of a Tribunal, or any order passed on appeal therefrom, under the provisions of this Part."

Now, can it be said that the decision of the Tribunal in respect of the Ranian land and other properties of similar description debars the Amritsar Court from ordering restitution of these properties, which it is bound to do under S. 144 of the Code? It is conceded that in its judgment the Tribunal has decided in the clearest possible terms that these properties do not belong to the Gurdwara Guru Sar Sutlani or any other Gurdwara to which the Act is applicable. It is contended, however that these properties having been claimed by certain Sikhs as the property of Gurdwara Guru Sar Sutlani in the "consolidated list" which was submitted by them to the Local Government under S. 3 of the Act, and the Mahant's petition of claim in respect of these properties made under S. 5 having been dismissed by the Tribunal, the order of dismissal is tantamount to a declaration that they belonged to the Gurdwara. In my opinion, this contention is without force and must be rejected. In the first place, such an interpretation of the decision of the Tribunal will be in direct conflict with the very terms of that decision in which it has been expressly held that the properties do not belong to the Gurdwara. Secondly, a perusal of the relevant provisions of the Act shows that it is only with regard to those properties included in the consolidated list, in respect of which no petition of claim under sub-S. (1), S. 5 has been filed and consequently a notification under sub-S. (3) of that section has been made by the Local Government that mutation in favour of the Gurdwara Committee can be effected under S. 26 of the Act, or a suit for possession lies under S. 28.

With regard to properties which are included in the consolidated list and in respect of which a petition of claim has been filed under sub-S. (1), S. 5 and an adjudication given by the Tribunal, the Gurdwara Committee would be entitled to have the mutation effected in its favour under S. 26 or possession decreed under the newly enacted section 25 (a), only if the decision of the Tribunal is that the property in question belongs to a notified Gurdwara. The phraseology of these sections is clear and explicit, and it is admitted that there is no other provision in the Act bearing on the point. It is therefore not the mere fact of dismissal of the Mahant's petition of claim under S. 5 (1), relating to the Ranian and other lands which entitles the Gurdwara Committee to retain possession, but a declaration by the Tribunal that they belonged to the Gurdwara. As in this case where no declaration has been made by the Tribunal, its decision does not debar the executing Court from carrying out the provisions of the ordinary law in making restitution of properties which had been improperly seized by it in execution of its decree, which has since been reversed. I hold therefore that Muhammad Bakhsh has no right to refuse to deposit the amount in the executing Court as ordered by Mr. Zutshi.

For the reasons given above, I accept the appeal, set aside the order of the lower Court, dated 13th June 1930, and direct it to proceed with the disposal of the application of the appellant under Ss. 144/151, Civil P. C., in reference to the foregoing observations. Having regard to all the circumstances I leave the parties to bear their own costs in this Court.

B.V./R.K. *Appeal allowed.*

A. I. R. 1933 Lahore 801

JAI LAL AND AGHA HAIDAR, JJ.

Makhan and *others*—**Appellants.**

v.

Gulab Din and *others*—**Respondents.**

First Appeal No. 32 of 1926, Decided on 17th May 1933, from decree of Senior Sub-Judge, Sheikhupura, D/-24-7-1925.

(a) Custom (Punjab)—Alienation — Sale of ancestral land by sonless proprietor—Sale impeached by reversioners on ground of necessity and want of consideration — Burden of proving necessity and consideration is on vendees — Once necessity is proved it is no business of vendees to see to application of money.

Where a sale of ancestral land by a sonless proprietor is impeached by reversioners on the ground of necessity and want of consideration, the burden of proving necessity and consideration is on the vendees. But once the necessity and payment of consideration is proved, it is no business of the vendees to see to the application of the money. [P 03 C 1, 2]

(b) Custom (Punjab)—Succession—Daughter succeeds in preference to collaterals.

In the case of ancestral land of a sonless proprietor, daughter is a preferential heir to collaterals and reversioners [P 804 C 1]

(c) Custom (Punjab)— Succession — Rule— Record of Rights—Entry in—(*Quaere*).

Earliest settlement records in favour of one party. Subsequent records silent on the question. Last settlement record in favour of opposite party Whether the first settlement record lays down correct rule of succession: 13 *Lah* 410, *Ref*. (*Quaere*). [P 804 C **1**]

Barkat Ali and *Fakir Chand*—for Appellants.

Mehr Chand Mahajan, *Mohsin Shah* and *Durga Das*—for Respondents.

Facts. — The appellants instituted a suit against Fakir Syed Iftikharuddin and Sheikh Gulab Din for possession of the land on the ground that it was ancestral land between the plaintiff and Baghela and that the latter had sold it without consideration and necessity. The plaintiffs claimed to be the reversioners of Baghela. It appeared that the land was originally owned jointly by Baghela and the plaintiffs, the shares being one-third and two-third respectively. Baghela died on 14th August 1910, leaving a widow, Mt. Karam Bibi, who remarried during the pendency of the present litigation. He also left a daughter, Mt. Gauharan, who is alive and has married after this appeal was presented in the High Court.

The present suit was instituted on 4th May 1913. It was a suit for possession by reversioners on the ground that ancestral land had been sold by a sonless proprietor without consideration and necessity. The plaintiffs did not claim possession on the ground that Baghela was not entitled to sell their two-third share in the land in dispute as a cosharer. The principal question therefore on which the result of the suit must depend was the question of consideration and necessity for the sale. The trial Court held that the sale was both for consideration and necessity and on this and on other grounds also dismissed the suit. Before the High Court the appellants attacked the decree of the trial Court on three main grounds: (1) That the conclusion of the trial Court that the sale was for consideration and necessity was erroneous. (2) That the view of the Courts below that Sohela, one of the plaintiffs, had acquiesced in the sale was erroneous and that in any case the acquiescence of Sohela did not affect the right of the other plaintiffs to obtain possession of half of the land in dispute because the parties were governed by the Pagwand rule of succession and not by Chundawand, as found by the Court below, it being conceded that if the Pagwand rule of succession governed the parties, Sohela would be entitled to half the land in dispute on the death of Baghela, whereas if the Chundawand rule prevailed, he would inherit the whole of the land. (3) That Mt. Gauharan was not an heir of her deceased father according to the custom governing the parties and the decision of the trial Court to the contrary was erroneous.

Jai Lal, J. — (After stating the facts proceeded). Now with regard to the question of consideration and necessity, the sale-deed does not recite in what manner the consideration was paid or for what purpose it was taken by the vendor. In the suit instituted by the vendees against Piranditta and others in 1902 it appears that Baghela was impleaded as a defendant and he filed a written statement, was then examined as a party and thereafter as a witness and on the three occasions he admitted the receipt of the consideration and stated that Rs. 2,500 had been taken by him in order to pay previous debts, that Rs. 800 had been paid to him in cash which he required for the expenses of his marriage and that Rs. 700 were still owing to him by the vendees. It is in evidence that his betrothal took place about the time when the sale-deed was executed and that he was married to Mt. Karam Bibi about eighteen months or two years after the sale. There is some conflict in the evidence of both parties as to the amount spent by him on the marriage. According to the plaintiffs, the expenses could not have been more than about Rs. 200 which, it is alleged Baghela raised elsewhere. The fact however remains that he needed money for his marriage expenses and his marriage was actually celebrated soon after the sale. It also is apparent from the record that Baghela was in straitened circumstances. The land in dispute belonged to him and to the plaintiff but was in possession of others who had denied their title so far back as about 1891 and unless steps had been taken to regain possession by instituting proper proceedings in the civil Courts, the remedy would have become barred by time, Baghela had no means to pay for the expenses of the litigation. The plaintiffs themselves took no action to recover the land and apparently took no interest in the affairs till after the death of Baghela and then also when one Sheikh Dastgir, an Inspector of Police, entered into an agreement with them to finance them with a view to secure the land in suit. It is in such circumstances that the sale was effected by Baghela.

The burden of proving consideration and necessity was no doubt on the vendees in this suit. The trial Court has held that they have discharged this burden and under all the circumstances I am unable to differ from the conclusion of the trial Court. Rs. 2,500 is alleged to have been paid to Budh Singh and Daya Singh, creditors of Baghela. Budh Singh was examined as a witness and he stated that Baghela owed them money on bonds and that more than Rs. 3,000 was due to them and that Fakir Syed Iftkharuddin settled the claim after going into accounts and paid them Rupees 2,500 in full satisfaction of the debt whereupon the bonds were returned to him duly discharged. Daya Singh, a brother of Budh Singh, and who was a joint creditor with him, having died, has not been produced as a witness. Two witnesses, Mehnga Singh and Umar Din, support this statement of Budh Singh. Fakir Syed Iftkharuddin died during the pendency of this suit and was succeeded by his minor son. The bonds have not been produced nor have any account books been produced from which it may appear that Fakir Syed Iftkharuddin actually paid Rs. 2,500 to Budh Singh, but the non-production of these documents is attributable to his death under the circumstances. The witnesses for the plaintiffs have admitted that Baghela used to deal with Dayal Singh, uncle of Budh Singh and Daya Singh, before the execution of the sale-deed subsequent to which he began to deal with **D. W. Thakar Das.**

As to the payment of Rs. 800 Mehnga Singh and Umar Din have deposed to the payment of this amount to Baghela, I have already stated that it is fully established that Baghela was of marriageable age and needed money for the marriage expenses and was actually married soon after the sale was effected. There is no reliable evidence that the whole of this amount was spent on his marriage, but it was not the business of the vendees to see to the application of the money and it is not possible to hold that Rs. 800 was an unusully extravagant amount to be spent by Baghela on his marriage and other ceremonies connected therewith. The payment of Rs. 700 after the conclusion of the suit against Piranditta and others has been proved by the evidence of Muqarab Khan and Mr. Abdul Ghani, a gentleman holding a high judicial office in the United Provinces. Both these witness say that Rs. 700 was paid in their presence by Sheikh Gulab Din.

The learned counsel for the appellant admitted before us that the payment of this amount of Baghela had been established by the evidence on the record and that therefore he did not contest this item. (After considering the evidence, his Lordship concluded). In my opinion therefore under all the circumstances of this case, consideration and necessity for the sale must be deemed to have been proved and it must otherwise be held to be an act of prudence on the part of Baghela and this really disposes of this appeal.

I am further of opinion that the view of the trial Judge that Sohela has acquiesced in the sale is correct. He took a lease of the land from the vendees for one year. It is however doubtful whether he got possession of the land under the lease. Probably the lease was executed merely to create evidence of estoppel against Sohela, but by a subsequent registered deed, dated 19th August 1911, Sohela relinquished his right on receipt of Rs. 200 in favour of Fakir Syed Iftkharuddin. The execution of this deed is admitted in the plaint, but it is alleged that it was invalid. No grounds however are mentioned in support of this assertion and the deed, in my opinion, has not been proved to be invalid. It was deliberately executed by Sohela on receipt of consideration and must be deemed to be binding on him so far as his share in the land in dispute is concerned. Its validity could not be challenged in the present suit unless the other plaintiffs had first obtained a declaration, if they considered such a course open to them, that Sohela's action was not binding on them even with regard to his own share in the land in dispute. If however the plaintiffs, other than Sohela be held to be the owners of the other half of the land in dispute, then Sohela's relinquishment would not affect their rights to that extent, and the question therefore would arise whether Sohela was entitled to succeed to the whole of the land in dispute as contended by the defendants or to only half the land as admitted by the plaintiffs. This question however would arise only if Mt. Gauharan be held not to be entitled to succeed to the estate of her father.

In order to decide this question it is necessary to determine whether the family of the parties is governed by the Chundawand rule of succession or by the Pagwand rule. The earliest settlement record is certainly in favour of the defendants; the last one however favours the plaintiffs and the intermediate records are silent on the question. The respondents' counsel claims that, following *I. L. R.* 13 *Lah.* 410, this Court must hold that the entries in the first settlement record lay down the correct rule of succession. The matter however has not been properly investigated and in view of my conclusion on the point of consideration and necessity, I propose to leave the question undecided, holding that in any case the plaintiffs are not entitled to succeed with regard to half the property in dispute which admittedly ought to go to Sohela if Mt. Gauharan be held not to be entitled to succeed. This brings me to the question of the right of Mt. Gauharan to succeed in preference to the collaterals. Here again, the Qanungo, who was examined as a witness in the case, has given a number of instances according to which the daughter or the daughter's sons have succeeded in preference to the collaterals, but I am anxious not to express any final opinion on a question of custom which does not need a decision after my decision of the question of consideration and necessity. On the present record however the view of the trial Judge that the daughters succeed in preference to the reversioners and therefore the latter have no right to sue for possession in the presence of Mt. Gauharan appears to be correct.

I would therefore uphold the decree of the trial Court and dismiss the appeal with costs. I have purposely refrained from alluding to the claim of defendants for improvements alleged to be effected on the property which they claim in case the sale is set aside.

Agha Haidar, J.—I agree with my learned brother in dismissing this appeal.

V.B. *Appeal dismissed.*

A. I. R. 1933 Lahore 804

JAI LAL, J.

Allah Yar—Defendant—Appellant.

v.

Ghazan and *others* — Plaintiffs—Respondents.

Second Appeal No. 1497 of 1932, Decided on 1st March 1933.

Custom (Punjab)—Alienation—Plot recorded in names of brothers or cousins at first settlement—Presumption is that plot is ancestral—Their separate possession has no effect.

When a plot of land was owned, at the time of the first settlement, jointly by persons who were brothers or cousins, the presumption, in the absence of any indication that the land was the self-acquired property of the owners, is that it was originally held by their common ancestor: *AIR* 1930 *Lah* 793, *Foll.* [P 805 C 1]

The effect of an addition in the entry in the revenue records that possession of the parties was separate as malik qabza may be merely that the parties had separate possession for convenience of cultivation. [P 805 C 1]

M. M. Tufail—for Appellant.

M. Monir—for Respondents.

Judgment.—This second appeal arises out of a suit for recovery of land which it is alleged was gifted by Jahana to his sister's son. The plaintiff is a grandson of Jahana's real uncle. The District Judge has agreed with the trial Court in decreeing the suit. The only question that is argued before me relates to the ancestral nature of the property. In dealing with this question all that the learned District Judge says is as follows:

> "It is submitted in the petition of appeal that in the first place, the property is not proved to be ancestral. Although there is apparently no specific evidence on the record to show that the land was inherited by Jahana from Mubariz Khan the finding of the lower Court that it was, is a legitimate inference from the facts established and ample authority in case law has been cited."

The learned Judge did not proceed to discuss the case law or to state the facts on which this inference was based. The appeal therefore had to be admitted to a hearing. I have now heard counsel on both sides and have referred to the record and the judgment of the trial Court. In that judgment reliance is placed on three judgments of this Court. *Niamat* v. *Nura* (1), and *A. I. R.* 1931 *Lah.* 599, have no bearing on the present case. The rule laid down in the first case is no longer the law according to the subsequent judgments of this Court and the facts contemplated by the 1931 case do not exist in the case because the name of the commmon ancestor is not proved to be mentioned in the pedigree table prepared at the earliest settlement which admittedly was in 1862. *A. I. R.* 1930 *Lah.* 793, cited by the trial Judge, however, covers the present case. In that case the following observation was made by the learned Judge:

> "There is ample authority for the proposition that when a plot of land was owned, at the time of the first settlement, jointly by persons who were brothers or cousins, the presumption, in the absence of any indication that the land was the self-acquired property of the owners, is that it was originally held by their common ancestor."

In the present case there are no indications that the land was the self-acquired property of the owners. It has been established that, in the first settlement of 1862, the plaintiff's father Mirza and Jahana's father Nur Khan along with Fazal, brother of Mirza, were entered as joint owners holding shares which they would have been entitled to, if the land has descended to them from the common ancestor. The rule laid down in the 1930 case, therefore, fully applies to the present case. I have carefully considered the effect of an addition in the entry in the revenue record that possession of the parties was separate as malik qabza; it appears that the three persons mentioned above were also entered as owners of the shamilat according to their ancestral shares. The addition that the possession was separate as malik qabza, therefore, merely means in this case that the parties had separate possession for convenience of cultivation. The decision of the Courts below is, therefore, supported by the evidence and I dismiss this appeal with costs.

M.N. *Appeal dismissed.*

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1. (1911) 10 I C 338.

A. I. R. 1933 Lahore 805

ADDISON AND BHIDE, JJ.

Panna Devi—Plaintiff—Appellant.

v.

Mehta Sham Lal and *others* — Defendants—Respondents.

First Appeal No. 585 of 1927, Decided on 13th February 1933.

(a) Civil P. C. (1908), O. 22, R. 4 — One of defendants dying pending appeal — No legal representative brought on record — Suit as against him must be dismissed.

It is the duty of the plaintiff to be diligent and to bring the legal representatives of the deceased defendant on the record within a reasonable time and if she fails to do so the appeal will be dismissed so far as that defendant is concerned and the property of his father in his hands will not be liable for any decree which may be passed. [P 805 C 2; P 806 C 1]

(b) Succession Act (1908), Ss. 216 and 332 —Suit brought by legatee with permission of executor on pronote to which according to will she was entitled is maintainable — Pronote.

According to a will made by *A* the father of the plaintiff, the plaintiff was entitled to all the movables as well as debts due to her father at the time of his death. She instituted the present suit against *B* and his three brothers on the basis of a pronote. But *R* was appointed the executor under the will and he had taken out probate thereof. The lower Court otherwise decreed the suit but dismissed it on the ground that only the executor could sue. Against that decision the plaintiff appealed:

Held: that as the executor had given evidence to the effect that the suit was instituted with his permission and as according to the will she was entitled to this pronote, the plaintiff could sue on the basis of that pronote but she would certainly not be entitled to realize the money until she obtained the usual succession certificate, [P 806 C 1]

Badri Das—for Appellant.

Addison, J.—On 1st November 1919, Sham Lal, defendant No. 1, and his father Diwan Chand deceased executed a pronote for Rs. 10,000, in favour of Rai Bahadur Lala Bishen Das, father of Mt. Parma Devi, plaintiff. Lala Bishen Das died in 1921 and one executor of his will, namely Lala Ram Kishen, took out probate thereof. According to his will the plaintiff was entitled to all the movables as well as debts due to her father at the time of his death. She instituted the present suit against Shah Lal and his three brothers, Kirpa Ram, Mohan Lal and Jagpat Nath on 28th April 1925, on the basis of the pronote. Defendant Nos. 2 to 4 were impleaded as representatives of their deceased father Diwan Chand who had signed the pronote along with Sham Lal, defendant No. 1. The usual pleas were raised. The trial Court held that the pronote had been executed as stated and that Diwan Chand's immorality, if any, did not affect the liability of defendants 2 to 4. He, however, dismissed the suit on the ground that only the executor could sue. Against this decision the plaintiff has appealed.

The appeal abates as regards defendant No. 4 Jagpat Nath who died in 1929. It was the duty of the plaintiff to be diligent and to bring his legal representatives on the record within a reasonable time and this she failed to do. The appeal must, therefore, be dismissed so far as Jagpat Nath, defendant No. 4, is concerned, and the property of his father in his hands will not be liable for any decree which may be passed. Obviously, however, the appeal does not abate as a whole and can proceed against defendants Nos. 1 to 3. On the merits the execution is amply proved and I am not impressed with the evidence to the effect that Diwan Chand was of immoral character. Besides, there is no evidence to connect this debt with immorality. So far as the merits are concerned the plaintiff has established her case. According to S. 216 of the Indian Succession Act this suit should have been instituted by the executor. This would also have been the easier course. The executor however has given evidence to the effect that the suit was instituted with his permission. This may be taken to mean that he assented to the plaintiff's taking this unrealised pronote as part of her legacy within the meaning of of S. 332 of the Indian Succession Act.

According to the will she was entitled to this pronote, though ordinarily speaking the executor would have instituted the suit upon it. Still it seems to me that this does not matter if he handed over her the pronote in question and assented to her taking it in that way. Under S. 336 this assent will refer back to the date of the death of the testator. Looking at the case from this point of view I am of opinion that the plaintiff could sue on the basis of the pronote but she would certainly not be entitled to realize the money until she obtains the usual succession certificate; whereas if the executor had sued he could have got a decree without it.

For the reasons given, I would accept the appeal ex parte and grant the plaintiff a decree for Rs. 10,000, with interest thereon at 6 per cent per annum from date of suit till date of realization. The decree will be a personal one against Sham Lal, defendant No. 1, but can only be executed against defendants Nos. 2 and 3, Kirpa Ram and Mohan Lal, to the extent of the assets of their deceased father in their hands. As already stated the suit stands dismissed against defendant 4. Further this decree cannot be executed till a succession certificate is put in by the plaintiff. The plaintiff will have ex parte costs of this appeal. The parties will bear their own costs in the trial Court.

Bhide, J.—I agree.

V.S. *Order accordingly.*

A. I. R. 1933 Lahore 806

ADDISON, J.

Abdul Karim and *others* — Defendants —Appellants.

v.

Hakam Mal-Tani Mal — Plaintiffs — Respondents.

Misc. First Appeal No. 1427 of 1932, Decided on 24th April 1933.

Civil P. C. (1908), O. 21, R 2—Oral agreement to pay decree by instalments in Court —Instalment paid—Agreement is adjustment and can be proved if certified within 90 days —Evidence Act (1872), S. 92.

An oral agreement between parties to a decree varying the terms of the decree can be proved and that the proof thereof is not barred by S 92, Evidence Act. But an oral rgreement that an instalment of the decree is to be paid in Court, which is later on actually so paid, amounts to an adjustment of the decree within the meaning of O. 21, R. 2 and is capable of proof provided the adjustment has been certified within 90 days of its alleged completion. Else the executing Court could not recognize the alleged adjustment: *AIR* 1931 *Sind* 42, *Foll.* [P 807 C 1]

Jalaluddin and *Nihal Chand Mehra*—for Appellants.

Achhru Ram—for Respondents.

Judgment.—The firm of Hakam Mal-Tani Mal obtained a consent mortgage decree for Rs. 13,172, against Abdul Karim, etc., but there was a provision that the decree would be held to be fully satisfied, if the judgment-debtors paid into Court Rs. 2.000 by the 31st March 1930 and Rs. 4,000 by the 31st March 1931, and that in case of default in paying either of these instalments, the whole amount of the decree with costs and future interest would be payable. Rs. 2,000 were paid before the 31st March 1930, but the sum of Rs. 4,000 was not paid by the 31st March 1931. Accordingly the decree-holder applied for execution for the whole decree by sale of the mortgaged property. The judgment-debtors, on 22nd July 1932, put in a petition to the effect that, when the time came to pay the second instalment of Rs. 4,000, they could not do so and asked the decree-holder for an extension of time. Accordingly, an agreement was arrived at that the judgment-debtors should pay Rs. 3,000, by the end of April 1931 and the balance of Rs. 1,500, by the end of December 1931: and if this were done, the decree was to be considered fully satisfied as before. The judgment-debtors claimed that they made these payments in time and that, therefore, the decree was incapable of being further executed. The decree-holder replied that the last payment alleged under the new agreement was to be made in December 1931 and that the objection of the judgment-debtors being dated the 22nd July 1932, it was time-barred as an application for certification under O. 21, R. 2, Civil Procedure Code. The decree-holder also denied the facts, stating that the first instalment of Rs. 2,000 was paid on the 1st April 1930, that there was no oral agreement in 1931 and that although Rs. 3,000, were paid before the end of April 1931, nothing more was paid. The executing Court has held that the alleged agreement amounted to an adjustment of the nature referred to in O. 21, R. 2, Civil P. C., and that it ought to have been certified within 90 days of the alleged completion in December 1931. This not having been done, it rejected the objections and orderd the execution of the decree to proceed. Against this decision the judgment-debtors have preferred this appeal.

It was held in *A. I. R.* 1931 *Sind* 42, that an oral agreement between parties to a decree varying the terms of the decree can be proved and that the proof thereof is not barred by S. 92 of the Evidence Act. It was further held there that an oral agreement that an instalment of the decree is to be paid in Court, which is later on actually so paid, amounts to an adjustment of the decree within the meaning of O. 21, R. 2, and is capable of proof. With this ruling I am with all respect in agreement. It follows that the agreement pleaded in the present case amounted to an adjustment of the decree, it being alleged that the agreement was carried out and the instalments fixed paid. As the last instalment is alleged to have been paid in December 1931, the adjustment had to be certified within 90 days of its alleged completion. This not having been done the executing Court could not recognise the alleged adjustment.

The decision of the Court below was, in my opinion, correct and I dismiss the appeal with costs.

R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 807

ADDISON, J.

Hari Chand and *another* — Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No 307 of 1933, Decided on 6th March 1933.

Criminal P. C. (1898) S. 526—Omission to record reasons is merely an irregularity.

The omission to record reason for transfer is merely an irregularity and not a ground for interference. [P 808 C 1]

Facts.—The case was instituted on 8th November 1932, and was sent to the Bench of Honorary Magistrates at Lyallpur, exercising the powers of a Second Class Magistrate, for disposal. The Bench heard prosecution evidence, charged the accused, and fixed 14th January 1933, for further cross-examination of the prosecution witnesses. On 11th January 1933, the learned District Magistrate transferred the case to the Court of Sardar Bahadur Sardar Hardial Singh, Special Magistrate, Lyallpur, by order as below: "Sardar Hardial Singh should try this case." There was no proper application for transfer, no notice was given to the accused persons of the projected transfer, and no reasons for the transfer have been recorded.

Grounds.—The accused persons are prejudiced by the transfer in several ways. Firstly, they will be tried by a Magistrate with higher powers of punishment than the Bench. Secondly, if they asked for de novo proceedings, the case will be prolonged, and they will have to pay extra fees to their counsel besides continuing to be subject to the indignity of being accused persons for a longer period than they might have expected had the case remained with the Bench. If they do not ask for de novo proceedings, they run the risk of being the losers on account of the witnesses not having been fully examined before the second Court. In the circumstances they should have been allowed an opportunity to object to the transfer before it was actually made, i. e., notice should have been sent to them. Further, no proper application for transfer was made. The District Magistrate is empowered to transfer suo motu, but this discretion must be exercised judiciously, with due regard to the convenience of both parties, and in the interests of justice. The present case had reached an advanced stage, and transfer to another Court should only have been ordered on very strong grounds. No grounds at all are mentioned in the order, in contravention of the provisions of S. 526 (5), Criminal P. C. In the circumstances, I recommend that the order of transfer passed by the learned District Magistrate be set aside, and the case be sent back to the Bench of Honorary Magistrates for disposal.

Order.—The omission to record reasons is merely an irregularity. I see no reason to interfere, and dismiss the petition. Let the records be returned.

M.N. *Petition dismissed.*

A. I. R. 1933 Lahore 808

BHIDE, J.

Piran Ditta and *others* — Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 155 of 1933, Decided on 24th April 1933, from order of Sess. Judge, Gujranwala, D/- 3rd January 1933.

(a) Penal Code (1860), Ss. 302 and 149—Fight between two parties—Prosecution evidence found to be unreliable — Both sides having received about same number of injuries by itself is not sufficient to infer existence of free fight.

A free fight means a fight when both parties intend to fight from the very beginning and go out for the purpose and then there is a pitched battle. Simply because in a fight between two parties the same number of injuries is received by both sides, the existence of a free fight cannot be inferred and the accused cannot be convicted on that score where the prosecution evidence is unreliable : *AIR* 1931 *Lah* 513, *Rel on.* [P 809 C 1]

(b) Criminal Trial — Prosecution evidence must be judged on its own merits and not on version of accused.

Prosecution evidence must be judged on its own merits ; and hence where the prosecution evidence is quite unreliable accused cannot be convicted even though the version of the accused is also unconvincing. [P 808 C 2]

Shujauddin—for Appellants.

Ram Lal Anand I—for the Crown.

Judgment.—Eleven persons were prosecuted under Ss. 302/149 and 147, Penal Code, for rioting and causing the death of one Fazal Ahmad. Five out of them, namely, Piran Ditta, Lal, Rahmat, Barkat and Ahmad Din, were convicted under S. 325/149, Penal Code, and sentenced to rigorous imprisonment for five years each. These convicts have preferred the present appeal. The material facts of the case were briefly as follows: There was enmity between the party of the deceased, Fazal Ahmad, and the party of the accused for a considerable time. On the day of the occurrence, at about noon, Fazal Ahmad was going out to cut fodder when he was waylaid and attacked by the eleven accused. Six out of them are said to have been lying in ambush while the remaining five joined them a little later. When Fazal Ahmad was attacked, he raised a hue and cry upon which Muhammad, Faiz Ahmad and Fazal reached the spot. They saw the accused Hassan, Lal and Barkat giving blows with a hatchet on the head of Fazal Ahmad. They tried to rescue him, but were themselves beaten. In the meantime the other eye-witnesses, namely, Fazal, Ilam Din, Hussain and Sultan also arrived. The assailants then left the spot. Fazal Ahmad was placed on a cot and was taken to the Gujrat Hospital; but by the time the party reached the hospital it was discovered that he had already expired. The matter was reported to the police and after investigation eleven persons were challaned as stated above.

The accused pleaded not guilty. Two of them, namely, Lal and Rehmat, put forward a story that while they were returning from their well they were themselves waylaid and beaten by the deceased, Fazal, Ilam Din, Hussain, Muhammad and Faiz. Lal's ulna bone was fractured while Rehmat received some eleven injuries. Piran Ditta, who went to their rescue, was also beaten. In the course of the scuffle, it was alleged, that Fazal Ahmad accidentally received a blow given by one of his own companions and that this blow was responsible for his fatal injury. Excepting Lal, Rehmat and Piran Ditta, the other accused pleaded alibi. The learned Sessions Judge found that the prosecution story had been grossly exaggerated and that the witnesses were interested, but he held, in view of the fact that both sides had received about the same number of injuries, that there was a free fight and convicted five of the accused who had received injuries on the ground that their presence in the fight was proved beyond any doubt.

The learned counsel for the appellants has urged that the learned Sessions Judge having found the prosecution evidence to be unreliable, the conviction of the appellants was not justified. There seems to be considerable force in this contention. There is no doubt that the story as put forward by the prosecution witnesses cannot be believed. (After discussing the prosecution evidence, the judgment proceeded). The version given by the accused is also no doubt unconvincing, but the prosecution evidence must be judged on its own merits. The learned Sessions

Judge has held that there was a free fight; but there seems to be no evidence either direct or circumstantial to justify this finding. According to the prosecution witnesses, Fazal Ahmad was waylaid and attacked by eleven persons. It is true that the medical evidence shows that three persons were injured on the side of the prosecution and five on the side of the accused and that the number of injuries sustained by persons on either side was about the same. But this fact alone cannot, I think, justify any finding that there was a free fight. As pointed out in *A. I. R.* 1931 *Lah.* 513, a free fight means a fight when both parties intend to fight from the very beginning and go out for the purpose and then there is a pitched battle. There is no evidence on the record to show that there was any free fight between the parties in this sense. The equal number of injuries sustained on either side can obviously not be held to be sufficient to show that there was such a fight. The number of injuries sustained would depend upon a variety of circumstances; for instance, the physical strength of the parties, the weapons used, the help received by them from others and so on. I do not see why an equal number of injuries could not have been received even if one person was attacked at the outset and others came to his rescue and were beaten. In the absence of any evidence to justify the finding as to a free fight, it was obviously necessary to find which party was the aggressor and in what circumstances Fazal Ahmad received the fatal injury. There seems to be no reliable evidence to arrive at a finding on this point. To hold that the appellants are guilty merely because they received injuries seems to be unjust in the circumstances. On the evidence on the record it seems impossible to hold any of the appellants guilty of the offence with which they were charged. If the prosecution witnesses choose to put forward a version which appears to be obviously unreliable and implicate innocent persons with the guilty, they must take the risk of having their evidence disbelieved. I am of opinion that the guilt of the appellants has not been satisfactorily established and their conviction cannot be sustained.

I therefore accept the appeal and setting aside the conviction acquit the appellants.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 809

AGHA HAIDAR, J.

Daulat Ram—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1317 of 1932, Decided on 27th February 1933.

Criminal P. C. (1898), S. 103—Non-compliance with is not fatal unless accused is prejudiced in any way.

It is not an inflexible rule that, in cases where the search witnesses do not satisfy the provisions of S. 103 the whole proceedings should be quashed. Each case must be decided upon its own facts and circumstances and, if there is a slightest apprehension that the accused might have been the victim of a piece of chicanery or sharp practice on the party of any member of the raiding party, a Court of justice must give him the full benefit of it and set aside his conviction, but not otherwise. [P 810 C 1, 2]

Nand Lal—for Petitioner.

Hem Raj Mahajan—for the Crown.

Judgment. — The two petitioners, Daulat Ram and Jagat Singh, were found guilty by a Magistrate of the First Class at Sheikhupura, of an offence under S. 61 (1) (a), Excise Act, 1914, and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 200 each and, in default of fine, to undergo rigorous imprisonment for a further period of six months each. On appeal, the Additional Sessions Judge, Lyallpur, dismissed the appeal of Jagat Singh in toto, but in the case of Daulat Ram, he reduced the sentence to one of six months' rigorous imprisonment and a fine of Rs. 100 and, in default of payment of fine, he ordered rigorous imprisonment for a further period of three months.

Against the order of the Additional Sessions Judge, Lyallpur, Jagat Singh and Daulat Ram have filed in this Court separate petitions for revisions (Criminal Revisions Nos. 1317 and 1491 of 1932), and this judgment will dispose of them together. On 2nd July 1932, Mehta Bhim Sen, Sub-Inspector of Police, P. W. 1, was investigating a case of theft in the village Dehr. At about 11 a. m., he received information that the two petitioners were distilling illicit liquor in a haveli at Chak No. 24. He took with him Hakim Ali, P. W. 2, Sardar Khan, P. W. 3, and some other persons and raided the haveli which is situated at a distance of 300-400 karams from the abadi of Chak No. 24. The distance between the village Dehr and Chak No. 24 is one and a half miles only. On reaching the spot they found the two petitioners actually working the still. Daulat Ram, on seeing the raiding party, ran into a kotha and broke three bottles containing some liquid substance. The still was broken up and its component parts were taken possession of by the Sub-Inspector. It is unfortunate that the fluid, which came out of the bottles when they were broken, was not preserved and examined with a view to ascertain what it really was. But there cannot be any manner of doubt that the still, which was dismantled by the raiding party, was being used for the purpose of distilling illicit liquor. A number of articles, including a large quantity of lahan, were recovered from the premises and, in view of the nature of these article, it is clear that the two petitioners were engaged in the illicit distillation of liquor. The defence put forward by the petitioners was worthless and, in fact, no argument was addressed to this Court by their counsel on the basis of this evidence.

The point, which was seriously argued on behalf of the petitioners, was that the requirements of S. 103, Criminal P. C., were not strictly complied with by the police inasmuch as the witnesses to the search of Jagat Singh's havali were not respectable inhabitants of the locality. A number of cases were indiscriminately cited by counsel for the petitioners and a good deal of the Court's time was wasted in reading them. It is not necessary to refer to them because I find that they have no application whatsoever to the facts and circumstances established in the present case. Undoubtedly it was the duty of the prosecution to see that the witnesses were respectable inhabitants of the locality, but no case has been shown to me which lays down as an inflexible rule that, in cases where the search witnesses do not satisfy the provisions of S. 103, Criminal P. C., the whole proceedings should be quashed. I can imagine very well a case in which it is suspected that some small articles, say a packet of cocaine, has been placed by a member of the search party into the house of the accused. In such a case the accused can reasonably plead in defence that, as the persons, who accompanied the police or Exise Authorities, were not respectable members of the locality, but standing henchmen of the police they might have smuggled some small quantity of an excisable article into the house. But, where the case for the prosecution is that the accused were actually distilling illicit liquor, requiring heavy and cumbrous parts for working the still which cannot possibly be stealthily planted on the premises of the accused, such a defence would not be of any avail to the accused. Each case must be decided upon its own facts and circumstances and, if there is the slightest apprehension that the accused might have been the victim of a piece of chicanery or sharp practice on the part of any member of the raiding party, a Court of justice must give him the full benefit of it and set aside his conviction. It must appear from the record that injustice has, very likely, been done to the accused by the non-compliance of the provisions of S. 103, Criminal P. C. In the present case I do not think that in broad daylight it would be possible for the Sub-Inspector of Police or any member of the raiding party to surreptitiously place the component pieces of the still in their proper position in the haveli of Jagat Singh.

On the record as it stands, I am satisfied that the two petitioners were engaged in manufacturing illicit liquor when Jagat Singh's haveli was raided and that they have been rightly convicted and sentenced. In my opinion the sentence of fine in these hard days would operate harshly upon the families of the petitioners. I therefore while maintaining the sentence of imprisonment in the case of both the petitioners set aside the sentence of fine. In case the fine has been recovered it shall be refunded to the petitioners. With this modification I dismiss both the petitions for revision.

M N. *Petitions dismissed.*

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* A. I. R. 1933 Lahore 810

SHADI LAL, C. J AND ABDUL QADIR, J.

Tulsi Ram and *another*—Defendants—Appellants.

v.

Radha Kishen and *another*—Plaintiffs and Defendants—Respondents.

First Appeal No 2238 of 1928, Decided on 10th June 1933.

(a) Transfer of Property Act (1882), S. 74—Doctrine proceeds on principle of equity—Subrogation.

The doctrine of subrogation proceeds upon principles of equity and cannot be availed of by a person who has not performed his own obligation. [P 811 C 2]

***(b) Transfer of Property Act (1882), S. 74—Sale of property subject to two mortgages—Bulk of purchase-money left with vendee to pay off mortgages — Payment of prior mortgagee by vendee cannot be used as shield against claim of second mortgagee—Subrogation.**

If a person purchases property subject to two prior mortgages and the bulk of the price is retained by him for their discharge. his payment of the first mortgage would not entitle him to set up that mortgage as a shield against the claim of the second mortgagee, inasmuch as payment by him is really a payment of the mortgagor. Moreover the doctrine of subrogation rests on the presumed intention to keep alive the first mortgage as a shield against the puisne incumbrancer, but that presumption must be deemed to be rebutted when the purchase in question contemplates the discharge of the puisne incumbrancer by payment out of the purchase money. [P 811 C 2]

J. G. Sethi and *Kahan Chand*—for Appellants

Mehr Chand Mahajan, Dev Raj Sawhney and *Janki Nath Wazir*—for Respondents.

Shadi Lal, C. J. — On 8th April 1924, Sita Ram mortgaged five shops and two residential houses to Tirath Ram for Rs. 35,265 odd; and promised to pay interest at 8 annas per cent per mensem for four months and 23 days on Rs. 30,000, and, in the event of default, at 12 annas per cent per mensem on the entire mortgage money. On 24th July 1925, Sita Ram mortgaged to the plaintiff firm Radha Kishen-Mohan Lal, the equity of redemption in the aforesaid mortgaged property and also a kothi for Rupees 10,000; and stipulated to pay interest at 10 annas per cent per mensem for one year, and, thereafter, at 12 annas per cent per mensem. It appears that Sita Ram was anxious to discharge his mortgage debts, and in March 1926, he sold the entire

> "mortgaged property with the exception of the kothi, to the contesting defendants Tulsi Ram-Ram Rattan for Rs. 51,000."

Of the sale consideration only Rupees 2,500 were paid to the vendor, and the balance, namely, Rs. 48,500 remained in deposit with the vendees who were to pay Rs. 38,500 or less to the first mortgagee within six months, and Rs. 10,000 to the second mortgagees at the time of the registration of the sale-deed. The vendees did not however pay either of the mortgagees the money which was kept in deposit with them, with the result that the first mortgagee brought an action for the recovery of the debt due to him and obtained a preliminary decree for sale which developed into a final decree on 19th April 1927. It appears that to satisfy this decree the vendees had to pay altogether Rs. 49,172-14-9 to the first mortgagee.

The present action has been brought by the puisne mortgagees who claim to recover from the mortgaged property the money due to them on the basis of their mortgage. The vendees, who are in possession of all the parcels of the mortgaged premises, except the kothi, seek to use the first mortgage, which they claim to have redeemed by satisfying the final decree in favour of the first mortgagee, as a shield against the puisne mortgagees. Now, the doctrine of subrogation, upon which reliance has been placed, proceeds upon principles of equity and cannot be availed of by a person who has not performed his own obligation. It is clear that the purchasers obtained from the date of the sale possession of the entire property except two small rooms, but they had paid only Rs. 2,500 out of the sale price. It was clearly contemplated that both the mortgage debts should be discharged out of the money retained by them, but they avoided payment by putting forward untenable excuses. It is contended that the money left in deposit with them was not sufficient to satisfy the claims of both the mortgagees, but the evidence of the mortgagor Lala Sita Ram shows that the first mortgagee Lala Tirath Ram had agreed to relinquish his claim on receiving within six months Rs. 35,000 with interest thereon for that period. The deposition of the mortgagee, as recorded in the English record, is not clear on the point, but the trial Judge, who himself recorded the evidence, states that

> "there is clear evidence of Lala Tirtha Ram, the prior mortgagee, that if Rs. 35,000 had been paid to him with interest within six months of the sale-deed, his mortgage would have been redeemed."

The calculations made by the learned Judge show that the money deposited with the purchasers was sufficient to discharge both the mortgages, and they alone are to blame, if, owing to their delay, the debt on the first mortgage swelled to a large amount, and the second mortgage still remains unredeemed. If a person purchases property subject to two prior mortgages and the bulk of the price is retained by him for their discharge, his payment of the first mortgage would not entitle him to set up that mortgage as a shield against the claim of the second mortgagee, inasmuch as payment by him was really a payment of the mortgagor.

Moreover, the doctrine of subrogation rests on the presumed intention to keep alive the first mortgage as a shield against the puisne incumbrancer. but that presumption must be deemed to be rebutted when the purchase in question contemplates the discharge of the puisne incumbrancer by payment out of the purchase money. The result is that neither on general principles nor on the facts of this case are the purchasers entitled to invoke the rule of subrogation. The only other point urged by the learned counsel for the appellants is that the puisne mortgagees should first proceed against the kothi, which is one of the properties included in their mortgage, but excluded from the sale. It is contended that they should realize the debt first from the kothi, and the balance from the other mortgaged properties. The mortgagees have a right to proceed against whatever property they choose, and the vendees, who are themselves responsible for this litigation, are not entitled to ask them to proceed against the kothi in question in the first instance. There is no valid reason why the mortgagees should be hampered in recovering their debt by any restriction.

There is no force in either of the points raised on behalf of the appellants. The appeal accordingly fails and is dismissed with costs.

Abdul Qadir, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 812

TEK CHAND, J.

Tara Singh and *another*—Insolvents—Appellants.

v.

Sarmukh Singh and *others* — Creditors—Respondents.

Misc. First Appeal No. 398 of 1932, Decided on 20th June 1933, from order of Dist. Judge, Gujranwala, D/- 10th February 1932.

(a) Provincial Insolvency Act (1920), Section 42 (2)—Application for discharge—Report of official receiver in favour of discharge—Onus of proof is on opposing creditors.

Where an insolvent applies for discharge and the report of the Official Receiver is in favour of granting a discharge to the insolvents, the onus of proving the contrary lies on the opposing creditors. [P 812 C 2]

(b) Provincial Insolvency Act :(1920), S. 42—Discharge can be refused if facts mentioned in S. 42 are established.

The insolvents failed to show that their liability had arisen from circumstances for which they could not be held responsible. They were not able to produce 'account books nor did they explain satisfactorily the alleged loss of the books:

Held: that Court should not grant an absolute order of discharge as the insolvents must have known at the time of contracting bebts, that they had no reasonable or probable ground for expecting that they would be able to repay them. [P 812 C 2; P 813 C 1]

Dev Raj Sawhney—for Appellants.

Charan Singh—for Respondents.

Judgment. — The appellants, Tara Singh and Lal Singh, were adjudicated insolvents on their own application on 18th January 1930. On 9th December 1930 they applied under S. 41, Provincial Insolvency Act, for an order of discharge. The application was sent to the Official Receiver, Gujranwala, who reported that he had no objection to their being discharged, as "no complaint of the dishonesty or misconduct had been against them." The learned District Judge however did not agree with the view of the Official Receiver and has dismissed the application. On appeal Mr. Dev Raj Sawhney for the appellants has urged that the report of the Official Receiver being in favour of granting a discharge to the insolvents, the onus of proving the contrary lay on the opposing creditors. The proposition of law enunciated by counsel is correct, but in this case the report of the Official Receiver is very brief and does not discuss any of the points raised by the opposing creditors. The learned District Judge has gone carefully into these points and has held that several of the facts mentioned in S. 42 of the Act, have been established in the case, and therefore he has refused to grant an absolute order of discharge. After hearing counsel at length and examining the record I am of opinion that the order of the learned Judge is correct and this appeal must fail.

The insolvents carried on a very small business. They dealt in papar and warian and for that purpose they did not require much capital. They have entirely failed to explain that they had borrowed such a large sum of money for the purposes of this business. The assets now available are reported to be of the value of less than two pies in the rupee on the amount of their unsecured liability. Under Cl. (a), S. 42, it lay upon the insolvents to show that their liability had arisen from circumstances for which they could not be justly held responsible, and counsel had frankly admitted that they have entirely failed to show that this was so. It is also admitted that they kept books of account but these have not been produced. They alleged that the books had been lost, but the explanation offered by them as to the alleged loss is ridiculous on the face of it, and has been rightly rejected.

The learned District Judge has shown and I agree with him—that at the time of contracting the debts the insolvents must have known that they had no reasonable or probable ground for expecting that they would be able to repay them. They have not been able to account for the loss of their assets and there is no doubt that they have brought on their insolvency by unjustifiable and extravagant living and culpable negligence of their business affairs. In my opinion the learned District Judge has rightly held that the case of the appellants falls under Cls. (a), (d), (e) and (f), S. 42, and his order dismissing the application for discharge is just and proper. I dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 813

DALIP SINGH, J.

Bhagwan Das—Decree-holder—Appellant.

v.

Nikka — Judgment-debtor — Respondant.

Misc. Second Appeal No. 1964 of 1932, Decided on 29th June 1933, from order of Senior Sub-Judge, Gurdaspur, D/- 11th October 1932.

Punjab Alienation of Land Act (1900 as amended by Act 1 of 1931), S. 16 (2)—Mortgage ordered to be effected by Court without advice of Collector and no provisions made for judgment-debtor—Mortgage is not valid.

Where a mortgage ordered to be effected by the Court in respect of the property of the judgment-debtor is without the advice of the Collector and no suitable provision is made for the maintenance of the judgment-debtor and his family, the mortgage is not valid. [P 813 C 2]

Chiranjiva Lal Aggarwal—for Appellant.

Judgment.—The appellant in this case obtained a decree against the respondent and applied for execution. Subsequently he applied for and obtained attachment. One day previous to the attachment the judgment debtor mortgaged the land to the Co-operative Society. The decree-holder applied for mustajri of the land attached and the papers were sent in the ordinary course to the Collector. The Collector returned the papers to the Court concerned deciding that he was not prepared to recommend any mortgage as no sufficient land was left for the support of the judgment-debtor. The Court fixed 16th May 1931, to hear the parties and on that day the decree-holder was present and the judgment-debtor was absent and the Court passed an order that 52 kanals of land attached be mortgaged to one Ghulam Nabi, son of Ghaus, for Rs. 544. On the same day subsequently to the order the judgment-debtor put in an application objecting on two grounds to the mortgage: (1) that the property was already mortgaged with the Co-operative Society and therefore could not be re-mortgaged, and (2) that it was ancestral and could not be attached. The Court dismissed the objections on the ground that it was too late and the order effecting the mortgage had already been passed. The judgment-debtor appealed and the learned appellate Court held that the Court had acted somewhat harshly to the judgment-debtor, it could have directed him to file a petition to set aside the ex parte order, that it was too late to order the judgment-debtor to do so now; and that under S. 151 he accepted the appeal and remanded the case to the Court below for disposing of the objections on the merits.

On the merits the Court held that the two objections of the judgment-debtor had no force and that he had no locus standi to object on behalf of the Co-operative Society and that the plea that the land was ancestral could not be raised by the judgment-debtor. I may add here, that the learned counsel for the appellant informs me that the alienation in favour of the Co-operative Society was set aside by a civil suit brought by the Co-operative Society, but there is nothing on the record to show me this. On the contrary all that I have got before me is a judgment in which a mortgage in favour of Ghulam Nabi was set aside in favour of the mortgage to the Co-operative Society in a suit brought by the Co-operative Society. In any case the trial Court further pointed out that it was unable to decide the objections unless the order mortgaging the land to Ghulam Nabi was set aside. The judgment-debtor appealed again and the learned Senior Subordinate Judge held that the advice of the Collector was not sought and this should have been done and no suitable provision had been made for the maintenance of the judgment-debtor and his family and that there was no prospect of the mortgage ever being discharged. He accordingly accepted the appeal and set aside the order of the lower Court and directed it to seek the advice of the Collector and then came to a decision as regards the character of the temporary alienation which would equitably be made in the interests of the decree-holder.

The decree-holder has come in appeal. He contends that the trial Court had done all it could, that before deciding the objections it had consulted the Collector and it had jurisdiction to overrule the Collector. All this may be so, but now under the amending section to the Land Alienation Act, such a mortgage as was ordered could not be made. No doubt in the present case possibly my order might relate back to 16th May 1931, and therefore might not be in conflict directly with the Act. At the same time the position is that rightly or wrongly the appellate Court set aside the order of the trial Court dismissing the objections as well as the order making the mortgage and at least one ground is arguable, namely, that the order did not make any provision for the maintenance of the judgment-debtor and his family. I do not see therefore that any good purpose will now be served by restoring that original order and therefore I dismiss this appeal. No order as to costs as the respondents are not present.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 814

ADDISON, J.

Umar Din—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 308 of 1933, Decided on 23rd June 1933, from order of Sess. Judge, Jallunder, D/- 21st February 1933.

Punjab Municipal Act (3 of 1911), Ss. 81 and 121—License fee can be collected only when license is granted

License fees under S. 121 are only payable when licenses are granted. Where no license has ever been granted nor has it been applied for, the attempt to levy these fees by the distress and sale of the movable property of the people, carrying on various trades, under S. 81 is illegal, the proper remedy being that provided in sub-S. 5, S. 121. [P 815 C 2]

Anant Ram Khosla—for Petitioner.

Achhru Ram—for Municipal Committee, Nurmahal.

Facts.—There are 15 petitions for revision filed against the order of Lala Daya Ram, Magistrate, Second Class of Phillaur, passed under S. 81, Municipal Act, for the recovery of Rs. 50, arrears of license fee, and these can be dealt with in one order. The petitioner and others are alleged to have carried on a tanning industry within the Municipal limits of Nurmahal. By resolution No. 2 of 1931, the Municipal Committee resolved that the money due as balance of license fees be recovered from the petitioners under S. 81, Municipal Act, and the list filed under my orders by the Public Prosecutor who contests the petition on behalf of the Municipal Authorities, shows in each case from what period the money was due. The resolution is dated the 21st April and the application was made on the 1st May to the tahsildar for recovery. Two of the tanners appealed to the Deputy Commissioner on 21st May and their appeals were accepted on the 16th July on the ground that the resolution was ultra vires because no license had ever been issued. It appears to have been the practice of the Committee merely to record the names of the tanners in a register and collect from them the license fees yearly. The two appellants whose appeals were accepted are not included amongst the 15 present petitioners. Accordingly, on the 21st November warrants of attachment were issued under S. 81 against those who had not appealed. On the 25th objections were filed before the tahsildar that the application was ultra vires as it has been signed by the clerk of the Committee, when, according to the rules, it should have been signed either by the President, Vice President, or Secretary: vide S. 81, Municipal Act. It was also objected that the petitioners never applied for licenses and therefore no license fee could be recovered. The Committee was represented before the tahsildar by counsel.

On 16th December 1931 the tehsildar recorded his opinion that the warrants were ultra vires; but instead of dismissing the proceedings he sent the file to the Deputy Commissioner for orders. The Deputy Commissioner sent the file in original to the Municipal Committee for necessary correction. The applications were then signed by the President and the Committee in order to support themselves, passed a further resolution that the procedure they had adopted was correct and that their dues should be recovered. They then returned the file to the Deputy Commissioner who wrote on it. "I agree. Orders to issue accordingly." During the pendency of the above proceedings the petitioners moved the Deputy Commissioner under S. 232, Punjab Municipal Act, to cancel resolution No. 2 (first resolution of the Committee) on the ground that it was ultra vires as the procedure adopted for assessing taxes was wrong and the provisions of S. 121 had been ignored. The Deputy Commissioner dismissed the petition on 16th September 1931 refusing to interfere under S. 232 on the ground that an appeal ought to have been lodged.

Grounds.—On 16th January 1933, the Public Prosecutor appeared before me and admitted that none of the present petitioners had ever actually been issued any license. What appears to have happened is that a large number of persons including the petitioners had carried on this tanning business for a number of years probably before the Municipality had ever been constituted· that the Commissioner had subsequently ordered that license fee should be recovered from them, that the Committee, instead of ordering the tanners to apply for licenses in the regular course and proceeding under Cl. (5), S. 121, Municipal Act, against those who did not, proceeded to open a sort of tax register and attempted to recover the money as a tax from every one then carrying on this business. It is perfectly obvious that a license is not a tax and as pointed out by the learned District Magistrate in his appellate order dated 16th July 1931, the only remedy the Committee had against those persons who carried on tanning business without applying for a license, was under Cl. (5), S. 121 of the Act; i. e., that their business should be closed down and they should be fined. The procedure adopted against the petitioners was therefore initially illegal.

Furthermore, the learned Magistrate before whom the Committee applied for the issue of a warrant, having himself decided that the application was ultra vires should, in my opinion, have dismissed it on his own initiative. I know of no procedure whereby he could have reported the matter to a higher authority for orders. It is possible that he might himself have allowed the petition to be amended by adding the signatures of the proper officials as required by the Act; but the order of the Deputy Commissioner instructing the tahsildar to issue warrants after having obtained the amendment was, in my opinion, a further irregularity. These proceedings are after all, quasi judicial and I know of no authority under which a higher Court can order a lower Court to issue any judicial process against its own opinion. It has been argued by the Public Prosecutor that no revision lies against an order under S. 81; but *P. R.* 23 of 1903, 52 *I. C.* 670 and 1927 *Lah.* 161, are rulings to the contrary. Had the Municipality ever issued licenses, any arrears of license fee due from the licensees could probably have been collected under Ss. 81 and 84: but without the issue of licenses I fail to see how recovery under these sections could be legal. Under the circumstances I forward the revisions to the High Court with the recommendation that they may be accepted, the proceedings before the Magistrate be set aside and the warrants of recovery cancelled.

Order.—I agree that license fees under S. 121, Municipal Act, are only payable when licenses are granted. In the cases before me no licenses have ever been granted nor have they been applied for. It follows that the attempt to levy these fees by the distress and sale of the movable property of the people, carrying on the various trades, under S. 81, Municipal Act, was illegal, the proper remedy apparently being provided in sub-S. 5, S. 121, Municipal Act. I therefore agree with the learned Sessions Judge, accept the revisions and set aside the proceedings of the Magistrate for recovery of the fees by warrant.

K.S. *Revision accepted.*

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* A. I. R. 1933 Lahore 815

JAI LAL AND DALIP SINGH, JJ.

Mathra Das and *Sons*—Petitioners.

v.

Commissioner of Income-tax—Opposite Party.

Civil Ref. No. 24 of 1932, Decided on 4th July 1933, from decision of Commissioner of Income-tax, Lahore, D/ 18th June 1932.

(a) Income-tax Act (1922), S. 25 (A)—Prior division of property merely recited in registered will—Will is no evidence of division.

A mere recital of a prior division of property in a will even though it be a registered one; is no evidence of such division and cannot confer title. And such a document cannot be deemed to be evidence of a disruption of a Hindu undivided family within the meaning of S. 25-A, Income-tax Act. [P 816 C 1]

***(b) Income-tax Act (1922), S. 25 (A)—Income-tax officer accepting allegation of assessee as to partition in one year is not barred from considering question of partition in subsequent year.**

Merely because the income-tax officer accepts the allegation of the assessee that there has been a partition in a certain year, he is not debarred from considering the truth about fact of partition in the next year. The fact that assessee's allegation has been accepted in the previous year may possibly alter the burden of proof. [P 816 C 2]

M. C. Mahajan—for Petitioners.

J. N. Aggarwal—for Opposite Party.

Jai Lal, J.—The assessee in this case is Messrs. Mathra Das and Sons. This firm, it has been found, does business as general merchants in several places, the principal shop being at Bannu. Mathra Das apparently was the head of the family consisting of the sons and the grandsons, who owned the entire business though Mathra Das claims it to be his self-acquired property. On 13th August 1929, Mathra Das made a will in which he recited that in the month of May that year he had given certain shops to his sons and other members of his family retaining only four items of property and the business in Bannu and that the sons were living separately and were the owners of the shops, including the business then in such shops; that he had only retained four shops in respect of which he made the will. The Income-tax Authorities have assessed Mathra Das and Sons in respect of the profits of all the shops, the assessment being for the year 1931-32. Mathra Das objected and alleged that the only business carried on by him was at Bannu and the business carried on in other places was owned by those to whom the shops in question had been given by him in May 1929 and therefore the profits in respect of those shops could not be included in his assessment. Having failed before the Income-tax Authorities he has succeeded in three questions being referred to this Court under S. 66 (2), Income-tax Act: (1) Whether the document made on 13th August 1929 does not evidence the disruption of the Hindu undivided family ? (2) Whether Messrs. Mathra Das and Sons, Bannu, is not to be assessed only in respect of the income from the general merchandise shop at Bannu as was done for 1930-31 assessment ? (3) Whether under the circumstances of the case, it is legal to assess the income of all the shops in the hands of Lala Mathra Das as head of the Hindu undivided family ?

Now a reference to the document dated 13th August 1929, shows that it is nothing, but a will disposing of the four shops which, according to Mathra Das, he had not dealt with in the division that he had made in May 1929: that division being merely recited in detail in this will. The will, it may be mentioned, has been registered under the Registration Act, but still it does not cease to be a will. It does not profess either to divide the property mentioned therein or to grant it to the donees mentioned. Such a document cannot, in my opinion, be said to confer a title.

It is no doubt an important piece of evidence of what may have happened before; but no evidence on the present record is pointed out to us establishing either the division of the property or the gift in question. The document therefore does not evidence the disruption of the Hindu undivided family in the sense in which that term must be understood under S. 25 (A), Income-tax Act. The answer to the second question naturally follows from the answer to the first question. It appears that in 1930-31, the Income-tax Officer accepted the allegation of the assessees that there had been a partition of the family property whereby the shops situated elsewhere than Bannu and fallen to the share of others and the present assessee was assessed only in respect of the profits of the Bannu shop. A question was raised by the assessee that this debarred the Income-tax Authorities from including the income of those other shops in the income of the assessee, but this question has not been referred to us by the Commissioner. The fact that the allegation of the assessee was accepted in 1930-31, is therefore only one of the considerations which have to be borne in mind by the Income-tax Authorities and may possibly alter the burden of proof. Still with this fact before them and the will and other circumstances the Income-tax Authorities have held that there was no real partition in May 1929 or a genuine gift of the shops by the father to the sons and others, but that the whole transaction was bogus. That being so, on the facts found by the Income-tax Authorities the assessment is not open to any legal objection. Question 3 also must be deemed to have been answered in the light of the observations made above. I would therefore answer the questions referred to this Court against the assessee. The answer to the first two questions shall be in the negative and the answer to the third question shall be in the affirmative. The petitioner must pay the costs of the Income-tax Commissioner.

Dalip Singh, J.—I agree.

K.S. ***Reference answered.***

A. I. R. 1933 Lahore 817

TEK CHAND, J.

Ram Labhai—Appellant.

v.

Durga Das and *others*—Respondents.

Misc. First Appeal No. 326 of 1933, Decided on 23rd June 1933, from order of Senior Sub-Judge, Lahore, D/- 13th February 1933.

(a) Hindu Law — Guardianship — Mother does not lose right of guardian of minor son on remarriage where remarriage is permitted by custom — Hindu Widow Remarriage Act (1856), S. 3.

Under Hindu law the mother is, after the father, the natural and legal guardian of her children and she does not lose her right by remarriage in cases when such remarriage is recognized as valid by custom. To such cases S. 3, Act 16 of 1856, was obviously not intended to apply. And even under the Act, the mother is not considered to be physically dead and may, in appropriate cases, be appointed as guardian though not in her own natural right, but where it is for the welfare of the minor to do so: *A I R* 1919 *Lah* 40 and 38 *Cal* 862, *Ref.* [P 817 C 2; P 818 C 1]

(b) Guardians and Wards Act (1890), S. 17 —Sentimental consideration should not prevail against welfare of minor.

Sentimental consideration should not be allowed to prevail against what is for the obvious welfare of the minor. [P 818 C 2]

Dina Nath Bhasin—for Appellant.

Ganga Ram—for Respondents.

Judgment.—One Lachhman Das, a Zargar of Lahore, died in September 1928, leaving him surviving a young widow, Mt. Ram Labhai, alias Krishan Piari and an infant son, Darshan Das, who was then 1½ years old. His other relations were his elder brother, Durga Das, respondent, who is lame and unmarried and keeps a petty goldsmith's shop at Lahore, and his mother, Mt. Khan Devi, an old lady over 60 years of age. The only property which the deceased owned at the time of his death was a half-share in a house which has been mortgaged by the two brothers some years before. Within a few days of the death of Lachhman Das, Mt. Ram Labhai, with the child Darshan Das, went over to live with her father, Lal Chand, and brother, Gian Chand. For nearly three years they lived there and during this period neither Durga Das nor Mt. Khan Devi took any interest whatever in them. On 21st April 1931, Ram Labhai re-married and began to live with her second husband, Labha Mal, in the Gujranwala District. She took over the boy with her, and he has been living with them upto this time.

Within a fortnight of the re-marriage, on 5th May 1931, Durga Das filed an application under the Guardians and Wards Act for appointment as guardian of the person and property of the minor. The application was opposed by Mt. Ram Labhai and shortly afterwards she filed a counter application asking for her own appointment as guardian. Her father, Lal Chand, and brother, Gian Chand, also made separate applications supporting Mt. Ram Labhai's prayer, and also urging that if for some reason the Court was not inclined to appoint her as guardian, one of them might be appointed as such. This was followed by a further application by Mt. Khan Devi, the paternal grandmother of the minor, who put forward her claims in the event of her son, Durga Das's application being rejected.

Proceedings in this simple matter dragged on in the lower Court for nearly 21 months, a part of the time being taken up in performing experiments in Court for making the boy familiar with Durga Das and Mt. Khan Devi. For this purpose he was brought into the Court several times but whenever he was asked to go over to them he used to cry bitterly. The experiments having thus been unsuccessful the Judge decided to give a decision on the merits, and on 13th February 1933 he appointed Durga Das as the guardian of the person of the minor, holding that no appointment was necessary for the guardianship of property, as the only property of the minor was the equity of redemption in one-half of a heavily encumbered house. From this order Mt. Ram Labhai has appealed and I have examined the record and heard both counsel at considerable length. It was contended by counsel for the respondent, and this contention appears to have largely influenced the learned Subordinate Judge, that under S. 3 of Act 15 of 1856, Mt. Ram Labhai, having remarried, had forfeited her natural right to the guardianship of her minor son from her first husband, and that his brother and mother were entitled to be appointed as such. Now in the first place, I am extremely doubtful, if the provisions of that Act apply at all to the parties. They do not belong to one of the Hindu high castes and there is evidence on the record that the practice of remarriage of widows is common among them. It is well-settled that under Hindu Law the mother is, after the father, the natural and legal guardian of her children and does not lose her right by remarriage in cases when such remarriage is recognised as valid by custom: *Mt. Indi* v. *Chania* (1) and *Ganga Parshad* v. *Rameshar Sahu* (2). To such cases S. 3 of Act. 16 of 1856 was obviously not intended to apply. But, as pointed out by Mookerji, J., in the case last cited (pp. 872-73) even under the Act, the mother is not considered to be physically dead and may, in appropriate cases, be appointed as guardian, though not in her own natural right, but where it is for the welfare of the minor to do so. The Act does not absolutely disqualify her from such appointment, but merely contains an enabling provision making it lawful for the relations of the deceased father to apply for the guardianship of his children in the presence of their mother, and for the Court to appoint one of them if it thinks fit to do so in the interests of the minor. I do not think it necessary to pursue the matter further, for even if S. 3 was applicable to this case, the order of the learned Judge is defective inasmuch as he seems to have overlooked the proviso to the section which runs as follows:

> "Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother, unless the proposed guardian shall have given security for the support and proper education of the children whilst minors."

Admittedly the minor in this case does not possess property of his own for his support and education during minority; and the respondent has not given security as laid down in the proviso, nor has the mother consented to his appointment. The respondent, who was present in person and by counsel before me, did not offer to furnish security as required by the imperative provisions of the Statute under which he sought to be appointed, and for this reason alone the order of the lower Court must be set aside. Nor does his previous conduct indicate that he is likely to take much interest in the minor. As stated already, soon after the kriya ceremony of Lachhman Das, the minor, and his widowed mother had to shift to her parent's house where they lived for nearly three years. During this period Durga Das did not contribute anything towards their expenses. In fact, he had been realizing and appropriating to his own use the minor's share of the rent of the house. So long as Mt. Ram Labhai was not remarried he entirely neglected her and her son, but as soon as she remarried he pretended to evince great interest in his welfare and at once filed an application for his appointment as guardian of the person and and property of the minor. I have no doubt that this application was filed in a spirit of petulant resentment against the remarriage of Mt. Ram Labhai rather than actuated by a sincere desire for the welfare of the minor.

The learned Senior Subordinate Judge has laid considerable stress on the fact that Durga Das is a bachelor and being lame and over forty years of age is not likely to be married and therefore the minor Darshan Das is the "only hope of the family" and should be made over to him and his mother, Mt. Khan Devi. I do not think sentimental consideration of this kind should be allowed to prevail against what is for the obvious welfare of the minor. He is of a very tender age yet and obviously requires the care and guidance of his mother for some years to come. She remarried over two years ago and during this period she had looked after him very well. Indeed in the application or throughout the proceedings no charge of neglect has been brought against her. The step-father, Labha Mal, was present before me at the hearing and expressed his willingness to bear the expeses of the upkeep and education of the minor. He has already put him in school and has been providing him with food, raiment and the other necessaries of life. I am of opinion, therefore that at least for some years to come the boy should be allowed to remain with his mother, and not made over to the respondent who has not evinced any interest in him so far. It may be that later on when Darshan Das has grown in years it may be desirable to send him to the family of his father, but that is a contingency about which we need not speculate now. After careful consideration, I have reached the conclusion that this is not a case, in which it is at all necessary to make an appointment of the guardian of the person of the minor at this stage. The minor can live with his mother for three or four years more, after which Durga Das

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1. AIR 1919 Lah 40=53 I C 783=1 Lah 146.
2. (1911) 38 Cal 862=10 I C 69.

or Mt. Khan Devi may, if so advised. apply for appointment as guardian of his person and the Court then dealing with the case, may, in view of the advanced age of the boy and the other circumstances then existing, come to the conclusion that it is in the interests of the minor that he should thenceforward live with, and be brought up by, the respondent. For the foregoing reasons, I accept the appeal, set aside the order of the lower Court appointing Durga Das as guardian of the person of Darshan Das, minor, and dismiss his application for appointment as such. Having regard to all the circumstances, I leave the parties to bear their own costs.

K.S. *Appeal accepted.*

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* A. I. R. 1933 Lahore 819

BHIDE AND CURRIE, JJ.

Indar Singh Gurmukh Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 393 of 1933, Decided on 1st June 1933, from order of Addl. Sess. Judge, Ferozepore, D/- 24th December 1932.

* **Penal Code (1860), Ss. 34 and 302 — Common intention to commit robbery — Different acts committed by different accused in furtherance of common intention—Each is liable for results of all such acts.**

The common intention of the culprits was to commit robbery and in furtherance of that intention different acts were committed by different persons. While *S* one of the accused had gone to fetch *K* for carrying out that common intention another accused shot down deceased who was the son of *K* in furtherance of the same:

Held : that although *S* was not actually present at the time of murder, still as he was also one of the participators in the joint criminal action in the course of which the murder was committed, he was also constructively guilty under S. 302 : *A I R* 1925 *P C* 1, *Foll.* ; 21 *P R* 1919 *Cr* ; 52 *I C* 395=*A I R* 1919 *Lah* 256, and *A I R* 1914 *Cal* 901, *held Overruled by AIR* 1925 *P C* 1. [P 821 C 1]

Nazir Ahmad—for Appellant.

V. N. Sethi for the *Government Advocate*—for the Crown.

Bhide, J.—On 3rd May 1932, a daring robbery was committed in the house of Kishen Singh, a Jat of Chak Jaimalwala in the Ferozepore district. A little before sunset four persons went to his house, armed with double barrelled guns. The adult male members of the family were out. Two of them asked Sant Ram, son of Kishen Singh (a boy aged about 8) to take them to the field where Kishen Singh was working. One of the other two persons took his stand on the roof while the fourth took his stand near the main door and closed it. Kehr Singh and Chanan Singh, sons of Kishen Singh, who were working at their shop close by saw Sant Ram being taken by two armed men towards Kishan Singh's field and suspecting foul play went to their own house. They pushed open the door while the culprit who was standing on guard behind it fired and shot Kehr Singh dead. Chanan Singh was also slightly injured and fell down but soon afterwards was able to run away. Shortly thereafter Kishen Singh was brought to the house and under threat of being shot was compelled to surrender the keys of his safe. The robbers then opened the safe and took the cash, currency notes, and gold and silver ornaments lying inside. Some other wooden boxes were also broken and some jewellery found therefrom was taken. The women were stripped of their jewellery. Kishen Singh, his wife, Mt. Gulabi, his son, Sher Singh, and Sher Singh's wife, Mt. Harnam Kaur, were beaten and subjected to torture by putting clothes on thein heads, etc., in order to compel them to disclose information about other valuables, which the robbers believed to be hidden in the house. But no such information having been obtained the culprits eventually departed with their booty. The matter was promptly reported to the police the same night at about 1-15 a. m. Soon afterwards the police received information about the robbery of a house from two persons named Abdullah and Hakim Ali and of a mare and a camel from the haveli of Dhab Khusal committed on the same night by four armed persons; and from the accounts given, these offences also appeared to have been committed by the same culprits.

Investigation proceeded and suspicion fell upon the present appellants and two other persons named Nazar Singh and Kehr Singh. Inder Singh and Kehr Singh were traced to a village in the Faridkot State. There was an encounter between these men and the Faridkot police in the course of which Kehr Singh was shot dead while Indar Singh was wounded in the arm. Sardara Singh and Nazar Singh were arrested later. Indar Singh, Sardara Singh, and Nazar Singh were identified as the culprits who committed the robbery at

Chak Jaimalwala by a large number of witnesses at identification parades held in the presence of Magistrates and were eventually challaned. Nazar Singh was given the benefit of doubt and acquitted by the learned Sessions Judge but the present appellants were convicted under Ss. 392, 452 and 302 read with S. 34, Penal Code. Under the last section they were sentenced to death while under the first two sections they were sentenced to imprisonment for seven years and to transportation for life, respectively. A large number of witnesses were produced on behalf of the prosecution and the evidence of these witnesses has been classified under nine heads and considered carefully by the learned Sessions Judge. Briefly stated, the evidence relates to: (a) the movements of the robbers immediately before the commission of the offence in question; (b) to their identification by the inmates of the house and other persons in the village, who had opportunity of seeing them; (c) to the injuries received by Kehr Singh, deceased, and other persons in the house; (d) to the subsequent movements of the culprits and commission of two other robberies by them on the same night as stated above; (e) to the disposal of the stolen property and (f) their arrest and recovery of guns and cartridges from them. The learned Sessions Judge has subjected all this evidence to careful scrutiny and accepted only such of the evidence as he considered to be above all suspicion. The evidence thus relied upon falls mainly under (b), (c), (e) and (f) above and was held to be sufficient to bring home to the appellants the charges framed against them and they were accordingly convicted on the basis of that evidence only.

It will be sufficient to confine ourselves to that evidence for the purposes of this appeal as no attempt was made before us to rely on any evidence which was rejected by the learned Sessions Judge as unworthy of credit. The facts that a robbery was committed in the house of Kishen Singh in the circumstances set forth above, that Kehr Singh, son of Kishen Singh, was shot dead and Chanan Singh, another son of his, was injured, that Kishen Singh himself, Mt. Gulabi, his wife, his son, Sher Singh, Mt. Harnam Kaur, his daughter-in-law, were subjected to torture and that a large amount of valuable property was taken away have been established beyond any doubt by the evidence on the record and have not been disputed. The main question which requires careful consideration in this case is that of the identification of the culprits. (After discussing the evidence regarding this, the judgment proceeded). After carefully considering the evidence referred to above, I have no hesitation in agreeing with the learned Sessions Judge in holding that both the appellants took part in the robbery committed in Kishen Singh's house on the evening of 3rd May 1932. The convictions under Ss. 452 and 394, Penal Code, must therefore be maintained. As regards Indar Singh, the witnesses are unanimous that it was he who fired the shot at Kehr Singh which resulted in his death. His conviction under S. 302, Penal Code, must therefore stand and the sentence of death passed on him confirmed, as there are no extenuating circumstances whatever in his case. As regards Sardara Singh, it was urged that as he had gone to fetch Kishen Singh and was not present when Kehr Singh was shot he cannot be held liable for the murder of Kehr Singh. It was contended that S. 34, Penal Code, would not apply as Sardara Singh was absent at the time of the murder and cannot therefore be said to have participated in the crime. This contention appears to me to be clearly untenable in view of the interpretation placed upon that section by their Lordships of the Privy Council in *Barendra Kumar Ghose* v. *Emperor* (1). Their Lordships observed as follows:

> "Section 34 deals with the doing of separate acts similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by a criminal act in the first part because they refer to it."

In the present instance, the common intention of the culprits was obviously to commit robbery and in furtherance of that intention different acts were committed by different persons. Sardara Singh had gone to fetch Kishen Singh for carrying out that common intention while Indar Singh shot down Kehr Singh in furtherance of the same. The decision to shoot Kehr Singh was no doubt taken by Indar Singh alone but there can be no doubt that it was taken in furtherance of the common intention. The object of

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1. AIR 1925 P C 1=85 I C 47=26 Cr L J 43
52 I A 50=52 Cal 197 (PC).

Indar Singh apparently was to strike terror and disarm all opposition and in this he succeeded; for there was no attempt to offer any effective resistance to the robbers thereafter. I can find nothing in the wording of S. 34 or in the judgment of their Lordships in *Barendra Kumar Ghose* v. *Emperor* (1), to justify the contention of the learned counsel that the actual presence at the time of murder of a person charged with that offence in circumstances such as those of the present case is essential. All that the section seems to require is that he is one of the participators in the joint criminal action in the course of which the murder is committed. In the present instance there can be no doubt that Sardara Singh, though temporarily absent, was participating in the joint criminal action in the course of which the murder was committed. *Harnam Singh* v. *Emperor* (2), on which the learned counsel relied, must, I think, be held to be overruled in view of the above decision of their Lordships of the Privy Council. In *Barendra Kumar* v. *Emperor* (1), the learned Judge who decided 21 *P. R.* 1919 (*cr.*) (2) takes the same view of S. 34 as was taken in *Emperor* v. *Nirmal Kanta Roy* (3), but the later ruling was definitely overruled by the decision of their Lordships in *Barendra Kumar* v. *Emperor* (1). I must accordingly hold that Sardara Singh was rightly convicted of murder by virtue of the provisions of S. 34, Penal Code. As regards the sentences, although Sardara Singh has been held constructively liable, the fact that all the four culprits were armed with guns shows that they all intended to use them, when necessary, in furtherance of their common object. The offence was of very serious character and there are no extenuating circumstances as already stated. I see no adequate ground for not confirming the sentence of death. I would accordingly dismiss both the appeals and confirm the sentences of death passed on the appellants.

Currie, J.—I agree.

K.S. *Appeals dismissed.*

** A. I. R. 1933 Lahore 821

DALIP SINGH, J.

Ratan Chand and *others*—Petitioners.

v.

Smail and *others*—Opposite Parties.

Civil Revn. Petn. No. 456 of 1933 and Civil Appeal No. 330 of 1933, Decided on 22nd June 1933, from order of Dist. Judge, Jhang, D/- 16th January 1933.

(a) Jurisdiction—Question of fraud—Fraud.

The Court should always strain its jurisdiction where a question of fraud is involved. [P 822 C 1]

(b) Limitation Act (1908), S. 5—Petition for insolvency — Provincial Insolvency Act (1920), S. 13.

Section 5, Limitation Act, does not apply to petitions for insolvency: *AIR* 1932 *Mad* 352, *Full.* [P 822 C 1]

(c) Transfer of Property Act (1882)—Act does not apply to Punjab.

The Transfer of Property Act does not apply to the Punjab. [P 822 C 1]

(d) Provincial Insolvency Act (1920), Ss. 7 and 9—Time under S. 9 runs from date of execution and not from date of registration of the deed. (marked **)

Period of three months prescribed under S. 9 begins to run from the date of execution and not from date of registration of the deed. [P 822 C 2]

J. L. Kapur—for Petitioners.

M. C. Mahajan and *Ratal Lal*—for Opposite Parties.

Judgment.—The facts of this case are that the creditors of a certain alleged debtor put in an application for his being declared an insolvent. The act of insolvency alleged was a lease-deed or mortgage-deed executed on 11th September 1931, and registered on 17th December 1931. The petition was put in on 8th January 1932. If time is reckoned from the date of the registration the petition is within time; if reckoned from the date of execution of the deed then the act of insolvency was committed beyond the three months prescribed by S. 9, Insolvency Act. The trial Court held that the time should run from the date of registration. On appeal the learned District Judge held that time should run from the date of execution; he also held that S. 5, Limitation Act, did not apply to insolvency petitions and therefore time could not be extended. He therefore dismissed the petition for insolvency.

The petitioners have come in second appeal and a preliminary objection has been raised that no appeal lies. The learned counsel for the appellants conceded that no appeal lies. He wants the petition to be treated as a revision. As from the judgment it

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2. AIR 1919 Lah 256=52 I C 395=20 Cr L J 635 =21 P R 1919 Cr.
3. AIR 1914 Cal 901=24 I C 340=15 Cr L J 460 =41 Cal 1072.

appears that something verey near a fraud had been committed by the judgment-debtor, I allow this prayer though the learned counsel for the appellants did not urge it as a ground. But, as pointed out in various rulings, the Court should always strain its jurisdiction where a question of fraud is involved. Coming now to the merits, the first point arising for decision is whether S. 5, Limitation Act, applied to petitions for insolvency or not. There is an obiter dictum in a Division Bench ruling of this Court reported as *A. I. R.* 1925 *Lah*. 436. On the other hand, there is a Madras ruling, *A. I. R.* 1932 *Mad*. 352, where the matter has been exhaustively discussed. I do not think the obiter dictum of the Division Bench, where the point did not arise for decision and was not evidently seriously contested, binds me, and the learned counsel for the appellants has not been able to show me that the reasoning in the Madras case is incorrect. I therefore hold that S. 5, Limitation Act, does not apply to the petitions for insolvency.

The next point arising for decision is whether the date of transfer should be the date of registration or the date of execution. In this connection it is necessary to bear in mind that the Transfer of Property Act does not apply to the Punjab and therefore rulings in that Act, which specially provide in S. 54 that immovable property of the value of Rs. 100 and upwards can only be transferred by registered instrument, have no direct bearing in this province. In Mulla's Commentary on the Registration Act, at p. 163 it is stated that the title does not pass until the registration, but the authorities cited for this proposition are under the Transfer of Property Act. In S. 49, Registration Act, it is provided that no document required to be registered by S. 17 shall affect any immovable property comprising therein. The question therefore before me is whether in the Punjab where a vendor has an option either to effect a sale orally or in writing but chooses the second course can he be said to make the transfer on the date of execution or should it be held that he does not make the transfer until registration is effected though by the operation of S. 47, Registration Act, after registration the transfer is antedated to the date of execution? The point is not free from difficulty and it is possible to hold that where the vendor has exercised his choice with respect to the mode of conveyance then by reason of S. 49, Registration Act, title does not pass prior to registration though after registration it may be antedated. On the other hand, it is also possible to hold that the writing is really no more than a proof of the transfer which is effected and the transfer has taken place though the document itself does not prove the transfer and no other evidence can be given to prove the transfer, and S. 47 only recognises the fact that the transfer has really taken place earlier. After considering the matter, I am of opinion that on the whole it is correct to consider that the transfer has taken place on the date of execution but in any event for the purposes of S. 9 the words "makes the transfer" show clearly that it is the date of execution that is intended. It is clear that registration may be effected in the absence of the vendor and indeed without his consent. It would be difficult to hold that a person who is not consenting can be held to make a transfer on the date of registration.

I therefore consider that the learned District Judge was right in his decision and I dismiss the petition with costs.

K.S. *Petition dismissed.*

A. I. R. 1933 Lahore 822

JAI LAL AND DALIP SINGH, JJ.

Firm Hashnak Mal Thakar Das — **Petitioner.**

v.

Commissioner of Income-tax, Punjab, Delhi and N. W. F. Provinces, Lahore— **Opposite Party.**

Civil Misc. Petn. No. 401 of 1932, Decided on 5th July 1933.

Income-tax Act (1922), Ss 9 and 66 (3) — Small sum spent on repairs of mortgaged property — Assessee not able to furnish particulars of income— Mandamus cannot be issued.

The only question in a petition under S. 66 (3) was whether a small sum expended on the mortgaged property was to be disallowed. The assessee was not able to give any facts about his income :

Held : that as the amount was small no mandamus can be issued on it alone. [P 823 C 1]

Kanshi Nath and *Asa Ram Aggarwal* —for Petitioner.

J. N. Aggarwal—for Opposite Party.

Dalip Singh, J.—On this application, I am of opinion, after hearing the counsel for the assessee, that no point of law arises except with regard to the question of the sum expended on repairs of the mortgaged property. The learned counsel however is unable to tell us any facts about the income from this property and whether it is or is not ordered in the headinng "property" in the assessment order of the Income-tax Officer. The sum is small and I would not issue a mandamus on it alone. I would point out only that the reason given by the learned Assistant Commissioner for disallowing the sum does not appear correct. I would dismiss the petition with costs.

Jai Lal, J.—I agree.

K.S. *Petition dismissed.*

A. I. R. 1933 Lahore 823

TEK CHAND, J.

Gilani Shah—Appellant.

v.

Sant Ram and *others*—Respondents.

Misc. First Appeal No. 1037 of 1932, Decided on 29th June 1933, from order of Dist. Judge, Shahpur, D/- 4th April 1932.

Civil P. C. (1908), O. 41, R. 27 — Production of additional evidence in appellate Court — Held on fact that additional evidence should be admitted.

The appellant applied for being adjudicated an insolvent on the ground that he was unable to pay his debts and that his liabilities exceeded his assets. The application was dismissed by the District Judge on 4th April 1932 on the ground that the appellant had failed to prove that he was unable to pay his debts and that the squares which were part of his assets were worth much more than what the appellant had represented them to be and that he had made no attempt to sell them or to obtain the permission of the Deputy Commissioner. He appealed to the High Court and along with the memorandum of appeal filed a copy of an order of the Deputy Commissioner dated 2nd June 1933 rejecting his application for permission to sell the squares for a certain price. The respondents objected to the copy of the Deputy Commissioner's order being admitted in evidence at this stage :

Held : that even if this appeal were to be dismissed as it was competent to the appellant to file a fresh application for adjudication before the District Judge, and in the proceedings on that application to prove the fact that the Deputy Commissioner had refused to grant him sanction to sell the squares, this was a fit case in which the High Court should exercise its powers under O. 41, R. 27 and admit the copy of the order of the Deputy Commissioner. [P 823 C 2]

Ghulam Mohy-ud-din—for Appellant.

Nawal Kishore—for Respondents.

Judgment.—The appellant, Gilani Shah, applied for being adjudicated an insolvent on the ground that he was unable to pay his debts and that his liabilities amounted to Rs. 10,197. In the petition he stated that his assets, including two squares which had been granted to him on horse-breeding conditions, were worth Rs. 5,472-4-0. The application was dismissed by the learned District Judge on the ground that the appellant had failed to prove that he was unable to pay his debts. The learned Judge was of opinion that the squares were worth much more than what the appellant had represented them to be and that he had made no attempt to sell them or to obtain the permission of the Deputy Commissioner. This order was passed on 4th April 1932. On 20th June 1932 Gilani Shah appealed to this Court and along with the memorandum of appeal filed a copy of an order of the Deputy Commissioner, Sargodha, dated 2nd June 1933, rejecting his application for permission to sell the squares to one Muzaffar Ali Shah for Rupees 13,000. It is contended by Mr. Ghulam Mohyuddin on behalf of the appellant that the order of the Collector leaves no doubt that the squares are not available for the purpose of meeting the appellant's liabilities and that therefore an order of adjudication should be passed. Mr. Nawal Kishore for the respondents, has objected to the copy of the Deputy Commissioner's order being admitted in evidence at this stage, but after hearing him, I see no force in this objection. Even if I were to dismiss the present appeal, it will be competent to the appellant to file a fresh application for adjudication before the District Judge, and in the proceedings on that application he can prove the fact that the Deputy Commissioner has refused to grant him sanction to sell the squares. In my opinion, this is a fit case in which this Court should exercise its powers under O. 41, R. 27, Civil P. C., and admit the copy of the order of the Deputy Commissioner.

This evidence however is not conclusive for the decision of the case. It appears from the appellant's own application that the squares were worth much more than what he had stated them to be before the District Judge and that another grantee was prepared to purchase them for Rs. 13,000. Though in view of the Deputy Commissioner's order the squares cannot be sold, it is not clear from the record whether under the conditions of the grant they cannot be leased for a number of years and whether their income along with other property of the appellant will not be sufficient for meeting his liabilities. In these circumstances the proper course for me is to remand the case to the District Judge for rehearing and re-decision after taking into consideration the order of the Deputy Commissioner above referred to. I therefore accept the appeal, set aside the judgment of the learned District Judge and remand the case to him for re-hearing and disposal in accordance with law. Court-fee on this appeal shall be refunded; other costs shall be costs in the cause.

K.S. *Petition dismissed.*

A. I R. 1933 Lahore 824

ADDISON AND AGHA HAIDAR, JJ.

Ralla and *others*—Plaintiffs — Appellants.

v.

Attra and *another*—Defendants — Respondents.

Second Appeal No. 2371 of 1928, Decided on 29th June 1933, from decree of Dist. Judge, Hoshiarpur, D/- 18th July 1928.

Punjab Limitation (Custom) Act (1 of 1920), S 7 and Art. 2 (b) — Suit for declaration by collaterals that certain adoption and gift by childless proprietor are invalid—Declaration granted by trial Court and upheld by lower appellate Court — Second appeal in High Court — Gift declared invalid and adoption question not considered on ground of want of certificate — Death of proprietor and suit for possession by reversioners is governed by Art. 2 (b) and not S. 7.

A childless proprietor made an adoption and subsequently effected a gift in favour of the adopted boy. The collaterals filed a suit for a declaration that the adoption and gift were invalid. The trial Court decreed the suit and the lower appellate Court upheld it. In second appeal the High Court confirmed the invalidity of the gift and declined to go into the question of adoption as there was not the requisite certificate under S. 41 (3), Punjab Courts Act. On the death of the proprietor, the reversioners sued for possession of the properties. It was contended that they had to file a suit for declaration under S. 7, Lim. Act, and then only they could sue for possession :

Held : that the decision of the lower appellate Court regarding adoption had become final that the reversioners had already the declaration both as regards adoption and gift and that their suit was governed by Art. 2 (b) and not by S. 7 :

Held further : that, the principle that if there are several points before a Court of appeal and that Court chooses to decide the appeal on a certain point, leaving the other points undecided, then the question involved in those other points remains open and would not be subject to the rule of res judicata and it would be open to the parties to re-agitate such questions as have been left undecided, did not apply to the present case. [P 825 C 1, 2]

Badri Das—for Appellants.

Asa Ram Aggarwal for *J. N. Aggarwal* and *J. N. Aggarwal*—for Respondents.

Agha Haidar, J.—This appeal arises out of a suit for possession of certain lands and houses. The trial Court decreed the plaintiffs' claim in its entirety deciding all the issues in his favour, but the District Judge, on appeal by the defendant, Atra, dismissed the plaintiffs' suit on the question of limitation only, leaving the other points in the appeal before him undecided. The plaintiffs have now come up in second appeal to this Court. One Nathu was a sonless Jat. On 28th May 1890, he adopted the defendant, Atra, who was related to him as the grandson of his father's sister. Atra continued to live with Nathu for a number of years and eventually, on 11th September 1913, Nathu made a gift of his landed property and houses in his favour. On 5th February 1914, the then collaterals of Nathu who are now represented by the plaintiffs, instituted a suit for a declaration that the adoption of Atra by Nathu was invalid, that the gift in his favour was of no effect and, on the death of Nathu, their interests as reversioners shall not, in any way, be affected. On 15th January 1915, the trial Court decreed the plaintiffs' suit. The defendants went up in appeal and the learned District Judge, on 8th April 1915, allowed the appeal and dismissed the plaintiffs' suit. The plaintiffs then went up in second appeal to the Chief Court (Civil Appeal No. 1160 of 1915) and, on 31st May 1918, a Division Bench of that Court set aside the decision of the lower appellate Court and remanded the case for the decision of the case on the merits. The case accordingly came before the District Judge for decision and he held that the gift in favour of the defendant, Atra, by Nathu was not valid.

He also recorded a finding that the adoption of Atra by Nathu was ineffectual and the rights of reversioners would not, in any way, be affected, on the death of Nathu. On these findings the appeal by the defendants, Nathu and Atra, was dismissed and the decree of the trial Court was upheld. This was 10th January 1919. Against this decision there was a second appeal (Civil Appeal No. 866 of 1919) to the High Court and the decision is to be found reported as *Nathu* v. *Banna* (1). The learned Judges held that the gift in favour of Atra was not valid under the Customary Law applicable to the parties.

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1. AIR 1922 Lah 426=69 I C 507=3 Lah 344.

On the question of adoption they found that they could not go into the matter because the defendants-appellants did not produce a certificate regarding the question of adoption from the District Judge, as required by S. 41 (3), Punjab Courts Act.

In August 1925, Nathu died and the plaintiffs, who are his reversioners, instituted the present suit for possession on 22nd September 1926. A number of issues were raised, but we are primarily concerned in this appeal with the plea of limitation. The question of limitation is governed by the Punjab Limitation (Custom) Act (Local Act 1 of 1920). The learned counsel for the appellants has argued that, so far as the land in suit is concerned, the case falls within the purview of Art. 2 (b) of the Schedule attached to the Punjab Limitation (Custom) Act, and as regards the houses, the case comes under Art. 4 (b) of the said Act. His argument is that in the litigation which terminated with the judgment of Mr. Kennaway and affirmed by the High Court in *Nathu* v. *Banna* (1), his clients had already obtained a declaration declaring the gift as well as the adoption of the defendant invalid and hence there was nothing left for them on the death of Nathu except to bring a suit for possession, as they had done. This argument seems to be well-founded. On a persual of the judgment of Mr. Kennaway it appears that the learned Judge had decided the question of the validity of the gift against the defendants and in doing so he had recorded findings which clearly show that, in his opinion, the adoption of Atra by Nathu was not valid under the Customary Law. I am quite familiar with the well-recognised rule of law which has been laid down in a number of decisions, that, if there are several points before a Court of appeal and that Court chooses to decide the appeal on a certain point, leaving the other points undecided, then the question involved in those other points remains open and would not be subject to the rule of res judicata and would be open to the parties to re-agitate such questions as have been left undecided. That principle does not apply to the present case.

The High Court decided the question of the validity of the gift which was legitimately before it but as regards the question of adoption it was precluded from going into it unless the requisite certificate under S. 41 (3), Punjab Courts Act, was forthcoming. This certificate admittedly was not forthcoming and therefore it was beyond the power and jurisdiction of the High Court to take up the question of adoption and give a decision upon it. This being so, the decision of Mr. Kennaway, on the question of adoption becomes final and it is binding upon the parties. The position therefore is that the plaintiffs have already got a declaration in their favour both on the question of adoption as well as the gift and it is futile to argue that under the provisions of S. 7, Punjab Limitation (Custom) Act, it was incumbent upon the plaintiffs to bring a suit for a declaration and, after obtaining that declaration, to file a suit for possession. Such a suit would be obviously misconceived and no Court of Justice would entertain it in view of the previous declarations which have already been granted. The result therefore is that the declaration having been obtained by the plaintiffs they were fully entitled to bring the present suit which is certainly within the period prescribed by the Schedule attached to the Punjab Limitation (Custom) Act. In this view, I would allow the appeal and set aside the decision of the learned Judge of the lower appellate Court.

Mr. Jagan Nath Aggarwal, who appeared on behalf of the respondents, urged that it would be necessary to order a remand in view of the fact that the learned Judge of the lower appellate Court has refrained from recording any finding on issue No. 3 which is to be found at p. 6 of the paper book. There is substance in this objection, but Mr. Badri Das has offered to pay a sum of Rs. 300 to Mr. Jagan Nath's client, Atra in full satisfaction of any amount which might be due to him in respect of any sum which he might have paid for the redemption of any portion of the property in suit. Mr. Jagan Nath Aggarwal has accepted the offer of Mr. Badri Das. This being so, it is not necessary to order any remand for the trial of this issue by the lower appellate Court. It is agreed that there is no other issue which is of any importance for the purpose of the case. The appellants would pay to the respondent, Atra a sum of Rs. 300. The order as to costs made by the learned Judge of the lower appellate Court shall stand. The plaintiffs-appellants shall be entitled to deduct the amount of costs of this appeal, which are hereby allowed to them against the defendant-respondent, Atra, from the sum of Rs. 300 and to pay the balance to him before they obtain possession. Having regard to the decision recorded above, the cross-objections fail and are hereby dismissed but without costs.

Addison, J.—I agree.

K.S. *Appeal allowed.*

A I. R. 1933 Lahore 826

TEK CHAND, J.

Hira Lal—Judgment-debtor — Appellant.

v.

Mt. Mohan Devi—Decree-holder—Respondent.

Misc. First Appeal No. 956 of 1932, Decided on 28th June 1933, from order of First Class Sub-Judge, Lahore.

(a) Civil P. C. (1908), O. 21, R. 22— Notice to judgment-debtor under O. 21, R. 22 — Judgment-debtor's objection as to decree-holder's right to execute decree overruled — Subsequent objection by judgment-debtor as to mode of execution of decree is not barred by res judicata—Civil P. C. (1908), S. 11.

The object of the notice issued under O. 21, R. 22 is to give the person, against whom execution is taken, an opportunity to urge objections as to the maintainability of the execution application and to prevent his being taken by surprise after the lapse of two years or more from the date of the decree. While raising such objections, he is obviously not bound to raise all other points, which might exist against the particular mode in which execution is sought. Hence where a judgment-debtor's objection as to decree-holder's right to maintain execution application is overruled, he is not debarred by res judicata from objecting to the mode of execution sought subsequently: *A I R* 1915 *All* 344 and *A I R* 1928 *Mad* 746, *Ref.* [P 827 C 1]

(b) Hindu Law— Maintenance — Maintenance made charge over house and decree-holder entitled only to proceed against such property for maintenance — Appointment of receiver is desirable for paying arrears and ensuring punctual payment of maintenance —Civil P. C. (1908), O. 40, R. 1.

Where under a decree for maintenance the decree-holder is entitled only to proceed against a house which has been made a charge for payment of maintenance and the maintenance is allowed to fall in arrears it is highly desirable to appoint a receiver for paying off arrears as well as for ensuring punctual payment of maintenance in future. [P 827 C 1]

Shamair Chand—for Appellant.

Ajit Ram—for Respondent.

Judgment.—Civil Appeals Nos. 956 and 957 of 1932 arise out of proceedings in execution of a decree and may be disposed of together. The parties are husband and wife who do not appear to have been on good terms for some time. In 1922 two suits were instituted, one by the husband, Hira Lal, for restitution of conjugal rights, and the other by the wife, Mt. Mohan Devi, for recovery of maintenance. Both suits were referred to arbitration and on 4th March 1923 the arbitrator gave his award, allowing Mt. Mohan Devi maintenance at the rate of Rs. 50 per month from 1st August 1922, and making this and future maintenance a charge on a house belonging to the husband. A decree in accordance with the award was passed on 29th January 1924. The husband appears to have paid maintenance for some years at the rate decreed, but he neglected to do so for some months before the present proceedings started. Accordingly the wife took out execution of the decree and prayed for attachment of the movable property of the judgment-debtor and for his arrest. A notice under O. 21, R. 22, Civil P. C., was issued to the judgment-debtor to show cause why the decree should not be executed against him. He appeared in answer to this notice and stated that the decree could not be executed, as the decree-holder had waived her right to receive maintenance which has been granted to her by the decree. On 24th February 1933, the executing Court held that the alleged waiver had not been proved and that the execution could proceed. A few days after, warrants for the arrest of the judgment-debtor and for attachment of his movable property were issued, but he objected that the decree, having created a charge on the house in Ram Gali for the maintenance of the decree-holder, it was not competent to the decree-holder to proceed against him personally or against the other property belonging to him. The learned Subordinate Judge has overruled this objection in limini on the short ground that the plea is barred by res judicata by reason of the fact that the objection was not raised by the judgment-debtor when he appeared to show cause on the notice which had been issued under O. 21, R. 22, Civil P. C. Against this order the judgment-debtor has preferred an appeal to this Court (Civil Appeal No. 956 of 1932).

The decree-holder had applied to the lower Court for appointment of a receiver to realize the rent of the house on which her maintenance had been charged in the decree, and out of the amount so realized to pay Rs. 50 p. m., as well as the arrears of maintenance which are stated to amount to over Rs. 1,200. The lower

Court has rejected this application also, and the decree-holder has appealed to this Court (Civil Appeal 957 of 1932). In my opinion, the contention of the judgment-debtor that his plea is not barred by the rule of res judicata is well-founded and his appeal must succeed. There is a conflict of opinion as to whether the principle underlying Explanation 4 to S. 11 is applicable at all to execution proceedings, but it is not necessary to decide that point for the purposes of this application. It will suffice to say that the object of the notice issued under O. 21, R. 22 is to give the person, against whom execution is taken, an opportunity to urge objections as to the maintainability of the execution application and to prevent his being taken by surprise after the lapse of two years or more from the date of the decree.

While raising such objections, he is obviously not bound to raise all other points, which might exist against the particular mode in which execution is sought: cf. *Kalyan Singh* v. *Jagan Prasad* (1) and *A. I. R.* 1928 *Mad.* 746. In my opinion, the ground on which the learned Judge has shut out the plea is not sound and the judgment-debtor's appeal must be accepted, the order, appealed against, set aside and the case remanded for decision of the objection on the merits. In this connection the learned Judge will determine inter alia whether the mere fact that the decree created a charge on the house for the due payment of the maintenance took away from the wife her ordinary right under the Hindu Law to claim maintenance personally from the husband. In view of my decision on the judgment-debtor's appeal, the decree-holder's application for the appointment of a receiver should be kept pending till the lower Court has come to a final decision on the objections raised by the judgment-debtor. If the Court finds that the decree-holder is entitled to proceed against the person and property of the judgment-debtor no occasion for the appointment of a receiver shall arise. If, on the other hand, it is held under the decree, that the decree-holder can proceed only against the house in Ram Gali for payment of her maintenance then it will be highly desirable to appoint a receiver for the purpose of paying off the arrears as well as for ensuring punctual payment of the maintenance in future, without forcing her to take out execution every month.

I accept both the appeals, set aside the orders of the Court below and remand the case to it for rehearing and redecision in accordance with the foregoing remarks. Having regard to all the circumstances, I leave the parties in both appeals to bear their own costs in this Court.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 827

JAI LAL AND DALIP SINGH, JJ.

Piyare Lal and *others* — Assessees — Petitioners.

v.

Commissioner of Income-tax—Opposite Party.

Civil Misc. Petn. No. 182 of 1932, Decided on 3rd July 1933, from order of Income-tax Commissioner, Punjab.

(a) Income-tax Act (1922), S. 25-A—Income-tax officer can decide question as to dissolution or existence of joint-family — Hindu Law—Partition.

The dissolution or existence of a joint Hindu family depends on the intention of the members thereof and is a question of fact. It is therefore open to the income-tax officer to decide on the facts whether the intention to dissolve is present or absent: *AIR* 1932 *Lah* 575, *Rel on.* [P 827 C 2; P 828 C 1]

(b) Income-tax Act (1922), S. 66 (3)—Finding of fact

The High Court cannot enter into a finding of fact arrived at by the Income-tax officer. [P 828 C 1]

(c) Income-tax Act (1922), Ss. 25-A and 26-A—Joint Hindu family cannot be registered under S. 26-A as there is no firm in existence.

The very definition of "firm" involves the idea of contractual relationship between several persons and when the finding of fact of the Income-tax Officer is that there is no contractual relationship between these persons but the relation ship between them is that of a joint Hindu family relationship based on a status and not on contract there is no firm in existence which he could possibly register under the provisions of S. 26-A. [P 828 C 1]

Shamair Chand—for Petitioners.

J. N. Aggarwal—for Opposite Parties.

Dalip Singh, J.—Only two points of law have been raised before us by the learned counsel for the petitioner. Firstly he contends that the Income-tax Officer had no power in the face of register D to hold that the family had not separated. It seems to me however that this is a question of fact for, as held by the Privy Council, the dissolution or existence of a joint Hindu family depends on the intention of the members thereof. It was, therefore

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1. AIR 1915 All 844=30 I C 523=37 All 539.

open to the Income-tax Officer to decide on the facts that the intention to dissolve was present or absent. He has held that it was absent and that therefore there was no dissolution and this is a finding of fact into which we cannot entire. *Jattushah Nathu Shah* v. *Commr of Income-tax* (1), also supports me in this conclusion.

The next point contended by the learned counsel for the petitioner was that S. 26-A is independent of S. 25-A, and as the Income tax Officer was faced with an instrument he had no option but to register the firm as such. But the very definition of "firm" involves the idea of contractual relationship between several persons and when the finding of fact of the Income-tax Officer was that there was no contractual relationship between these persons but the relationship between them was that of a joint Hindu family, that is a relationship based on a status and not on contract, there was no firm in existence which he could possibly register under the provisions of S. 26-A. I therefore see no point of law that the Commissioner should be asked to refer and I would dismiss this petition with costs.

Jai Lal, J.—I agree.

K.S. *Petition dismissed.*

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1. A I R 1932 Lah 575=138 I C 187=14 Lah 134.

A. I. R. 1933 Lahore 828

ADDISON AND AGHA HAIDAR, JJ.

Gobind Singh and *others*—Appellants.

v.

Managing Committee of Gurdwaras and *others*—Respondents.

First Appeal No. 795 of 1931, Decided on 11th July 1933, from decree of Dist. Judge, Amritsar, D/- 23rd February 1931.

(a) **Punjab Sikh Gurudwaras Act (8 of 1925), Ss. 5 (3) and 28—Publication of notification under S. 5 (3).**

The publication of notification under S. 5 (3) is conclusive proof of the fact that no claim was made. [P 828 C 2]

(b) **Punjab Sikh Gurudwaras Act (8 of 1925), S. 3—Service of notice on person in full physical possession is proper service.**

Service of notice on the person who is in full physical and lawful possession is proper service within the meaning of S. 3 even though the real owners are some other persons. [P 829 C 1]

(c) **Punjab Sikh Gurudwaras Act (8 of 1925), S. 30 (ii), Prov. 1—Applicability.**

If claimant could have found out that certain property is entered in list by exercise of diligence, S. 30 (ii), Prov 1 has no application. [P 829 C 1]

Gobind Ram Khanna, Ajit Ram **and** *Hem Raj Mahajan*—for Appellants.

Charan Singh—for Respondents.

Addison, J.—This is a suit under S. 28, Sikh Gurdwaras Act, by the managing committee of most of the Gurdwaras within the area of the Municipal Committee of Amritsar, against Gurbakhsh Singh, Gobind Singh and others, for possession of a bunga attached to the Golden Temple, Amritsar.

Under S. 20 (3) of the Act a list was prepared of all rights, titles and interests in immovable properties, inclusive of the Gurdwara itself, and in part four of this list [see from (1)] was included the bunga in question. As contemplated by S. 3 (1) of the Act, the name of the person in possession of the bunga was also given. His name is Gurbakhsh Singh, defendant 1. Under S. 3 (3) of the Act the Local Government sent by registered post a notice of the claim to this Gurbakhsh Singh. No claim was made with respect to the bunga within the prescribed period and accordingly under S. 5 (3) of the Act a notification was issued to the effect that no claim had been made by anyone regarding it. The publication of this notification is conclusive proof of the fact that no claim was made. S. 28 of the Act, lays down that where a notification has issued under S. 5 (3), the committee of the gurdwara may sue on behalf of the gurdwara for possession of the property specified in the notification. This suit was brought and it has been decreed. Defendants have appealed.

It was argued before us that notice was not given under S. 3 (3) to the persons in possession, that is, it was contended before us that Gurbukhsh Singh was not in possession. Apparently, the descendants of the persons who built the bunga within the precincts of the Golden Temple are Gobind Singh, etc., that is, the defendants other than Gurbakhsh Singh, but to the outward world Gurbakhsh Singh alone was in possession. The other defendants gave him a lease which is dated 4th January 1917. He paid no rent; he was to look after the bunga entirely, see to its repairs and have it whitewashed. Gurbakhsh Singh as a witness denied that he received notice but this is no longer in dispute as counsel for the appellants did not contend that notice had not been served upon him. Further, Gurbakhsh Singh as a witness admitted that his two sons used to live with him in this bunga and that he had his own private Granth Sahib inside the building. On the other hand, Ganga Singh, the mukhtariam of the Gurdwara Committee, has stated that he had no knowledge that the bunga was under the control of any other person. From 1922 up to the time when notice was issued he knew of nobody connected with the bunga except Gurbakhsh Singh. He has stated that he was greatly surprised when Gurbakhsh Singh told him that he had made over the notice he had received from the Local Government to the real owners.

In these circumstances it seems to me that the provisions of S. 3 have been strictly carried out. It was enacted in that section that the name of the person in possession should be given and that he should be served with notice. This was in order to get over the difficulty of finding innumerable groups of owners. Gurbakhsh Singh was in full physical and lawful possession of the bunga and service upon him was proper service within the meaning of S. 3. Nor can it be said that in this case the first proviso to S. 30 (2) of the Act, can be applied. This proviso runs as follows:

> "Provided that in the case of a claim that might have been made under the provisions of S. 5 or S. 10, the Court need not so decide, if it is satisfied that the failure to make the claim was owing to the fact that the person who might have made the claim either had no knowledge of the existence of the right, title or interest that he might have so claimed or had no knowledge of the fact that the right, title or interest had been included in a list published under the provisions of sub-S (2), S. 3 or sub-S. (3), S. 7 and could not, by the exercise of reasonable diligence, have come to know of the existence of such right, title or interest, or of the fact that such right, title or interest, was so included."

The defendants other than Gurbakhsh were entered as in possession of 31 kanals 17 marlas of land and a muafi in the same list (though in different parts thereof) as the list in which the bunga was entered. There was an entry as regards the muafi and as regards the land in the revenue papers so that with a respect to them the defendants other than Gurbakhsh Singh were given notice under S. 3 of the Act, and a complete list was sent to them, in which of course the bunga was also entered. They knew that action had been taken as regards all lands, muafis, and bungas attached to the Golden Temple. It is true that they only directly received notice with respect to the muafi and the land but if they had exercised any diligence at all they would have seen that the bunga was entered in the list. This is apart from the fact that proper notice was given as regards the bunga to Gurbakhsh Singh who was in lawful and physical possession. In my judgment, it cannot be said in this case that the defendants other than Gurbakhsh Singh could not by the exercise of reasonable diligence have come to know of the existence of the fact that this bunga had been notified. They are thus not entitled to claim any indulgence.

For the reasons, given, I would dismiss the appeal with costs.

Agha Haidar, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 829

JAI LAL AND DALIP SINGH, JJ.

Haveli Shah and *another* —Assessees—Petitioners.

v.

Commissioner of Income tax—Opposite Party.

Civil Ref. No. 7 of 1932, Decided on 4th July 1933, from decision of Commissioner of Income-tax, Punjab, Delhi and N. W. F. Province, D/- 27th February 1932.

Income-tax Act (1922), S. 9— Annual value of building — Finding is one of fact which cannot be interfered with.

In estimating or arriving at a decision as to the annual value of building the Income-tax Officer is entitled to take into account the actual sum expended in the erection of the building. The finding of the Income-tax Officer is one of fact with which the High Court cannot interfere. [P 829 C 2]

M. L. Puri—for Petitioners.

J. N. Aggarwal—for Opposite Party.

Order.—The only point for decision in this reference is whether in estimating or arriving at a decision as to the annual value of the building the Income-tax Officer is entitled to take into account the actual sum expended in the erection of the building. Though a remote consideration, we do not think it can be called an irrelevant consideration and this being so, the finding becomes a finding of fact with which we cannot interfere. We therefore answer the question referred in the affirmative. No order as to costs.

K.S. *Question answered.*

A. I. R. 1933 Lahore 830

DALIP SINGH, J.

Dulla—Defendant—Appellant.

v.

Sandhi and *others* — Plaintiffs — Respondents.

Second Appeal No. 468 of 1932, Decided on 23rd June 1933, from decree of Dist. Judge, Jullundur, D/- 4th February 1932.

Execution Sale—Decree-holder mentioning in execution existence of encumbrance over property found by Court to be subsisting — Judgment-debtor not challenging this finding —Sale of property and payment of money by auction-purchaser to mortgagees — Suit by judgment debtor against decree-holder and auction-purchaser for return of money paid to mortgagees alleging mortgage was time-barred — Judgment-debtor is not entitled to succeed.

D brought a suit against *S* for an injunction. Certain persons alleging they were mortgagees of the property with reference to which the injunction was sought applied to be made parties. This was allowed and the trial Court dismissed the suit but found that the mortgage existed. On appeal the appellate Court decreed the suit. Nothing was stated about the mortgage. *S* then appealed to the High Court, but the appeal was dismissed and no objection was taken by him as to the existence of the mortgage. *D* executed this decree for costs and attached the house of *S* and brought it to sale. He mentioned the encumbrance which had been pleaded by the mortgagees. *S* objected in various petitions that there was no such mortgage subsisting. No decision was given by the executing Court and the sale was held subject to the encumbrance. The sale of the equity of redemption which had been sold was confirmed in favour of the auction-purchaser who paid off the mortgagees. *S* brought a suit in which he pleaded that the mortgage was time-barred and sued the auction-purchaser, the decree-holder and the mortgagees for return of the money paid to the mortgagees by the auction-purchaser. The trial Court dismissed the suit. On appeal the District Judge dismissed the appeal as against the mortgagees but decreed it as against the auction-purchaser in the second instance holding that the decree-holder had caused all this trouble by notifying the encumbrance and that the auction-purchaser had wrongly paid the mortgagees out of Court instead of depositing the mortgage encumbrance in Court and he also therefore was liable to the judgment-debtor :

Held : that as the decree-holder was faced with the finding of the trial Court that there was a subsisting mortgage and which had never been challenged subsequently, he was not acting improperly in notifying the execution Court of the existence of this encumbrance and that he was not to be blamed in the matter :

Held further : as regards the auction-purchaser that he had purchased the right, title and interest of the judgment-debtor which the Court thought to be only the equity of redemption and that there was no connection between the auction-purchaser and the mortgagor of property sold by Court decree which could entitle the mortgagor to demand not the property from the auction-purchaser but demand the amount of the mortgage which was alleged at the time of the sale to be outstanding: 27 *All* 97 (*F B*), *not Foll.* [P 831 C 1]

Shamair Chand—for Appellant.

Barkat Ali, *J. L. Kapur* and *Ratan Lal* for *R. L. Anand*—for Respondents.

Judgment.—The facts of this case are not in dispute before me. Dulla brought a suit against Sandhi for an injunction. Certain persons alleging they were mortgagees of the property with reference to which the injunction was sought applied to be made parties. This was allowed and the trial Court dismissed the suit but found that the mortgage existed. On appeal the appellate Court decreed the suit. Nothing was stated about the mortgage. Sandhi then appealed to the High Court but the appeal was dismissed and no objection was taken by him as to the existence of the mortgage. Dulla executed this decree for costs and attached the house of Sandhi and brought it to sale. He mentioned the encumbrance which had been pleaded by the mortgagees. Sandhi objected in various petitions that there was no such mortgage subsisting. No decision was given by the executing Court and the sale was held subject to the encumbrance. An objection was taken under O. 21, R. 90 in which the objection was again taken along with others that the mortgage no longer subsisted. It was decided against Sandhi and he appealed in some wrong Court and the appeal was dismissed. The sale of the equity of redemption which had been sold was confirmed in favour of Labhu Ram, purchaser, for Rs. 440. He paid Rs. 440 into Court and he paid a sum of Rs. 586 to the mortgagees and produces a receipt for the same. Sandhi brought a suit in which after stating the facts he pleaded that the mortgage was time-barred and sued the auction-purchaser, the decree-holder and the mortgagees for return of the money paid to the mortgagees by the auction-purchaser. The trial Court dismissed the suit. On appeal the learned Judge dismissed the appeal as against the mortgagees but decreed it as against the auction-purchaser in the second instance holding that the decree-holder had caused all this trouble by notifying the encumbrance and that the auction-purchaser had wrongly paid the mortgagees out of Court instead of depositing the mortgage encumbrance in Court and he also therefore was liable to the judgment-debtor.

I am quite unable to see how the Court arrived at this conclusion. The decree-holder was faced with the finding of the trial Court that there was a subsisting mortgage and as pointed out this finding had never been challenged subsequently. He was therefore not acting improperly in notifying the executing Court of the existence of this encumbrance. The judgment-debtor, if he wished to contend that no such encurbrance existed, could have come before the executing Court as he did and on the refusal of the Court to decide this point he might have appealed or taken any other step as he might have been advised. He might also have pleaded this subsequently in appeal under O. 21, R. 90, which he did not do. In any event, I do not see how the decree-holder was to blame in the matter at all.

So far as the auction-purchaser is concerned, he bought the right, title and interest of the judgment-debtor subject to an encumbrance. The learned counsel for the respondents contends that all that the Court sold was the equity of redemption and not the right, title and interest of the judgment-debtor. But it is clear enough that the Court thought that the equity of redemption was all the right, title and interest that the judgment-debtor possessed in the property at the time. I do not see how the fact that he has paid the mortgagees or that he has not paid the mortgagees has anything to do with the question which is whether the judgment-debtor can demand the amount of the mortgage from the auction-purchaser. The only case cited on the point is *Inayat Singh* v. *Izzat Unnissa Begam* (1), a Full Bench decision, but in that case where the decree-holder and the auction-purchaser were one and the same and the notification of the encumbrance was due to the action of the decree-holder-auction-purchaser, two Judges of the Allahabad High Court held that the decree-holder was estopped from refusing to pay the encumbrance amount to the judgment-debtor and one Judge further proceeded to draw a distinction between the equity of redemption and the right, title and interst of the judgment-debtor which the learned counsel for the respondents has also drawn. I am unable to follow either ground for the decision. I cannot see how there is any estoppel in the present case, where admittedly the decree-holder and the auction-purchaser are not one and the same and the learned counsel concedes that this ground does not apply. So far as the other ground is concerned, it seems to me to be based on a misapprehension. with due deference to the learned Judges who expressed that view. There is no connection between an auction-purchaser and the mortgagor of property sold by the Court decree which could entitle the mortgagor to demand not the property from the auction-purchaser but demand the amount of the mortgage which was alleged at the time of the sale to be outstanding.

I therefore accept the appeal and dismiss the plaintiff's suit with costs throughout.

K.S. *Appeal accepted.*

S. N. DAR, B.A. LL.B.
Vakil High Court.
SRINAGAR (Kashmir)

A. I. R. 1933 Lahore 831

TEK CHAND, J.

Hans Raj—Judgment-debtor— Appellant.

v.

Ram Rakhi and *another* — Decree-holders—Respondents.

Misc. First Appeal No. 429 of 1933, Decided on 23rd June 1933, from order of Senior Sub-Judge, Ferozepore, D/- 19th January 1933.

(a) Mortgage—Suit to enforce mortgage referred to arbitration — Award and decree thereon giving decree-holder choice of realizing amount from mortgaged property or any other immovable property of judgment-debtor — Decree-holder can validly proceed against property other than mortgaged one.

A suit to enforce a mortgage was settled by arbitration, and in the award and the decree which followed thereon, the decree-holder was given the choice of realizing the amount due either from the mortgaged lands or any other immovable property of the judgment-debtor :

Held : that the decree-holder was within his rights in proceeding against the property other than that which had been originally mortgaged. [P 832 C 1]

(b) Civil P. C. (1908), O. 21, R. 2—Decree providing that produce of land if realized by decree-holder to be adjusted towards interest—O. 21, R. 2 has no application.

A decree provided that the produce of the land, if realized by the decree-holder, should be adjusted towards interest. The judgment-debtor contended that the Court had refused to give credit to him for produce alleged to have been harvested by decree-holder :

Held : that O. 21, R. 2 had no application to the facts of the case and that this matter should be inquired into by the executing Court and appropriate orders passed thereon. [P 832 C 1]

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1. (1904) 27 All 97=(1904) A W N 174 (FB).

Nawal Kishore—for Appellant.

J. L. Kapur—for Respondents.

Judgment.—At the preliminary hearing of this case counsel for the appellant stated that a warrant for the arrest of the judgment-debtor had been issued by the executing Court. The record of the case however shows that this statement is incorrect and was apparently made on wrong instructions given by the appellant to his counsel. The principal ground on which the appeal was admitted therefore fails. The next contention raised was that the suit having been brought to enforce a mortgage, the decree-holder should have first brought the mortgaged property to sale and if the price realized was found to be insufficient to discharge the decretal amount, then only he could have taken out proceedings against the other property of the judgment-debtor. It appears however that the dispute was settled by arbitration, and in the award and the decree which followed thereon the decree-holder was given the choice of realizing the amount due from the mortgaged lands or any other movable or immovable property of the judgment-debtor. The decree-holder was therefore within his rights in proceeding against the property other than that which had been originally mortgaged. This contention also is without substance and must be rejected.

The lower Court has refused to give credit to the judgment-debtor for the produce of the Rabi harvest which the decree-holder is alleged to have realized. This is contrary to the clear provision in the decree, which laid down that the produce of the land, if realized by the decree-holder, should be adjusted towards interest. Mr. J. L. Kapur for the decree-holder has stated before me that if it is established that his client had authority to realize the produce of any harvest, he would have no objection to giving credit to it. It is obvious that O. 21, R. 2 has no application to the facts of the case. This matter should be inquired into by the executing Court and appropriate orders passed. The appeal therefore fails and is dismissed with costs.

K. S. *Appeal dismissed.*

A. I. R. 1933 Lahore 832

JAI LAL AND DALIP SINGH, JJ.

Pioneer Sports Ltd., Sialkot — Assessees—Petitioners.

v.

Income-tax Commissioner, Lahore — Opposite Party.

Civil Misc. Petn. No. 119 of 1933, Decided on 5th July 1933, from decision of Commissioner of Income-tax.

Income-tax Act (1922), S. 66 (3)—Question whether Income-tax Officer is justified in proceeding under proviso to S. 13 and not under part 1, S. 13—Case is fit one for reference to High Court.

Where a question of law is involved, viz., whether the Income-tax Officer was justified in proceeding under the proviso to S. 13 and not under the first part of that section, it is a fit case in which the Commissioner should be directed to transfer the question to the High Court. [P 833 C 1]

M. C. Mahajan—for Petitioners.

J. N. Aggarwal—for Opposite Party.

Order.—The assessee in this case is the Pioneer Sports Ltd., Sialkot. They have made an application under S. 66 (3), Income-tax Act, praying that this Court should direct the Commissioner of the Income-tax to refer certain questions for the opinion of this Court. The brief facts are these: The assessee carries on business of the manufacture and sale of sports goods at Sialkot. They send a fairly large quantity of goods to J. M. Ahluwalia and Sons, London, which, for the purposes of this assessment, has been found to be a separate firm. It appears from the account-books of the assessees that in respect of goods sent by them to J. M. Ahluwalia and Sons, London, the price charged is comparatively lower than the charges from other customers. The Income-tax authorities have further found that though the turn over for the year of assessment of the assessee is practically the same the net profits are much lower than those of the previous years. From this they suspect that there is something wrong with the books of the assessee. It is in fact suggested that the assessee has no right to charge small profits. Be that as it may, I fail to see that this is a defect in the methods of accounting regularly employed by the assessee. It is contended by the assessee that the assessment should have been made under S. 13, Income-tax Act, according to the entries in the books of the assessee with such variations as the Income-tax Officer considered necessary and therefore that the assessment could not have been made under the proviso to S. 13 as the Income-tax Officer appears to have done. We express no final opinion on this question, but it seems to us that under the circumstances alleged by the assessee, a question of law is involved, viz., whether the Income-tax officer was justified in proceeding under the proviso of S. 13 and not under the first part of that section. Another ground taken by the Income-tax officer for rejecting the books of the assessee might be mentioned here; that is, that in the opinion of that Officer the inventory did not represent the correct state of affairs and he, for some reasons which is not clearly understood by us here, distinguishes the inventory from the stock register. An objection is taken to this view of the Income-tax Officer also by the assessee on similar grounds. In our opinion, therefore this is a fit case in which we should direct the Commissioner of Income-tax to refer to this Court the question, whether under the circumstances mentioned in the order of the Income-tax Officer an assessment under the proviso to S. 13 could legally be made or whether the assessment should have been under the first part of S. 13. We accordingly direct the Commissioner to refer this question for the opinion of this Court.

K.S. *Order accordingly.*

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* * A. I. R. 1933 Lahore 833

JAI LAL AND ABDUL RASHID, JJ.

Narain Das and *another*—Plaintiffs—Appellants.

v.

Brij Lal and *another*— Defendants — Respondents.

First Appeal No. 2038 of 1927, Decided on 2nd June 1933, from decree of First Class Sub-Judge, Shahpur, D/- 7th April 1927.

*** * Hindu Law—Will—Bequest for dharmarth is void for uncertainty — Other bequests in same will — Though valid individually are also void.**

A bequest for dharmarth is void for uncertainty and consequently the remaining bequests in the will which are joined with the bequest of dharmarth are also void even though individually they are valid bequests: 23 *Bom* 725 (*P C*); 78 *P R* 1912; *A I R* 1928 *Mad* 876, *Bulair* v. *Duncan*, (1902) *A C* 87 and *Houston* v. *Burns*, 1918 *A C* 887, *Foll.* [P 835 C 1; P 836 C 2]

Achhru Ram for *Baridas*, *J. L. Kapur* and *Ram Lal Anand*—for Appellants.

M. C. Mahajan and *Gobindram Khanna*—for Respondents.

Jai Lal, J.—One Devi Dial resident of Behar had established a dharmsala called Dharmsala Devi Dial at Behra by means of a document, dated 27th March 1911 which is printed at p. 73 of the printed paper-book. He appointed one Bhai Nechal Singh as mahant of the dharmsala, and declared that the said mahant shall manage the dharmsala and the lands attached thereto and that the said mahant shall not be liable to be ejected "so long as he may retain good moral character." He was authorized to appoint his successor, but after consulting the manager or managers of the dharmsala. It is not necessary to describe the other conditions of the deed. It may however be mentioned that there is no indication in the deed who the manager or managers of the dharmsala were. It is however agreed on both sides before us that Devi Dial or his successor would presumably be understood to be the manager or managers. Subsequently to this in 1914, Nechal Singh resigned his mahantship, and abandoned it in favour of Devi Dial. The result was that the latter became both the manager and the mahant of the dharmsala. Whether there is under the circumstances any real distinction between the two offices it is not necessary to discuss. On 25th October 1918, Devi Dial executed his will which is the subject-matter of dispute in this case and died the next day, i. e., 26th October 1918. This will is printed at p. 59 of the printed paper-book. After stating that Devi Dial, testator, was without issue he purports to

> "make the following will in respect of movable and immovable property of every description as well as cash and agricultural property, etc., owned by me."

He appointed three gentlemen as the executors or trustees of the will and directed them to apply after his death in such a manner as they consider proper the money and property bequeathed to them for dharmarth, the dharmsala and Sanskrit education. To Brij Lal and Chuni Lal, who apparently would otherwise have succeeded to his estate, he gave land measuring 11 bighas and ½ kanals situated within the limits of Kohlian and also land held by him jointly with them as a mortgagee. They were to perform his death ceremonies and expenses whereof were to be paid by the executors and trustees, who are described in the will as sarprast. The will is inartistically drafted, but it is not difficult to ascertain from it the intention of the testator. Disputes having arisen between the executors and the legal heirs of the deceased, the former instituted the suit out of which this appeal has arisen for possession of the dharmsala, the land attached to it which is described in the plaint, possession of a kotha, recovery of mesne profits and price of trees alleged to have been removed by the defendants and for a declaration that the plaintiffs are the mortgagees of certain lands and a house situated thereon in their capacity as trustees of Devi Dial's will.

The defendants were the persons who would have succeeded to the estate of Devi Dial, but for the will. Their main contentions in the written statement were that the will had not been executed by Devi Dial, that he had not a disposing mind at the time of its execution. They alleged that Devi Dial was incompetent to make a will in respect of the dharmsala or of the land attached thereto. They also contended that the will related only to the property of the deceased which he owned at the time of his death and did not therefore affect the dharmsala and attached lands which he had already made a gift of by means of the deed of 27th March 1911. It was further urged that the will was void for uncertainty. The defendants denied that they had removed any trees or that they had taken possession of the kotha. They claimed that the agricultural land in respect of which the plaintiffs claimed a declaration as mortgagees had been bequeathed to them (the defendants) by virtue of the will. The Senior Subordinate Judge has found in favour of the plaintiffs on all these matters except the trees and mesne profits. The defendants have consequently presented this appeal. The plaintiffs also have appealed so far as their claim for the value of the trees and for mesne profits is concerned and also against the decree of the trial Judge leaving the parties to bear their own costs.

On behalf of the defendants-appellants it is contended: (a) that the will did not purport to deal with the rights of Devi Dial as manager and mahant of the dharmsala and the lands and buildings attached thereto, and (b) that the deceased was not competent to dispose of these rights by means of the will. The Senior Subordinate Judge has held that the deceased intended by the will to dispose of his entire property including his right to manage the dharmsala and the attached property. It is true that the will does not expressly make any disposition of the dharmsala or of the attached property, but there are indications that the deceased intended to include them in the bequest to the trustees. The Senior Subordinate Judge has held that movable and immovable property of every description as well as the cash and agricultural property etc., "owned" by him include this right and in support of this conclusion he takes support from the fact that subsequently in the same will he appoints the trustees in respect of his entire property and authorises them to devote the money and the property inter alia for the dharmsala. That he was not pleased with his relations is apparent from the fact that he gave them a very small area of land out of his property and this also as appears from the evidence on the record at the intercession of others. It is therefore clear that he had no faith in his relations and intended to deprive them of every connexion with his affairs. In my view having regard to the terms of the will the conclusion of the Senior Subordinate Judge that the plaintiffs-respondents were appointed as executors and trustees in respect of the dharmsala and the attached property as well is correct. No argument was addressed to us to show that the right to manage the dharmsala could not be subject of a bequest.

The next point taken up by the appellants was that the land in respect of which a declaration has been granted by the learned trial Judge in favour of the respondents and in which the deceased had mortgagee rights was bequeathed to the appellants by the will. The will however purports to give them the land which was held by the deceased as a mortgagee jointly with the appellants and it is conceded that in the land in question the deceased alone had the mortgagee rights. In other words the appellants are not joint mortgagees of it with the deceased. It is therefore clear that this land does not answer the description which was bequeathed to the appellants. This ground should therefore be decided against the appellants. Before dealing with the principal question that is raised in this appeal it will be convenient to deal with the dispute about the kotha. It was admitted that the kotha belonged to the deceased Devi Dial, but the contention of the defendants was that it had been taken possession of by the proprietors of the village who were therefore necessary parties to the suit. On our pointing out to Mr. M. C. Mahajan, counsel for the appellants, that the dispute in this case was whether the plaintiffs or the defendants were entitled to the kotha by virtue of the will, and therefore it was not necessary to implead the proprietors of the village and that as it was admitted that it belonged to the deceased the decree of the Senior Subordinate Judge must be upheld, the learned counsel conceded that he had no good ground to contest the decree of the trial Court on this part of the case.

This brings me to the principal contention of the appellants in this appeal. It is contended that a bequest for dharmarth is void for uncertainty, and as the remaining bequests for the dharmsala and Sanskrit education have been joined with the bequest of dharmarth so that the trustees are authorized to spend the money on the three objects in such manner as they may consider fit, the true interpretation of the disposition is that it is left to the trustees to apply the funds to either of these three objects and in such proportion as they think fit. In other words it is left to the trustees to apply the whole of the income of the trust property to dharmarth to the exclusion of the other objects or such part of it as they may deem fit or even not to apply any portion of it to dharmarth. It is therefore urged that as the bequest for dharmarth is void for uncertainty, the bequests for the dharmsala and Sanskrit education must also be held to be void. I am reluctantly compelled to give effect to this contention.

In *Ranchordas* v. *Parvati Bai* (1), their Lordships of the Privy Council held that a gift for dharmarth is void for uncertainty because the object of the gift, i. e., dharmarth is such a vague object that the Courts are unable to define or to enforce it. This view was followed by the Chief Court of the Punjab in *Gurdit Singh* v. *Sher Singh* (2). I am bound to follow these authorities, though not without some hesitation. It seems to me that the true significance of the expression "dharmarth" as understood among the Hindus has not been fully taken into consideration. I am in this respect fortified by the view of the learned Judges of the Madras High Court in *Parthasarathy Pillai* v. *Thiruvengada Pillai* (3) and respectfully agree with the opinion expressed by Subrahmania Ayyar, J., as to the real meaning of dharmarth. If therefore it had been open to me to take the contrary view I would have followed the interpretation placed on the expression dharmarth by the Madras High Court in the case cited above and would have held that the bequest in this case is not void for uncertainty. But as I have already stated, I must in view of the judgment of the Privy Council hold that the bequest for dharmarth is void for uncertainty. The next contention of Mr. M. C. Mahajan is that if the bequest for dharmarth be held to be void for uncertainty the bequests for the dharmsala and Sanskrit education, which, it may incidentally be remarked were conceded individually to be perfectly valid bequests, must also be held to be void on account of their co-relation with the bequest for dharmarth.

This is how the bequest is expressed in the will which is in Urdu. *Un ko ikhtiar hoga, kih meri wafat ke baad jis tereh munasib samjhen rupaiya wa jaidad bala ko lala sahib mamduh dharmarth aur dharmsala maujuda aur Sanskrit widya par us rupai ko sarf kardenge,* i. e., they are authorized after my death to spend as they may think proper the money and property mentioned above for dharmarth and the existing dharmsala and education of Sanskrit. It seems to me that though the conjunctive word "and" is used, the three objects of the trust must be read disjunctively as it is left to the discretion of the trustees to apply the trust funds as they may think proper, i. e., it is left to the trustees to apply them to all the three objects or to one or two of them and in such proportion as they may desire.

Venkata Narasimha Rao v. *Subba Rao* (4), cited by counsel supports his contention. In that case the bequest was for the spread of Sanskrit language or that of the Hindu religion, or for both. It was held that the bequest for promoting the Hindu religion was an indefinite or vague object and was therefore void for uncertainty. The bequest for spreading of Sanskrit language however was held to be valid, but the whole of the bequest was held to be void for uncertainty because it was held one of the objects was void for uncertainty, the whole bequest was void and inoperative because there was no indication as to what proportion was to be devoted respectively to charitable purposes and to the advancement

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1. (1899) 23 Bom 725=1 Bom L R 607 (PC).
2. (1912) 78 P R 1912=14 I C 247.
3. (1907) 30 Mad 340=17 M L J 379.
4. AIR 1923 Mad 376=78 I C 991=46 Mad 300.

of education. It was observed that the testator having left the application of the fund to the discretion of the trustees, it would be open to that body to apply the fund for spreading the Hindu religion, leaving nothing for the encouragement of Sanskrit. For these reasons the whole bequest was held to be void and inexecutable. The leading case on the subject appears to be the judgment of the House of Lords in *Bulair* v. *Duncan* (5). In that case a bequest in somewhat similar terms as in the present case was held to be void for uncertainty though one of the objects mentioned was held to be valid. The following observation of the Lord Chencellor in that case sums up the conclusion of their Lordship:

> "It appears to me that it is impossible to deny that the words on which the main question turns, namely 'charitable or public' are used disjunctively. Under those circumstances, it appears to me that it would be equally the law of England, as it would be the law of Scotland, that the disposition here given to A. B , to determine what particular public purposes should be the objects of the trust is too vague and uncertain for any Court either in England or Scotland to administer."

The other noble Lords who sat on the Bench delivered separate, but concurring judgments which are to the same effect. Lord Davey expressed himself in these terms:

> "If therefore the words in the present case were merely 'charitable purposes' or were 'charitable and public purposes,' I think effect might be given to them, the words in the latter case being construed to mean charitable purposes of a public character. But, my Lords, the words we have here are 'charitable or public purposes,' and I think these words must be read disjunctively. It would therefore be in the power of the trustees to apply the whole of the fund for purposes which are not charitable though they might be of a public character. Now, my Lords, I am not aware of any case in which effect has been given in Scottish Courts to a trust for 'public purposes' and I find in the cases which have been referred to, indications that such a trust would not be considered valid."

Lord Brampton remarked:

> "It is not disputed that if the word 'charitable' had stood alone the devise would have been sufficiently definite and valid ; but it is urged by the respondents that the additions of the words 'or public purposes' renders the devise indefinite and void because of its vagueness. It seems to me that the addition of those words would confer upon the trustee the power at his option to set aside charitable purposes altogether, and apply the whole of the bequest solely to any one or more of innumerable public purpose comprised within an unlimited area. In short the intentions of the testatrix are on the face of the will and codicil left, so far as relates to the 'public purposes' to be benefited, in absolute uncertainty."

This view was affirmed in a subsequent decision of the House of Lords in *Houston* v. *Burns* (6). The words under consideration in that case were "for such public, benevolent or charitable purpose as they (the trustees) should think proper." It was held that these words were to be read disjunctively and therefore the whole bequest was void for uncertainty. Following these authorities I hold that in this case the bequest for purpose of dharmarth fails being void for uncertainty and consequently the bequests for the dharmsala and the teaching of Sanskrit also fail.

The result is that this appeal must be accepted and the decree of the trial Court modified and while the suit in respect of the dharmsala and the other properties attached thereto by virtue of the original gift must be decreed, it must be dismissed so far as the prayer in respect of properties which were held by Devi Dial as full owner or as mortgagee at the time of his death and which were not already subject of the trust in favour of the dharmsala concerned. It may be noted that nothing was said before us by the counsel for the plaintiffs in support of their appeal which therefore must be dismissed. I should have mentioned in the earlieer part of the judgment that the will had been duly proved by the executors in the Probate Court and probate had been granted to them and also that an appeal by the defendants against the grant of the probate had been dismissed by this Court. Consequently Mr. M. C. Mahajan did not repeat the objection of his client that the will had not been executed by the deceased or that he had not a disposing mind at the time of its execution. In the circumstances of the case I would leave the parties to bear their own costs of this litigation throughout.

Abdul Rashid, J.—I agree.

K.S. *Appeal accepted.*

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5. (1902) A C 37.

6. (1918) A C 337=87 L J P C 99=118 L T 462 =34 T L R 219=55 S C L R 208.

A. I. R. 1933 Lahore 836

ADDISON AND AGHA HAIDAR, JJ.

Jowand Singh—Appellant.

v.

Sawan Singh and *others*—Respondents.

First Appeal No. 501 of 1927, Decided on 27th June 1933.

Transfer of Property Act (1882), S. 68 — Mistake as to law in force does not make contract voidable — Subsequent mortgagee taking mortgage in his favour with knowledge of prior mortgage — Such mortgagee

will be postponed till period fixed in prior mortgage even if former's mortgage is registered first — S. 68 does not apply but Contract Act, S. 21 applies to such transaction— Contract Act (1872), S. 21 — Registration Act (1908), S. 50.

A mistake as to the law in force does not make a contract voidable. A man cannot go back upon what he has deliberately done merely because he alleges that he acted under a misapprehension of the law.

A subsequent mortgagee took a mortgage in his favour, knowing of a previous but unregistered mortgage in favour of another mortgagee. This transaction was done under the impression that even if the prior mortgagee was able to obtain registration of his deed, yet the deed in favour of the subsequent mortgagee would take precedence as it was first registered.

Held : that S. 21, Contract Act, applied to the case and that the subsequent mortgage must be postponed till the period fixed in the prior mortgage has expired or the mortgage otherwise came to an end :

Held further: that S. 68, T. P. Act, had no application as that section was applicable only to cases where the security was lost to the mortgagee otherwise than by his own fault : *7 I C* 251, *Dist.* [P 838 C 1, 2]

Hazara Singh and *Harbhajan Das* — for Appellant.

Mohammad Amin for *Jawahar Singh* —for Respondents.

Addison, J.—On 26th July 1922, Jowand Singh, son of Bhag Singh, mortgaged with possession 79 kanals 7 marlas of land to Santa Singh, for Rs. 4,000. No interest was chargeable, it being stipulated that the produce would be the only profit obtainable by the mortgagee. On 5th May 1924, he executed a fresh mortgage of the same land in favour of the same Santa Singh for Rs. 7,000. This mortgage could not be redeemed for 15 years. No interest was again chargeable. The consideration was the former mortgage debt of Rs. 4,000 while Rs. 2,000 were to be paid before the Sub-Registrar and the mortgagee was to give the mortgagor a bond for the remaining sum of Rs. 1,000. The parties went to have this deed registered, but the Sub-Registrar was away. They therefore went home without effecting registration. In the meantime, Sawan Singh, Vir Singh, Banta Singh and Didar Singh, sons of Hari Singh, obtained a mortgage-deed of the same land in their favour on 19th June 1924. This deed was registered the same day. This mortgage could not be redeemed for the period of 16 years. The consideration was Rs. 7,000, of which the sum of Rs. 4,000 was to repay the first mortgage of Santa Singh, while the mortgagees released other land of the mortgagor mortgaged with them for Rs. 2,200. Of the balance, Rs. 680 were paid before the Sub-Registrar and Rs. 120 were for the expenses of the deed. Santa Singh, however took steps to have his second mortgage-deed compulsorily registered and this was done on 25th September 1924. The mortgagor however did not take the sum of Rs. 2,000 before the Sub-Registrar or the bond for Rs. 1,000 which the mortgagor had to execute in his favour.

On 21st March 1925, Sawan Singh, etc., sued Jowand Singh and Santa Singh for possession of the land on the strength of their mortgage-deed, dated and registered 19th June 1924. This suit was dismissed on 16th February 1926 on the ground that the plaintiffs took the land on mortgage with full knowledge of the fact that the mortgagor had already executed the second mortgage-deed in favour of Santa Singh. On 25th August 1926 the same plaintiffs brought the suit under appeal against the mortgagor, Jowand Singh alone, for recovery of Rs. 5,250. In para. 3 of the plaint it was alleged that the defendant at the time of the registration of the deed in favour of the plaintiffs did not bring to the notice of the plaintiffs the fact that he had re-mortgaged the land to Santa Singh for a period of 15 years, and thus induced the plaintiffs by fraud to pay him the sum of Rs. 3,000. This sum is made up as follows: Rs. 2,200, the money due on a mortgage of other land together with Rs. 680 paid in cash and Rs. 120 expended on the deed. The plaintiffs accordingly sued for this sum of Rs. 3,000 with interest at 24 per cent per annum, thereon, amounting to Rs. 1,560, together with Rs. 788, the costs with which they were burdened in the first suit. These three sums total Rs. 5,348, but Rs. 98 were remitted and the claim limited to Rs. 5,250. Again, in para. 6 of the plaint it is said that the cause of action accrued to the plaintiffs when the sum of Rs. 3,000 was paid and from the time of the defendant's intentionally practising fraud by concealing the fact of the previous mortgage effected by him in favour of Santa Singh. The cause of action therefore was based on fraud.

The defendant pleaded that there was trouble about the registration of the deed dated 5th May 1924 in favour of Santa Singh and that the plaintiffs approached him then to mortgage the land to them for 16 years for Rupees 7,000. At that time the plaintiffs had full knowledge of the unregistered mortgage-deed dated 5th May 1924, in favour of Santa Singh and they took the mortgage in their favour knowing that there might be trouble if Santa Singh was able to get his deed registered. The trial Judge has held that the plaintiffs have failed to establish that the mortgagor kept the execution of the second mortgage in favour of Santa Singh secret and that in fact he did tell them. Nevertheless the plaintiffs took the mortgage-deed in their favour with full knowledge of the previous mortgage referred to as they were under the impression that their deed would take precedence if it was first registered. Under this impression they risked the chance of litigation.

In spite of this finding the Subordinate Judge, First Class, has decreed the claim of the plaintiffs for the sum of Rs. 3,000 together with interest thereon amounting to Rs. 390 and against this decision the defendant has appealed. On the record there is no question that the finding of the trial Judge is correct that the plaintiffs took the mortgage in their favour, knowing of the second mortgage in favour of Santa Singh and that they did so under the impression that, even if Santa Singh was able to obtain registration of his deed, their deed would take precedence as it was first registered. In the circumstances it seems to me that the plaintiffs were not entitled to a decree. Their suit was based wholly on fraud and they have completely failed to establish fraud. It is laid down in S. 21, Contract Act, that a contract is not voidable because it was caused by a mistake as to any law in force in British India. The plaintiffs were under the mistaken impression that their mortgage would take effect before that of Santa Singh because it was first registered, but that mistake as to the law in force in British India does not make their contract voidable. A man cannot go back upon what he has deliberately done merely because he alleges that he acted under a misapprehension of the law. No other general rule is possible without offering enormous temptations to fraud. The plaintiffs in the present case deliberately purchased litigation and are not entitled to any relief. Of course their mortgage remains to them though they will not be entitled to possession or to sue for redemption till the period fixed in Santa Singh's mortgage has expired, or the mortgage otherwise comes to an end.

Had the mortgagor failed to disclose the existence of the prior incumbrance then undoubtedly S. 68, T. P. Act, would have applied: see *Bhola Nath* v. *Hira Mohan* (1). But this is not the case here. It is clear from the wording of S. 68 that it is applicable only to cases where the security is lost to the mortgagee otherwise than by his own fault. With these remarks I would accept the appeal, and dismiss the suit, but, in the circumstances of the case would leave the parties to bear their own costs throughout.

Agha Haidar, J.—I agree.

K.S. *Appeal accepted.*

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1. (1910) 7 I C 251.

A. I. R. 1933 Lahore 838

ABDUL RASHID, J.

Shib Dhan and *others*—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1407 of 1932, Decided on 21st June 1933.

Evidence Act (1872), Ss. 30 and 114, Illus. (b)—No conviction can be based on uncorroborated testimony of approver even if he has no enmity against accused.

No conviction can be based on the uncorroborated testimony of an approver and this rule should not be departed from on the ground that the approver has no enmity against the accused and that as his statement is a very detailed one, it must be taken to be true in its entirety, and must be given effect to. [P 839 C 1, 2]

Shamair Chand—for Appellants.

A. R. Khosla—for the Crown.

Judgment. — Criminal Appeals Nos. 1407 of 1932, 71 of 1933 and 700 of 1933, will be disposed of by one judgment. It is beyond dispute that six dacoities were committed on Rohtak-Jhajjar road on the night between 31st October and 1st November 1930 by a big gang of dacoits. Three of these dacoities form the subject-matter of the trial out of which these appeals have arisen. Eleven persons, namely, Shib Dhan, Kalia, Pahlada, Beg Raj, Ude Singh, Jogi Ram, Sis Ram, Ranjit, Bhagwana, Ujagar and Daryao, were convicted under S. 395, Penal Code, by the Assistant Sessions Judge of Rohtak of having taken part in these three dacoities and were sentenced to seven years' rigorous imprisonment each on each count, the sentences to run concurrently. One member of the gang, Chet Ram, is still absconding and another Dip Chand has turned an approver.

The facts of the case have been given in great detail in the judgment of the learned Assistant Sessions Judge and it is unnecessary to repeat them at length. Briefly stated the case for the prosecution is that Dip Chand, approver, used to live with two of the accused Ranjit and Bhagwana whom he knew to be in the habit of committing thefts. One day he purchased a muzzle loading gun from a chance acquaintance whose name and address he did not know. When Ranjit and Bhagwana became aware of the possession of a gun by Dip Chand they suggested that he should accompany them on some dacoity. Dallan (P. W. 7), informed them that a bania of Dhandlan village was taking his ghee to Rohtak the next night. The approver, Ranjit and Bhagwana made up their minds to carry off the ghee, and it was Ranjit and Bhagwana who secured the presence of the other members of the gang. The members of the gang assembled at Kaluwala Jauhar and from there proceeded to Gopiwala Piao on the Rohtak-Jhajjar road where they reached at 11 p. m. The approver Dip Chand was carrying his gun, Ujagar was armed with a pharsa and the others had lathis. Just after the moon had set three carts were seen proceeding towards Rohtak and on being stopped the men in the carts said they were coming from Dhandlan. As one of the men was getting out of the cart with a view to resist, Dip Chand shot at him wounding him severely, and he died the naxt day as a result of his injuries. Thereafter five other dacoities were committed, but it is unnecessary to give their details, and it would suffice to set out the charges framed against the appellants. The charges ran as follows:

> "That you, on or about the night between 31st October and 1st November 1930 at Rohtak-Jhajjar road along with Dip Chand, approver, while armed with deadly weapons: (1) near Gopiwala Piao committed dacoity in the cart of Mohammad Shafi and robbed Mohammad Shafi of Rs. 65 and Ram Chander of one blanket and one turban; (2) near the Kothra of Dighal on the same road committed dacoity on the cart of Girdhari and pulled away a pair of earrings; and (3) near the Piao of Dighal committed dacoity on the camel cart of Ghani and robbed him of two dothis, causing injuries and thereby committed an offence punishable under S. 397, S. 395, I. P. C., and within the cognizance of the Court of Session."

The direct evidence in the case consists of the statement of the approver Dip Chand. It is a well established rule of practice, which has been followed consistently by this Court for a number of years, that no conviction can be based on the uncorroborated testimony of an approver. In this case the learned Assistant Sessions Judge has held that the testimony of the approver has been corroborated in the case of six of the convicts, while absolutely no corroboration of the approver's testimony is available in the cases of Pahlada, Beg Raj, Ude Singh, Jogi Ram and Ranjit. He has however convicted these five persons also on the ground that the approver has no enmity against these persons, and as his statement is a very detailed one, it must be taken to be true in its entirety, and must be given effect to. I however see no reason why the well-known rule of practice enunciated above should be departed from in this particular case. I therefore accept the appeal of Pahlada, Beg Raj, Ude Singh, Jogi Ram and Ranjit and acquit them. As the crime had remained untraced for about a year the identification parades at which the witnesses identified the different culprits were held in November and December 1931. I am satisfied by the evidence of Chaudhri Mohammad Anwar, Honorary Magistrate, (P. W. 41), Lala Basheshar Nath Honorary Magistrate, (P. W. 51), Pandit Mool Chand, Naib Tahsildar, (P. W. 55) and Sardar Anup Singh, Inspector of Police, (P. W. 28) that the different identification parades were regularly conducted, and that the prosecution witnesses had no opportunity of seeing the culprits at any time before the parades were held. The fact that a large number of witnesses failed to identify any of the dacoits and that at least five out of the eleven appellants were not identified by anyone shows that the identification parades were held after all the necessary precautions had been taken. (After examining the case of each of the remaining six accused separately, the judgment concluded). The sentence of seven years rigorous imprisonment on each of the appellants on each count does not seem to me excessive, as in this case the dacoities were committed on the highway and the learned Assistant Sessions Judge has ordered the sentences on each count to run concurrently. For the reasons given above I dismiss the appeals of Shib Dhan, Kalia, Daryao, Ujagar, Sis Ram and Bhagwana.

K.S. *Order accordingly.*

** A. I. R. 1933 Lahore 839

DALIP SINGH, J.

Pearey Lal-Debi Sahai—Appellants.

v.

Nanne Mal-Panna Lal—Respondents.

Misc. First Appeal No. 1258 of 1931, Decided on 10th July 1933.

*** * Civil P. C. (1908), O. 21, Rr. 5, 6 and 8 —Subordinate Judge of one district sending decree for execution directly to Subordinate Judge of another district— Latter Court has inherent lack of jurisdiction to execute decree—Even otherwise it cannot send decree to another Subordinate Court for execution.**

The mode of sending the decree for execution under O. 21, R. 5 is a necessary part of the conferring of jurisdiction and without the mode being carried out as prescribed in the statute no jurisdiction is conferred. Hence where a Subordinate Judge of one district sends a decree for execution directly to a Subordinate Judge of another district, the latter has no jurisdiction to execute the decree as there is an inherent lack of jurisdiction :

Furthermore even assuming that the latter Court has jurisdiction to execute the decree, it has no power to transfer the decree to a Subordinate Court for execution : 22 *Cal* 764 and *AIR* 1919 *Pat* 324, *Rel on*.[P 840 C 2; P 841 C 1]

J.N. Aggarwal—for Appellants.

M. C. Mahajan—for Respondents.

Judgment.—On 31st March 1922 the Senior Subordinate Judge, Gurgaon, passed a decree for Rs. 5,025 and costs in favour of the firm Pearey Lal-Devi Sahai against the firm Nanne Mal-Panna Lal. On 9th June 1922, the Senior Subordinate Judge, Gurgaon, transferred the decree in question to the Senior Subordinate Judge, Delhi, acting under the provisions of O. 21, R. 6 and omitting to notice that under O. 21, R. 5 the decree should have been sent to the District Judge, Delhi. The Senior Subordinate Judge, Delhi, passed an order on 12th June 1922 sending the decree to the Subordinate Judge, First Class, Delhi. Proceedings went on in the Court of the learned Subordinate Judge, First Class, and the execution petition was finally consigned to the record room. Other infructuous petitions for execution were taken up. On 16th March 1929, an execution petition was again presented and notice was issued to the judgment-debtors. The judgment-debtors took two objections: (1) that the application was barred by time and (2) also that it was irregular. Both these objections were rejected. On 19th May 1930, the decree-holders again brought the present application for execution and for the first time inter alia the judgment-debtor took objection to the jurisdiction of the Court to execute the decree. The decree-holders objected that the judgment-debtors could not take up the objection as to jurisdiction on account of their conduct or possibly on the ground of waiver. Accordingly the Court framed two preliminary issues: (1) whether the judgment-debtors are precluded from raising the objections as to the jurisdiction of this Court and (2) whether the Court has jurisdiction to hear the execution petition.

The Court held that there was an inherent lack of jurisdiction in the Court to execute the decree and hence decided both the issues in favour of the judgment-debtors. The decree-holders have come in appeal. Interesting points of law arise in this connexion. The arguments of the learned counsel for the appellants were that there was no inherent lack of jurisdiction at all, the Court of the Subordinate Judge, First Class, was competent to execute the decree; and the irregularity, if any, took place only in the mode in which the decree reached the learned Subordinate Judge. As this objection was not raised previously by the judgment-debtors they must be deemed to have waived it and to have submitted to the jurisdiction of the Court and it is too late for them to raise it now. In this connexion he cites *Kishen Lal* v. *Jai Lal* (1), *Gurdeo Singh* v. *Chandrika Singh* (2), *Ledgard* v. *Bull* (3) and *Vishnu Sakharam* v. *Krishnarao* (4), Mulla's Civil Procedure Code at p. 112 and *Jang Bahadur* v. *Bank of Upper India* (5), as well as *A. I. R.* 1933 *Lah*. 3. He contends that jurisdiction is really conferred by S. 38, Civil P. C., and lies in the Court which passes the decree or in the Court to which it is sent. The procedure by which it is to be sent to any Court is prescribed in O. 21, Rr. 5 and 6, etc., but this is merely procedure and does not confer jurisdiction.

In reply the learned counsel for the respondents relies on *Debi Dayal Sahu* v. *Moharaj Singh* (6) and *Kunja Behari Singh* v. *Tarapada Mitra* (7), a Division Bench of the Patna High Court. These rulings certainly support him. He contends that the old S. 223 is reproduced in the present Code as S. 38, S. 39 and O. 21, Rr. 3, 5 and 7. He contends that these authorities dispose of the matter and that the mode of sending is a necessary part of the conferring of jurisdiction and that without the mode being carried out as prescribed in the statute no jurisdiction is conferred. In the alternative he contends that even if juris-

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1. AIR 1919 Lah 27=52 I C 352=1 Lah 158.
2. (1909) 36 Cal 193=1 I C 913.
3. (1886) 9 All 191=13 I A 134 (PC).
4. (1887) 11 Bom 153.
5. AIR 1928 P C 162=109 I C 417=55 I A 227=3 Luck 314 (PC).
6. (1895) 22 Cal 764.
7. AIR 1919 Pat 324=49 I C 374=4 Pat L J 49

diction could be conferred on the Senior Subordinate Judge, Delhi, to whom the decree was transferred, that learned Judge had no power to further transfer the decree to the Subordinate Judge, First Class, Delhi, because under O. 21, R. 8 a special power is conferred upon the District Court to transfer decrees sent to it for execution, but no such power is conferred on the Senior Subordinate Judge or on other Courts. The points raised are by no means free from difficulty. S. 223 of the old Code is identical with S. 38 of the new Code so far as the para, is concerned except that in S. 223 after the words "sent" are added the words "for execution under the provisions hereinafter contained." The learned counsel for the respondents contends that the words "hereinafter contained" were mere surplusage and were omitted therefore in the present Code. The learned counsel for the appellant contends that these words were important because they limited the jurisdiction of the Code to which a decree was sent for execution under the specified provisions whereas now these words have been omitted from S. 38 and transferred to the schedule thus clearly showing the intention of the Legislature to confer jurisdiction only by S. 38 and merely the procedure for transfer under O. 21, R. 5. There is great force in the arguments of the learned counsel for the appellants and had the matter been res-integra I might have held in their favour. It is true that *Debi Dayal* v. *Mohraj Singh* (6) is a ruling under the old Code, but *Kunj Behari Singh* v. *Tarapada Mitra* (7) is a ruling under the new Code and though this distinction was not argued presumably before the learned Judges who decided that case still the weight of authority is against the contention of the learned counsel for the appellants.

The second contention raised by the learned counsel for the respondents also has force. Assuming that under the new Code jurisdiction is conferred by the sending of the decree to the new Court by Court which passed the decree still no right of transfer of that decree is conferred on such a Court except under the provisions of O. 21, R. 8. The learned counsel for the appellants pointed out that the Senior Subordinate Judge had jurisdiction under S. 37, Punjab Courts Act, read with S. 24, Civil P. C., to transfer the case to some other Court. If this argument really had force it would follow that O. 21, R. 8 was mere surplusage, for the District Court admittedly would have the same jurisdiction under S. 24 that it has under O. 21, R. 8. I cannot hold that a rule of an order is a pure surplusage and I therefore must repel this contention of the learned counsel for the appellants. I therefore dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 841

HARRISON AND AGHA HAIDAR, JJ.

(Firm) Nand Ram-Atma Ram—Defendant—Appellants.

v.

(Firm) Gokal Chand-Jagan Nath — Plaintiff—Respondents.

First Appeal No. 1904 of 1926, Decided on 22nd February 1933, from decree of Senior Sub-Judge, Sialkot, D/-31st May 1926.

(a) **Interest—Agent to collect amounts—No contract to pay interest on such amount—Interest cannot be awarded by way of damages.**

Defendant, a commission agent was to collect amount on behalf of plaintiff and pay them over. There was no contract to pay interest on such amounts. Plaintiff claimed amount and interest by way of damages:

Held: that in a case of this sort interest could only be allowed if a contract, express or implied, had been made and that interest by way of damages could not be successfully claimed: 136 *I C* 719, *Rel on.* [P 842 C 1]

(b) **Contract Act (1872), S. 212—Agent collecting as much as possible from merchant and giving credit for balance—Subsequent insolvency of merchant—Agent is not liable.**

If a man's credit and finances are in a thoroughly bad state and he has no money to pay his debt which it is impossible to realise from him, all that can be done is to take from him what he has and to hope for the best.

A commission agent who was authorized to realise amounts on behalf of his principal collected as much as he could from a merchant who had dealings with his principal and gave credit for the balance. The merchant became an insolvent subsequently:

under the circumstances the agent was not negligent but that he had acted as prudently and wisely on his principal's behalf as he would have done in his own case. [P 843 C 2]

Hargopal and *Sunder Das*—for Appellants.

Badri Das, *Mool Chand* and *Ganga Ram*—for Respondents.

Harrison, J. — The plaintiff, being a Sialkot firm, brings this suit against the defendant firm of commission agents, doing business at Calcutta, claiming rendition of accounts and a decree for whatever may be found due and pays court-fee on the tentative amount of Rs. 1,100 and this in spite of the fact that he knew full well that the defendant admitted his liability for over Rs. 4,000 and had actually offered him the money. A decree has been given for Rs. 13,278-2-9 with future interest at 6 per cent. On this the defendant firm has appealed urging various grounds, but has only pressed three of them. The first ground taken was ground No. 4 where he claims demurrage, weight insurance and loading charges. Out of these he drops demurrage and weight insurance and merely urges that it must have cost him something to load goods which he did actually send to Calcutta and he points to certain evidence, which is so vague as to be of no value at all. He has failed to establish that he is entitled to anything under this head of loading charges. The second point is as to the interest charged, this having been allowed at the rate of 1 per cent until the institution of the suit. The third ground deals with the sum of Rupees 5,787-7-0 which has been allowed to the plaintiff by the trial Court on account of moneys realizable from certain Calcutta firms which, it is urged and found, the defendant negligently failed to collect and credit to the plaintiff.

Taking the point of interest first, the finding of the trial Court is that it is conclusively proved that no rate of interest was agreed upon between the parties at the start, otherwise defendants would have demanded interest along with the sums claimed. It further found that it was also proved that the prevalent rate of interest in Calcutta was Re. 1 or Rs. 1-4-0, and interest at the rate of Re. 1 per cent was therefore allowed. It has been clearly laid down in a recent authority, *Sham Singh* v. *Nanak* (1), that in a case of this sort interest can only be allowed if a contract, express or implied, has been made and that interest by way of damages cannot be successfully claimed. Now, there was clearly no expess contract, and as counsel has pointed out there is no evidence from which it can be inferred that there was any implied contract. On the contrary the letters on both sides show that while there were threats of charging interest and references were made to the prevailing rate, it was never stated that there had been any sort of agreement that interest would be charged. It appears to me that the trial Court has awarded this interest by way of damages and this is not sound in law. I would find therefore that there was no contract, express or implied, between the parties either at the beginning of the dealings or at a later stage, and that the only interest which can be allowed is the amount which the defendant has admitted. This is Rs. 623. In arguing the appeal Mr. Badri Das has pointed out that there is a miscalculation and that the amount of interest admitted should have been Rs. 681-8-0 more. This is admitted by Mr. Sundar Das and the total amount of interest therefore on the sum admittedly due from the defendant to the plaintiff is Rupees 1,304-8-0 and the decree will be altered to the extent of substituting this figure for the amount allowed. This will only involve the reduction of the defendant's liability by Rs. 328-1-0. Deducting this from the whole amount of interest awarded to the plaintiff of Rs. 2,822-13-9 for a period of two years and three months before suit, the amount comes to Rs. 2,494-12-9. At the same time Rs. 1,304-8-0 will have to be added, giving the net result of a deduction of Rs. 1,190-4-9.

This brings us to the main facts and points in the case. The plaintiff and the defendant are respectively client and commission agents, the defendant buying on the plaintiff's behalf sugar and gunny bags, that is to say, the present account was limited to those two items. Delivery was given for actual gunny bags which were sent to Sialkot and there was a delivery of a portion of the sugar not to the plaintiff himself but to his subsequent purchasers. The defendant admittedly bought forward on the plaintiff's behalf 262½ tons of sugar of the July, August and September shipments and the letter giving the details of the purchases as well as subsequent sales is to be found at p. 127 of the paper-book. Various quantities were bought and when the price rose the exact quantity purchased was subsequently sold at the order of the plaintiff. In closing the account of the old business it was kept open, the terms of the contract of sale being that the due date was to be six days after the arrival of the various shipments. The deal might be closed at any time before this or might be allowed to remain open until that date was reached. The account was settled as regards July shipment. August and September shipments arrived together sometime in November. The parties have been unable to tell us the exact date, nor is it of any particular importance, but we do not know what the due date of these two shipments was. The position therefore was this: that the profit of

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1. (1932) 136 I C 719.

the plaintiff was definitely fixed, the only difference, which the waiting could make in the closing of the account on one date or another, being in the figures which would have to be realized on the calculation of differences from the sellers and the purchasers respectively. If the price rose, the larger sum will be payable by the sellers and the smaller by the purchasers and vice versa. On the 18th October the transactions with Messrs. Chatter Bhuj Dossa were closed by the defendant, his reason for doing so being that he believed him to be in serious difficulties and by taking this action he hoped to realize at once, at any rate, a portion of the sum due and he also knew that if the rates went more definitely against this firm, there might be a danger of their not being able to recover anything. He purchased 75 tons from this firm and out of the amount due on the calculation of the differences, namely, Rs. 8,670 he succeeded in realising Rs. 4,020-12-3. This was the proportionate allotment to the plaintiff's account, the total amount due to the broker on behalf his client from this firm being Rs. 23,332. The details are given at p. 103 of the printed book in the evidence of Tikam Singh, who was at one time a member of the defendant firm. As showing the activities of the defendant I may quote the following extract from the witness's statement:

> "Rupees 23,332-8-0 was the total recoverable from this firm. Rs. 1,100 were recovered from him by cheque, Rs. 1,232-8-0 by cash, Rs. 3,000 by Atma Ram, defendant. Hundis were taken for Rs. 18,000 without interest. This account was closed and a new account started. Rs. 764-15-3 were received in cash in 1921 against the hundi of Rs. 18,000. In lieu of the prior hundis three hundis were taken for Rs. 7,500 on 6th October 1920 and for Rs. 5,000 on 10th October 1920, the details of which are given in the kharar bahi."

The accounts throughout have been made unintelligible by the practice of mixing up the dates of the English calendar with the Hindi and the account put in being partly in English and partly in Sindhi. Similarly there were defaults by two other firms. Kala Ram-Kanhaya Lal owed Rs. 1,274-6-6 on their account on behalf of the plaintiff. A suit was brought against them and a decree was obtained, but no money was realized. The same witness Tikam Singh at p. 106 tells us that the defendant financed the litigation, but the solicitor's bill had not yet been paid: Rs. 520-10-0 were still due from this firm. The third item is Rs. 1,275 due from firm Diwan Chand-Amar Chand. No decree was obtained against this firm. The same witness examined on interrogatories (p. 83 of the paper-book) states that this firm had closed their shop and were running away for fear of their creditors when he succeeded in obtaining Rs. 3,500 in cash in liquidation of the amount due. The balance still stands at Rs. 1,275 due from this firm. Now the finding of the learned Senior Subordinate Judge is that the defendant is liable, in spite of what he did, because he failed to realize the amount due from this defaulting firm and to pay it to the plaintiff. He says:

> "Taking each item in turn I am of opinion that the defendant is liable to the plaintiff for Rupees 4,649-3-9 still shown due from Chatter Bhuj Dossa. It was the duty of the defendant not only to debit Chatter Bhuj Dossa with this amount but also to recover the amount. Defendant recovered Rs. 1,100 from him in December 1920, Rs. 1,232-8-0 on 23rd December 1920, Rs. 3,000 on 22nd December 1920. Hundis for Rs. 18,000 were taken from him in defendant's favour on 11th December 1920. When an agent gives credit to a merchant instead of recovering money from him, he does so at his own risk and all the more so when the condition of the person to whom credit is given is shaky. This man was declared an insolvent on 8th May 1922. It does not appear when the act of insolvency was committed on which he was declared an insolvent on the application of his creditor. There was an interval of one year and seven months between the time of taking the hundis and his being declared an insolvent. The only payment made by him after these hundis were taken was of Rs. 764-15-3 on 26th March 1921. Thereafter fresh hundis were taken. Long credit was therefore given by defendant to a customer with shaky credit. In such circumstances if loss accrues to the principal by the insolvency of the debtor the agent is clearly liable."

With this proposition I cannot agree. All that the defendant had to do was to exercise that amount of care and to show energy in getting what he could in making the best bargain possible under the circumstances. If a man's credit and finances are in a thoroughly bad state and he has no money to pay his debt which it is impossible to realise from him, all that can be done is to take from him what he has and to hope for the best. Similarly in the cases of the other two defaulting dealers, it was for the plaintiff to show definitely that there has been negligence, and on the facts as found by the learned Senior Subordinate Judge it appears to me to be established that the defendant did all that was reasonably possible and that is no default of his that the realizations were not larger than they were. If under these circumstances the defendant in the position of this firm of commission agents might be held to be liable because of the failure of the firms with which he dealt on the Calcutta market, business would come to a complete stand-still. All that can be expected is that the commission agents should act as prudently and wisely in arranging on their clients' behalf as they would do when acting on their own behalf and it has not been shown, in my opinion, that he failed in any way to exercise due prudence and to show reasonable business acumen. I am therefore of opinion that the finding of the Senior Subordinate Judge on this point must be reversed.

But before doing so it is necessary to examine another proposition put forward by counsel for the plaintiff-respondent. This is that negligence was shown in the first place by the defendant firm failing to communicate with him before closing the account. Had they done so, he urges, he would have kept the account open until due date and the result of this would have been that the amount recoverable from the firm which eventually went to insolvency would have been very much smaller and the amount recoverable from other solvent firms would have been very larger and he would have benefited as a result. Now to foretell the future is not given to mortal men even if they are commission agents or dealers on the commodity market. It is easy to judge after the event, but is quite impossible to anticipate what the price would be on due date and what the relative position therefore of the purchasers and sellers will be shown to be. The commission agent had to act on the information available and it appears that as soon as he heard that this firm Chatter Bhuj Dossa was in difficulty, he closed the account in the hope of realising something. Counsel urges on behalf of the plaintiff that though he could not know the condition of the Calcutta market and the reputation of the local dealers, he could have gone himself to Calcutta or could have sent a man. Taking everything into account it appears to me that the defendant did his best and that possibly by acting that he did he made certain of saving something from the wreck. I would therefore hold that it has not been shown that there was any negligence on the part of the defendant in the action he took on behalf of his client and that he is not liable for the losses incurred by the failure of the firm Chatter Bhuj Dossa and the impossibility of recovering more than had been recovered from the other two defaulting firms. (The rest of the judgment is not necessary for purposes of this report).

Agha Haidar, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 844

ADDISON AND AGHA HAIDAR, JJ.

Ghulam Ahmad—Plaintiff—Appellant.

v.

Ghulam Farid and *another* — Defendants—Respondents.

Second Appeal, No. 1529 of 1932, Decided on 12th July 1933.

(a) Custom (Punjab)—Mohyal Brahmins — Conversion to Muhammadanism—Subsequent notification declaring all persons of this tribe to be members of agricultural tribe — Such converts come within notification — Punjab Alienation of Land Act (13 of 1900), S. 6.

A family of Mohyal Brahmins were converted to Muhammadanism. Subsequent to this a notification was issued by which all persons belonging to the Mohyal Brahmin tribe were declared to be members of an agricultural tribe :

Held : that the above family, though they were converts to Muhammadanism, were still Mohyal Brahmins and that they came within the notification, and that S. 6, Punjab Alienation of Land Act, applied to them. [P 845 C 1]

(b) Punjab Alienation of Land Act (13 of 1900), Ss. 6 and 9 — Mortgage in contravention of S. 6 is not absolutely illegal but can be revised by Deputy Commissioner.

If a member of an agricultural tribe makes a mortgage on his land in any manner or form not permitted by or under the Act, the mortgage is not absolutely illegal and the Deputy Commissioner has authority to revise and alter the terms of the mortgage, so as to bring it in accordance with such form of mortgage permitted by or under the Act as the mortgagee appears to him to be equitably entitled to claim. [P 845 C 1]

Chand Diwan—for Appellant.

Ghulam Mohy-ud-Din — for Respondents.

Addison, J.—Ghulam Farid, minor, defendant 1, is the son of Burhan Din. Burhan Din on 10th January 1919, mortgaged with possession certain land to the plaintiff, Ghulam Ahmad. The plaintiff mortgagee has come to Court and sued for possession alleging dispossession some one and a half years before suit by the minor, defendant 1 and his tenant defendant 2. Defendant 1 pleaded that the mortgage was void ab initio as he was a member of an agricultural tribe. This view has found favour with the Courts below and the suit has been dismissed. This second appeal is directed against that decision. The only question decided by the lower appellate Court is that the minor defendant is a member of the tribe of Mohyal Brahmins and that as all persons belonging to the tribe of Mohyal Brahmins have been declared to be members of an agricultural tribe an unlimited usufructuary mortgage in favour of a person not belonging to the same group is barred by the provisions of the Punjab Alienation of Land Act. The facts are that the ancestors of the minor defendant were Mohyal Brahmins, but they were converted to Muhammadanism long before the Punjab Alienation of Land Act came into force. The argument of the appellant's counsel was that the fact of their conversion caused them to cease to belong to the tribe of Mohyal Brahmins and that the minor defendant therefore did not come within the notification No. 2669-S, dated 1st October 1909. I do not think that there is any foundation for this argument. The case of Rajputs is analogous. Rajputs are Hindus, but in the Punjab many became Mussalmans before the Punjab Alienation of Land Act came into force. Yet when a notification is issued to the effect that in a particular district all persons belonging to the tribe of Rajputs are members of an agricultural tribe this includes Mahomedan Rajputs as well though they were converted to Islam before the Act came into force. There appears to me to be no distinction in principle between Rajputs and Mohyal Brahmins. Defendant 1 still belongs to the tribe of Mohyal Brahmins though he is a Mussalman. He therefore comes within the notification and the mortgage is not in accordance with the terms of the Punjab Alienation of Land Act. In this respect I am in agreement with the Courts below.

This however does not dispose of the appeal. The mortgage is not absolutely illegal. It is against the provisions of S. 6, Punjab Alienation of Land Act, but under S. 9, if a member of an agricultural tribe makes a mortgage of his land in any manner or form not permitted by or under this Act, the Deputy Commissioner has authority to revise and alter the terms of the mortgage, so as to bring it in accordance with such form of mortgage permitted by or under this Act as the mortgagee appears to him to be equitably entitled to claim. The mortgage in question can thus be made by the Deputy Commissioner into a mortgage for a limited number of years not exceeding twenty. It will therefore be the best course if the District Judge first determines how long the mortgagee has been in possession and over what areas and then sends the mortgage to the Deputy Commissioner to be revised and altered under the provisions of S. 9, Punjab Alienation of Land Act. I have no doubt that the Deputy Commissioner will allow both parties to be present before him when he is revising it. When his decision is communicated to the District Judge, the District Judge will then grant a decree for possession as mortgagee for the remaining period, if any, fixed by the Deputy Commissioner.

It was also pointed out to us that the only point decided by the District Judge was the question whether the minor defendant was a member of an agricultural tribe and that it might be possible for the respondents to defeat the appeal before the District Judge on other grounds. This may be so and the District Judge must therefore give an opportunity to the parties further to argue the appeal on any other point that can be taken. If he dismisses the appeal on other grounds then it will not be necessary to send the mortgage to the Deputy Commissioner as indicated above, but if he finds that the appeal cannot be defeated on any other ground he would have to send the mortgage to the Deputy Commissioner and follow the procedure already indicated above. I would therefore accept the appeal in the above sense and send the case back to the District Judge to be disposed of in accordance with law, though my decision is that the finding of the learned District Judge on the only issue he decided is correct. Parties will bear their own costs in this Court.

Agha Haidar, J.—I agree generally.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 845

SHADI LAL, C. J. AND ABDUL QADIR, J.

Mohammad Fazal and *others*—Plaintiffs—Appellants.

v.

Mohammad Salam Ullah and *others*—Defendants—Respondents.

Second Appeal No. 1093 of 1928, Decided on 30th May 1933, from decree of Dist. Judge, Jhelum, D/- 14th January 1928.

(a) Punjab Limitation (Custom) Act (1 of 1920), S. 7 (a)—Limitation for possession of ancestral property which has been alienated by challenging alienation is three years from date on which right to sue accrues.

The limitation allowed by the Punjab Limitation (Custom) Act 1 of 1920, for the possession of ancestral immovable property, which has been alienated, and the alienation of which is challenged as not binding on the plaintiff according to custom, is three years from the date on which the right to sue accrues. [P 846 C 2 ; P 847 C 1]

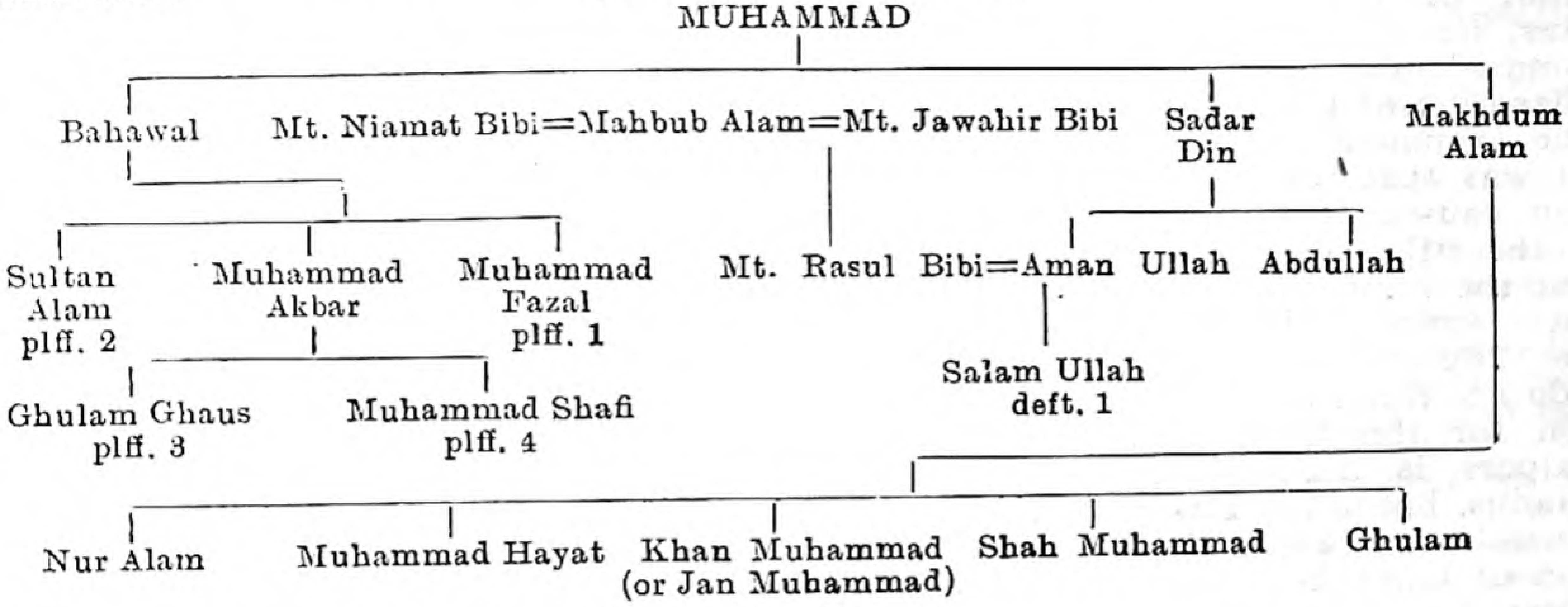
(b) **Practice—New plea cannot be taken in second appeal.**

Party cannot be allowed in second appeal to take advantage of a new plea which he has not raised before. [P 847 C 2]

Asadullah Khan for *Zafrullah Khan* and *Achhru Ram*—**for Appellants.**

Mehr Chand Mahajan—**for Respondents.**

Abdul Qadir, J.—The relationship between the plaintiffs and the defendants will be illustrated by a pedigree table, which is given at the beginning of the judgment of th etrial Court, and may be reproduced for facility of reference:



The property involved in the suit, out of which this second appeal has arisen, was one-third share of 1877 kanals 5 marlas of land in two villages and the same share out of two houses in another village, situated in Kharian Tahsil of Gujrat District. It belonged to Mahbub Alam, who died in 1886 leaving behind him three brothers, Bahawal or Bahawal Bakhsh, Sadar Din and Makhdum Alam, and two widows, Mt. Jawahir Bibi and Mt. Niamat Bibi. On his death, the land was mutated in the names of his widows. They gifted the property in favour of Aman Ullah, who was the nephew and son-in-law of the deceased, and mutation in his name was sanctioned on 25th November 1886. The descendants of Makhdum Alam sued for a declaration that the gift by the widows in favour of Aman Ullah would not affect their reversionary rights and obtained a declaratory decree setting aside the gift of 1890. Mt. Jawahir Bibi, one of the widows, died in 1905, and the descendants of Makhdum Alam then brought a suit for possession of that property, but it was dismissed because it was held that they could not sue in the lifetime of the second widow, Mt. Niamat Bibi. The latter also died in 1920, and a third suit was brought by the descendants of Makhdum Alam for their share of the property of Mahbub Alam, deceased, and it was decreed in their favour.

The present plaintiffs are descendants of Bahawal, brother of Mahbub Alam, and claim one-third of the property left by him. The principal defendant is Mohammad Salam Ullah, son of Aman Ullah. He opposes the claim of the descendants of Bahawal and pleads that the property had been mutated in favour of his father who was the khanadamad of Mahbub Alam and that Bahawal had consented to that mutation and the plaintiffs are therefore estopped from bringing this suit. He also pleaded that the property is not ancestral *qua* the plaintiffs and that the suit is barred by time

Several issues were framed of which the following three are material for the purposes of the appeal before us: (1) Is the suit within limitation ? (2) Are the plaintiffs estopped from suing by their acts and conduct or on account of the alleged consent of Bahawal Bakhsh ? (3) Are the lands at Bhola and Pohla villages ancestral *qua* the plaintiffs ? The trial Court dismissed the suit as barred by time, holding that the right to sue accrued on the death of Mt. Niamat Bibi, in July 1920, and the suit was lodged on 25th February 1926, and was clearly time-barred, as the limitation allowed by the Punjab Limitation (Custom) Act, 1 of 1920, for the possession of ancestral immovable property, which has been alienated, and the alienation of which is challenged as not binding on the plaintiff according to custom, is three years from the date on which the right to sue accrued. No finding was given on issue 3, as to the property being ancestral, but on issue 2 a finding was given in favour of the plaintiffs. The plaintiffs appealed. The only question raised in appeal before the learned District Judge was that of limitation. He agreed with the trial Court in holding that the suit should have been brought within three years of the death of Mt. Niamat Bibi and was not within time. He therefore dismissed the appeal with costs. The plaintiffs have now preferred this second appeal, which has been argued before us by Mr. Achhru Ram and Mr. Mehr Chand Mahajan has argued the case for the respondents.

As has been already noticed, the Court of first instance gave no finding as to the character of the property and in the present litigation it has not been decided whether the property is ancestral *qua* the plaintiffs or is self-acquired. It may be noted that in the previous litigation, in which the descendants of Makhdum Alam succeeded in securing a decree in their favour for their one-third share of Mahbub Alam's property, it was held that the property was self-acquired. Before us Mr. Achhru Ram has practically conceded that if the property was ancestral, Act 1 of 1920, applies to the case and the suit of his clients appears to have been rightly thrown out as barred by time. He contends however that the nature of the property has not been determined and suggests that the question should be gone into. It is pointed out however by Mr. Mehr Chand Mahajan, that the plaintiffs having definitely taken their stand on the ancestral nature of the property should not be allowed in second appeal to shift their ground and it must be held that the suit as brought is time-barred. He invites attention to para. 8 of the plaint, which describes the property in dispute as ancestral and to the statement of Muhammad Fazal who clearly stated that the lands as well as the houses in suit were ancestral property. The plaintiffs never accepted the proposition, on which the defendants rely, that the property was self-acquired and no such question was raised by them in the grounds of appeal, which they filed in this Court. He also adds that even in case of self-acquired property the suit of the plaintiffs cannot succeed as the property in dispute is in the possession of Salam Ullah, who is the son of the deceased's daughter and in the case of self-acquired property he is entitled to succeed in preference to collaterals, unless there is a special custom to the contrary, but no such special custom has been pleaded by the plaintiffs at any stage.

In my opinion, the contention of Mr. Mehr Chand Mahajan should prevail. The plaintiffs having all along maintained that the property was ancestral cannot in second appeal be allowed to take advantage of a plea which has not been raised by them before. Moreover, as has been mentioned above, even that plea cannot help them. I hold therefore that the suit has been rightly dismissed as barred by time by the Courts below and I would dismiss this appeal with costs.

Shadi Lal, C. J.—I concur.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 847

TEK CHAND, J.

Kashi Nath and *others*—Defendants — Appellants.

v.

Ram Jiwan and *others*— Plaintiffs and Defendants—Respondents.

Second Appeal No. 974 of 1932, Decided on 28th June 1933, from decree of Dist. Judge, Delhi, D/- 27th May 1932.

(a) Easements Act (1882), S. 18 — Right to open apertures in wall is subject to invasion of right of privacy of neighbour.

Every owner has got the right to open apertures in his own wall and unless by doing so he invades the privacy or any other pre-existing and well-established right vested in his neighbour, the latter cannot force him to close the apertures. The neighbour's remedy is to build on his own land or otherwise obstruct the apertures. [P 848 C 1]

(b) Specific Relief Act (1877), S. 52 — Defendant making aperture in his wall facing site of plaintiff—Plaintiff refused permission by Municipal Committee to raise wall obstructing aperture — Suit for injunction for closing aperture—Proper relief is pecuniary compensation and not injunction—Easements Act (1882), S. 18.

Defendant opened door and windows on his wall facing plaintiff's site. Plaintiff was refused permission by the Municipal Committee to construct a wall in front of the aperture. Thereupon plaintiff filed a suit for injunction for closing the door and windows. Injunction was granted by the lower appellate Court on the ground that the Municipal Committee had refused permission to build a wall:

Held: that that was not a legal ground for granting the injunction, that injunction was not the proper relief but that the threatened injury to plaintiff could be amply redressed by grant of pecuniary compensation. [P 848 C 2]

Nawal Kishore and *Kashi Nath* — for Appellants.

Hem Raj Mahajan for *Ram Jiwan*— for Respondents.

Judgment.—The plaintiffs, claiming to be co-owners with defendants 4 to 7 of the site coloured purple in the plan Ex. P-1, brought a suit against defendants 1 to 3 for a mandatory injunction for closing the door marked *A* and certain windows which they had opened in the southern wall of their own house. Defendants 1 to 3 contested the claim and pleaded that the site in question was a public street vested in the Municipal Committee and that the plaintiffs had no right to object to their opening the door and the windows in their own wall. They also pleaded that, having regard to the situation of the site and the other circumstances, it was not a fit case for the issue of an injunction, even if the site were held to be the property of the plaintiffs and defendants 4 to 7. The trial Judge found that the plaintiffs had failed to prove that the site was owned by them and defendants 4 to 7, and dismissed the suit. On appeal, the learned District Judge has reversed the finding, holding that the site had been proved to be the property of the plaintiffs and defendants 4 to 7 and, having regard to the peculiar circumstances of the case, he has issued an injunction to defendants 1 to 3 for closing the door marked *A* and the windows *B*, *C*, *D* and *E*. Defendants 1 to 3 have come up to this Court on second appeal and, on their behalf, Mr. Nawal Kishore has made various ingenious attempts to get over the finding of fact recorded in clear terms by the learned District Judge that the site in question was not a public street, but belonged to the plaintiffs and defendants 4 to 7. This finding was given on a consideration of the entire evidence on the record and, after giving due weight to the arguments of Mr. Nawal Kishore, I can see no ground justifying interference on second appeal.

The main question for consideration before me therefore is whether the learned Judge was right in issuing the mandatory injunction to defendants 1 to 3 in the form which he has done. It is conceded that every owner has got the right to open apertures in his own wall and unless by doing so he invades the privacy or any other pre-existing and well-established right vested in his neighbour, the latter cannot force him to close the apertures. The neighbour's remedy is to build on his own land or otherwise obstruct the apertures. The learned District Judge was fully aware of this rule, but he thought that an exception should be made in this case, as it was stated that the Municipal Committee had refused permission to the plaintiffs to construct the wall in front of the apertures. In my opinion this is not a legal ground for granting the injunction in the form in which the learned Judge has done it. In the plaint, the plaintiffs had stated that defendants 1 to 3 passed through the door over the site in question and it was evidently intended that the defendants should be directed not to do so. The learned District Judge has not discussed this aspect of the case, but the plaintiffs' learned counsel has raised the question before me. In my opinion the plaintiffs have a genuine grievance on the point. Having regard to the situation of the site and the other circumstances I am however of opinion that injunction is not the proper relief, and that the threatened injury to the plaintiffs and the ohter co-owners can be amply redressed by the grant of pecuniary compensation. Both counsel stated before me that it was not desirable to remand the case for the purpose of getting a finding from the learned District Judge as to the amount of the compensation and they suggested that after hearing them I should fix the amount myself. Accordingly I have heard counsel at length. After giving due weight to their submissions, I am of opinion that the ends of justice will be met by ordering defendants 1 to 3 to pay Rs. 550 to the owners of the site as follows: Rs. 450 to the plaintiffs; Rs. 50 to Jugti Ram, defendant 4, and Rs. 50 to Munshi Ram and Jawahara, defendants.

The plaint shows that the plaintiffs are the real sufferers by this infringement and naturally they should be given higher compensation than the co-owners whose houses are situate at a distance from the door and the windows in question, and the injuries to whose property is of a much less serious character. No compensation is to be allowed to Dwarka Das alias Pali Ram, defendant, who has admittedly sold his right to Ram Lachhman, son of defendant 1 on whose behalf his brother Kashi Nath Aggarwal, defendant 2, who is present in person before me, has made a statement that he does not claim any compensation. On payment of this compensation defendants 1 to 3 shall have the right to keep the door and the windows open and to pass through the door over the site in question. I accept the appeal, set aside the decree of the learned District Judge and in lieu thereof pass a decree against defendants 1 to 3 for payment of Rs. 450 to the plaintiffs, Rs. 50 to Jugti Ram, defendant 4 and Rs. 50 to Munshi Ram and Jawahara, defendants. Parties shall bear their own costs of this appeal, but the order of the learned District Judge as to costs in the Courts below shall stand.

K.S. *Appeal accepted.*

* A. I. R. 1933 Lahore 849 (1)

TEK CHAND, J.

Chhajju and *another* — Defendants — Appellants.

v.

Nanak Bakhsh— Plaintiffs — Respondents.

Misc. Second Appeal No. 283 of 1933, Decided on 19th June 1933, from order of Dist. Judge, Hoshiarpur, D/- 5th December 1932.

*** Limitation Act (1908), Art. 75 — Instalment bond giving promisee option to sue for whole amount in default of any one instalment—Right to realize amount by instalment is not lost by failure to exercise option.**

A bond was payable in six annual instalments. In default of any one instalment, promisee had the option to realize the entire amount at once. The first two instalments were paid; but the third was not paid. The promisee filed a suit when all the instalments were due for the fourth, fifth and sixth and no suit was filed in respect of third instalment:

Held: that the bond gave the plaintiff the option of taking advantage of the forfeiture clause, and his right to realize the amount by instalments as originally agreed upon could not be lost by his failure to exercise his option and that the suit was not time-barred: *A I R* 1930 *Lah* 214, *Rel on.* [P 849 C 2]

Fakir Chand—for Appellants.

Judgment.—On 25th February 1925 Chhajju, defendant 1, for himself and as guardian of his nephew, Dharman, defendant 2, executed a bond for Rs. 900 in favour of the plaintiff. It was agreed that the principal sum was not to carry any interest, but that it would be repaid in six annual instalments of Rs. 150 each, beginning with Jeth, Sambat 1982. It was also stipulated that if default was made in payment of any instalment, interest shall be paid at the rate of one per cent. per mensem. and the creditor shall, if he so desired, have the option of realising the entire amount at once. The defendants paid the first two instalments on the due dates, i. e., in Jeth Sambat 1982 and Jeth Sambat 1983. The third instalment, which was payable in Jeth 1984 was admittedly not paid and no suit in respect of this instalment has been filed.

On 13th June 1931 the plaintiff sued for recovery of the amount due on the remaining three instalments, which had become due in Sambat 1985, Sambat 1986 and Sambat 1987, together with interest due thereon. The defendants pleaded limitation. This plea found favour with the trial Judge and he dismissed the suit. On appeal the learned District Judge has held the suit to be within time, and has remanded the case for decision of the other issues. Before me the point of limitation has been raised again, but after hearing Mr. Fakir Chand, I have no hesitation in holding that the decision of the learned District Judge is correct. Mr. Fakir Chand, has conceded that the terms of the bond in dispute are very similar to those of the bond in *A. I. R.* 1930 *Lah.* 124, which the learned Judge has followed. The bond gave the plaintiff the option of taking advantage of the forfeiture, clause, and his right to realise the amount by instalments as originally agreed upon cannot be lost by his failure to exercise his option. In my opinion, the suit has been rightly held to be within time and I dismiss this appeal. As the respondent is not represented before me I make no order as to costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 849 (2)

TEK CHAND, J.

Bhan Singh—Plaintiff—Appellant.

v.

Kaka Singh and *another*— Defendants Respondents.

Second Appeal No. 1176 of 1929, Decided on 16th June 1933, from decree of Addl. Dist. Judge, Lahore, D/- 7th February 1929.

Contract Act (1872), S. 23— Money paid to procure girl for marriage — Agreement remaining unfulfilled — Plaintiff is entitled to refund of money.

The plaintiff was anxious to have his son married. The defendants offered to procure a Jat girl for the boy, provided the plaintiff paid them Rs. 2,000. The plaintiff agreed to pay the amount, and the defendants produced a girl who they represented was a Jat. The plaintiff paid Rs. 2,000 in cash to the defendants and a date was fixed for the marriage by chadar andazi. Before the ceremony, the girl informed the plaintiff that she was not a Jat but was a sweeper by caste and that the defendants had falsely stated that she was a

Jat. On this the contemplated marriage did not come off :

Held : that the agreement having remained unfulfilled the plaintiff was entitled to a refund of the money, even though the original agreement was void under S. 23, Contract Act : *A I R* 1919 *Lah* 35, *Ref.* [P 850 C 2]

Tirath Ram—for Appellant.

Mohammad Amin Khan— for Respondents.

Judgment.—The plaintiff, a Sikh Jat, of Kasur Tahsil, was anxious to have his son married. The defendants offered to procure a Jat girl for the boy, provided the plaintiff paid them Rs. 2,000. The plaintiff agreed to pay the amount, and the defendants, produced a girl, Mt. Kako, who, they represented, was a Jat and relation of Kaka Singh, defendant 1. The plaintiff paid Rs. 2,000 in cash to the defendants and a date was fixed for the marriage by chadar andazi. Before the ceremony, the girl informed the plaintiff that she was not a Jat but was a sweeper by caste and that the defendants had falsely stated that she was a relation to Kaka Singh. On this the contemplated marriage did not come off, and the plaintiff prosecuted the defendants for cheating. The Magistrate convicted the defendants and sentenced them each to undergo rigorous imprisonment for one year and to pay a fine of Rs. 500. Out of the fine, if realized, Rs. 750 was ordered to be paid to the plaintiff by way of compensation.

Thereafter the plaintiff brought a suit against the defendants for refund of Rs. 2,000 which, he alleged to have paid to the defendants. The Court found that the plaintiff had paid the defendants Rs. 2,000, as alleged by him, and after deducting Rs. 750 which had been realized by the plaintiff as compensation out of the fine paid by the defendants, passed a decree for Rs. 1,250 against the defendants. On appeal the learned additional District Judge dismissed the suit, holding that it had not been established that the girl was a sweeper by caste and that, in any case, the plaintiff had disentitled himself to get relief from the civil Court, as his son had actually gone through a form of marriage with Mt. Kako, who had given birth to a daughter from him.

On second appeal it was contended that the learned Additional District Judge had gone against the pleadings and admissions of the parties, and in order to elucidate the matter further this Court, by its order dated 19th October 1932, remanded the case under O. 41, R. 25, for further enquiry on certain issues. Both parties were given full opportunity to produce evidence on these issues, and the trial Judge has reported that the girl, Mt. Kako, was a sweeper by caste, that she was never married by chadar andazi to the plaintiff's son, nor did she give birth to a child from him. Mr. Mohammed Amin Khan for the respondents has attempted to challenge these findings, but on going through the record, I find myself unable to agree with him. On these findings there can be no doubt that the judgment of the learned Additional District Judge was erroneous and must be set aside. The agreement having remained unfulfilled the plaintiff is entitled to a refund of the money, even though the original agreement was void under S. 23, Contract Act: *Jiwana* v. *Malakchand* (1).

I accept the appeal, set aside the decree of the learned Additional District Judge, and restore that of the trial Court with proportionate costs in all Courts.

K.S. *Appeal accepted.*

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1. AIR 1919 Lah 35=53 I C 407=113 P R 1919.

A. I. R. 1933 Lahore 850

DALIP SINGH, J.

Nathu Mal—Appellant.

v.

Punjab and Sindh Bank, Ltd. — Respondents.

Misc. Second Appeal No. 1192 of 1932, Decided on 27th June 1933, from order of Dist. Judge, Gujranwala, D/- 12th July 1932.

Civil P. C. (1908), S. 151 — Auction-purchaser allowed to withdraw purchase money —Court has inherent power to order refund of such money.

The Court has inherent jurisdiction to order refund of purchase-money allowed to be withdrawn by the auction-purchaser : 39 *I C* 763 ; *A I R* 1922 *P C* 269, *Rel on.* [P 851 C 1]

Durga Das—for Appellant.

M. C. Mahajan and *Sundar Singh* — for Respondents.

Judgment.—The facts are clearly given in the judgments of the Courts below. Two points are contested before me: (1) That the judgment of the learned District Judge is wrong in holding that the order of the executing Court, dated 11th March 1927, did not set aside the sale after hearing the parties. I am clearly of opinion that the learned District Judge is right and the Court did not set aside the sale but only suspended the proceedings confirming the sale; the second point contended is that the Court has no jurisdiction against the auction-purchaser once rightly or wrongly it had allowed him to withdraw the purchase money on 17th August 1927. In this connection on the authority of *A. I. R.* 1922 *P. C.* 269 and *Sukdeodas* v. *Rito Singh* (1), I have no hesitation in holding that the Court had inherent jurisdiction to order it in the circumstances of the case. It is unnecessary to decide the preliminary objection that no appeal lies. I therefore dismiss the appeal with costs.

K.S. *Appeal dismissed.*

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1. (1917) 39 I C 763.

A. I. R. 1933 Lahore 851 (1)

DALIP SINGH, J.

Dhera Shah and *others* — Creditors — **Appellants.**

v.

Sant Ram and *another*—Debtors—Respondents.

Civil Appeal No. 1723 of 1932, Decided on 7th June 1933, from order of Dist. Judge, Attock, D/- 23-8-1932.

(a) Words and Phrases—Sakunat.

Where a person states that he is having his sakunat at a certain place, it does not necessarily mean that he ordinarily resides at that place. [P 851 C 2]

(b) Insolvency—Petition presented to wrong Court — Proper procedure is to return for presentation to proper Court—Practice.

Where an insolvency petition is filed in a wrong Court, the proper procedure is to return it for presentation to proper Court and not to dismiss it. [P 851 C 2]

Kishan Dayal—for Appellants.

Shamair Chand—for Respondents.

Judgment.—The learned District Judge in this case dismissed the petition to declare the respondents insolvents on the preliminary ground that it was not proved that that Court had jurisdiction as the alleged debtors had not been proved to reside at Nara.

The plaintiffs-creditors have come in appeal and the first point urged on their behalf is that the record does not show any order that the petitioners closed their case or that the case was closed by the Court on their behalf on any reasonable ground. I do not think that there is any force in this contention. The respondents have put in an affidavit stating that the Court did not refuse to take any evidence that was produced. Petitioners were represented by counsel and two witnesses were led on the preliminary issue of jurisdiction framed by the Court. The affidavit of the petitioners is a guarded one and merely states that the Court did not take the evidence present in Court. This may be perfectly correct without showing that the petitioners wished to produce any more evidence in Court. They further state that they did not close their case. This again may be true in the sense that no formal question was put to them as to whether they closed the case. It is possible that the Court merely asked their counsel whether he had any more witnesses to produce and the counsel did not wish to produce any more of the witnesses present and the Court thereupon proceeded to judgment. I therefore repel this contention of the appellants.

The next contention on his behalf is that on the record it is proved that the debtors reside at Nara. There are only two witnesses. The debtors themselves deny that they reside at Nara. They state that they have left this place and for the last 12 or 13 years have been carrying on business at a place called Phullarwan. A petition-writer is the only other witness and he states that in a mortgage-deed the debtors described themselves as having their sakunat at Nara. I do not think the word "sakunat" necessarily means that they ordinarily resided at Nara. Nara is the family home and the respondents had a house there; but from that it does not follow that they ordinarily resided at Nara. I therefore repel this contention of the appellants also. The last point taken is that in any case the learned Judge should not have dismissed the petition but should have returned it for presentation to the proper Court. This contention is correct. I do not know that it will be of any avail to the appellants. I accept the appeal so far as to direct that the petition be returned to the appellants for presentation to the proper Court if so advised. No order as to costs of this appeal.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 851 (2)

ABDUL RASHID, J.

Farida—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 598 of 1933, Decided on 23rd June 1933, from order of Sess. Judge, Lyallpur, D/- 14th March 1933.

Penal Code (1860), S. 300, Excep. 4—Death caused by one blow in sudden quarrel without deliberate intention—Held sentence of five years' rigorous imprisonment was excessive.

Only one blow was struck by the appellant on the head of deceased. It was further found that abusive language was exchanged just before the blow was struck and that the blow was given in a sudden quarrel without any deliberate intention and without the appellant having taken undue advantage or having acted in a cruel or unusual manner. As soon as the deceased fell down the appellant refrained from inflicting any other injury upon him:

Held: that a sentence of five years' rigorous imprisonment was excessive and that it should be reduced to one of two years' rigorous imprisonment, [P 852 C 2]

Ganesh Datta for *Government Advocate* —for the Crown.

Judgment.—This appeal has arisen out of a fight which took place between two herdsmen on 17th January 1933, at Mauza Imam Shah in the Lyallpur District. Farida, appellant, aged about 19 years, was grazing his sheep, and Sharifa, deceased, and his brother, Saida were watching their crops. The sheep of Farida and Shaman, P. W. 3, trespassed into the field of Sharifa who drove them out. After a short time Farida, appellant, and Shaman drove their flock into his field again. Sharifa, deceased, thereupon rounded up the animals, and was going to take them to the pound. Farida abused him and received abuse in return. Thereupon he hit Sharifa a single blow on the head with the lathi that he was carrying. Saida, P. W. 2, Shaman, P. W. 3, and Mangtu, P. W. 4, saw the blow struck from a distance of about 15 karams or so. As soon as they reached the scene of occurrence, Sharifa stood up, and spoke to them. A few hours after receiving the injuries, however, he breathed his last. The prosecution version has been supported by Saida, Mangtu and Shaman. The testimony of Shaman is particularly valuable as he was a friend and partner of Farida, appellant. Mangtu, P. W. 4, is an absolutely disinterested and impartial witness and I do not see any reason why he should support a false story. The accused stated that he was taking his flock to the canal to water them, and crossed Sharifa's field and as he refused to let them pass an altercation arose in the course of which Sharifa aimed a blow at him with a dang. In order to avoid the blow he pushed Sharifa who fell down and received an injury as a result of which he died. This story is not only in the highest degree improbable but was not put forward by the appellant in the Committing Magistrate's Court, and I am of the opinion that it is palpably false.

The question of sentence however requires consideration in this case. The learned Sessions Judge has held that only one blow was struck by the appellant on the head of the deceased, and that Excep. 4 to S. 300, Penal Code, is applicable to the facts of this case. He has held that abusive language was exchanged just before the blow was struck and that the blow was given in a sudden quarrel without any deliberate intention and without the appellant having taken undue advantage or having acted in a cruel or unusual manner. Death was due to the fracture of the skull measuring $1\frac{3}{4}$ inches in length. As soon as the deceased fell down the convict refrained from inflicting any other injury upon him. In view of the findings of the learned Sessions Judge, a sentence of five years' rigorous imprisonment seems to me to be excessive, and that it should be reduced. I therefore reduce the sentence to one of two years' rigorous imprisonment. The appeal is accepted only to this extent.

K.S. *Sentence reduced.*

A. I. R. 1933 Lahore 852

DALIP SINGH, J.

Dhanwantri Durga Das — Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 661 of 1933, Decided on 20th June 1933, from order of First Class Special Magistrate, Delhi, D/-28th April 1933.

(a) Criminal Trial — Two Courts having concurrent jurisdiction—Seisin of case by one Court does not oust jurisdiction of other Court—Jurisdiction.

Courts of concurrent jurisdiction can proceed to try the same offence and simply because one Court has seisin of the case, the jurisdiction of the other is not ousted, [P 853 C 2]

(b) Penal Code (1860), S. 307—Use of pistol with reckless disregard to consequences—Accused is guilty under S. 307 and also under Arms Act (1878), S. 19 (f).

Where the accused used a pistol with reckless disregard to consequences against a constable who was chasing him and the bullet struck the constable on his side and remained lodged inside:

Held: that it must be presumed that the accused intended to cause death and that he was guilty both under S. 307, I. P. C. and S. 19 (f), Arms Act. [P 854 C 1]

Shamair Chand and *Sham Lal*—for Appellant.

Carden Noad and *S. Abdul Aziz*—for the Crown.

Judgment.—The appellant in this case has been convicted by the learned Special Magistrate under S. 307, Penal Code, and sentenced to seven years' rigorous imprisonment. He has also been convicted under S. 19 (f), Arms Act, and sentenced to three years' rigorous imprisonment, the two sentences running consecutively. Before dealing with the facts of this case it is necessary to dispose of a preliminary objection which was raised by the learned counsel for the appellant as to the jurisdiction of the Magistrate to try this case. The facts concerned with this objection are that on 21st November 1930, Act 4 of 1930, was extended to Delhi. On 9th April 1931, the Local Government of Delhi ordered that this appellant should be tried on the charges on which he has now been convicted by the Special Tribunal provided for under Act 4 of 1930. The case accordingly proceeded before the Special Tribunal but before any charges were framed on 3rd February 1933, the Government of India issued a notification cancelling the notification of 21st November 1930, extending the Act to the province of Delhi. The argument of the learned counsel is that though the Act no longer extended to the province of Delhi to the Court which had been constituted under that Act was never dissolved by the Local Government at Delhi which alone could dissolve the said Court. He contends that the Act might have ceased to apply to the province of Delhi, but that would not ipso facto dissolve the Court nor could a notification of the Imperial Government dissolve the Court which could only be constituted by the Local Government and therefore could only be dissolved by the Local Government by an order in writing as provided in the Act read with the General Clauses Act, S. 21. It appears to be correct, as a matter of fact that the Local Government at Delhi never passed any order removing the Commissioners appointed or declaring that they had ceased to be Commissioners.

It is evidently assumed that the orders of the Supreme Government of India were sufficient for this purpose. The learned counsel's contention therefore is that the Court which was originally seized of this case is still in existence and as that Court had exclusive jurisdiction no other Court is empowered to try this case. He contends that the repeal of an Act creating a certain Court on a certain procedure would not cause the jurisdiction of the Court to cease at any rate so far as pending cases are concerned. In the alternative he contends that if the Court had not exclusive jurisdiction the Court had jurisdiction and having once seizin of the case no other Court could proceed to try the same case. The points raised by the learned counsel might have created considerable difficulty but it is unnecessary to enter into a detailed discussion of them because it seems to me that neither of the hypotheses of the learned counsel really exists. I find nothing in Act 4 of 1930 by which exclusive jurisdiction was conferred on the Special Tribunal. All that that Act declares is that, if so advised, the Local Government may constitute a special Court with special procedure to try certain offences and it may then order certain persons to be tried before that special Court. This really means nothing more than that the ordinary Courts and the Special Tribunal have concurrent jurisdiction over certain offences. The first contention therefore that the Special Tribunal had exclusive jurisdiction to try this case is not correct.

The second contention of the learned counsel is that granting there is concurrent jurisdiction and one Court has taken up the case the jurisdiction of the other Court is ousted by the first Court, taking seizin of the case. I know of no law or principles of law leading to this result. It may happen even under the Criminal Procedure Code in the case of what is known as continuing offences that two Courts may have jurisdiction to try the case. Both Courts might proceed to try the case in ignorance of the proceedings of the other Court. A special procedure is provided in the Criminal Procedure Code for such cases to prevent the continuance of two trials regarding the same offence, but apart from the special procedure I know of no principle by which Courts of concurrent jurisdiction could not proceed to try the same offence. Of course where one Court had arrived at a conclusion and delivered a judgment it would be open to the accused to plead autrefois convict or autrefois acquit but that is a different question altogether from holding that the proceedings in one or other of the Courts are coram non judice. I therefore repel this contention also and hold that the Special Magistrate had jurisdiction to try this case.

Coming now to the merits of the case I see no reason to doubt the direct evidence showing that the appellant, Dhanwantri was seen by two police officers, Ghulam Rasul and Gian Chand, passing along the nai sarak with a companion and that the two police officers pursued Dhanwantri and his companion and that while the chase continued down Chandni Chowk Dhanwantri and his companion separated, Dhanwantri running on the right side of the Chandni Chowk and his companion going off towards the left. Mohammad Afzal, constable, hearing a police whistle turned round and saw Dhanwantri and tried to catch him. Dhanwantri turned round and fired a pistol at the constable which struck the whistle that the constable had in his pocket and then passed through the side of the constable and the bullet remained lodged inside and was extracted subsequently as the medical evidence shows. Very pluckily the constable, though temporarily knocked out, continued the chase.

Dhanwantri, again fired at him but missed and his magazine being presumably exhausted he was seized by Mohammad Afzal, the pistol was snatched away by constable, Abdul Majid, who along with head-constable, Mohammad Haidar, also appeared on the scene and the appellant was then removed to the kotwali where a fard was prepared of the recovery of the pistol. The main point urged by the learned counsel for the appellant on the merits is that the pistol was on 21st April 1932, before the Special Tribunal shown to be defective by Vidya Bhushan who was an accused before the Special Tribunal. His contention is that the pistol has remained all along in the custody of the police. In its present condition the magazine is defective and the last two cartridges at any rate cannot be fired from this pistol. He further contends that the ejector is defective and the pistol could at most be fired once and once only. Now the evidence of the prosecution is that in all probability this pistol was fired four or five times (see the evidence of H. C. Ghulam Rasul), and according to all the evidence of the prosecution witnesses it was fired at least twice. It appears from the prosecution evidence that the pistol after being taken charge of by the police remained in the malkhana, nobody cleaned it or oiled it, and it seems to me quite possible that rust may have affected the ejector at any rate to account for its present defective condition. So far as the magazine is concerned, the learned counsel contends that rust could not possibly affect the spring of the magazine. The learned Government Advocate does not admit this proposition and there is no evidence on the record to show me what the position may be as regards the spring. Be that as it may, after allowing for certain natural extravagances in the evidence of the police constables as to the particular part they played in this affair and the courage they showed in contesting the appellant I see no reason to doubt the evidence as to the actual use of the pistol by the appellant. It must be borne in mind that the appellant himself denied the possession of a pistol altogether. His learned counsel, while not admitting that he had a pistol, has wisely confined himself to contesting that he might have had a pistol but he did not use it in the manner suggested by the prosecution. In considering therefore the evidence of the prosecution and weighing its truth it is an important fact to note that the appellant himself never raised exactly the case that his learned counsel has raised for him in appeal. I therefore consider that on the merits he has been rightly convicted under S. 307, Penal Code, for it is obvious from the place where the bullet struck that the shot was aimed with the intention of seriously injuring the police constable who was chasing the appellant and with reckless disregard as to whether his life was or was not endangered by doing so.

When a man uses a deadly weapon like a pistol in such a fashion the presumption against him is that he intended to cause death. I see no reason why the presumption should not be drawn against the appellant in this case. It follows that he has also been rightly convicted under S. 19 (f), Arms Act. The only question remaining is a question of sentence. It is a serious offence to shoot at policemen with pistols while the policemen are endeavouring to discharge their duties and I would not ordinarily have interfered with the sentence passed in the case but I bear in mind that for no fault of his the appellant has been an under-trial prisoner for nearly two and a half years and bearing this in mind I order that the two sentences should run concurrently. The appeal is otherwise dismissed.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 855

TEK CHAND, J.

Sher Singh-Dula Singh—Defendants—Appellants.

v.

Gopal Singh and *another*—Plaintiffs—Respondents.

Second Appeal No. 1499 of 1932, Decided on 20th June 1933, from decree of Dist. Judge, Lyallpur, D/- 3rd May 1932.

Civil P. C. (1908), O. 21, R. 63—Objection to attachment raised by alleged mortgagee dismissed — Declaratory suit under O. 21, R. 63 — Onus of proving that mortgage was effected for consideration and in good faith lies on claimant and Court should give definite finding on such point.

Where objection to an attachment raised by an alleged mortgagee is dismissed and he files a declaratory suit under O. 21, R. 63, the onus of proving that the transaction in his favour was for consideration and effected in good faith lies on him; and the Court should give a definite finding on these points after considering the evidence of parties bearing on it: *AIR* 1932 *Lah* 174 and *AIR* 1930 *P C* 255, *Rel on.* [P 855 C 2]

Asa Ram— for Appellants.

J. R. Agnihotri for *Anant Ram Khosla*—for Respondents.

Judgment.—This case has been very unsatisfactorily dealt with by the learned District Judge and must be remanded to him for rehearing and redecision. In execution of a decree obtained by firm Sher Singh-Dula Singh, defendant No. 2 against Sant Singh, defendant No. 1, certain property belonging to the latter was attached. The plaintiff Gopal Singh, who is a maternal cousin of the judgment-debtor, objected to the attachment on the ground that the property had been mortgaged to him by a deed executed and registered on 13th July 1922 and that it should be sold subject to his charge. The objection was disallowed and Gopal Singh instituted a suit under O. 21, R. 63, Civil Procedure Code for the usual declaration. The suit has been decreed and defendant No. 2 has preferred a second appeal to this Court.

The first issue in the suit was whether the mortgage set up by the plaintiff was for consideration. This is one of the essential points in the case, but the learned District Judge has not recorded any clear finding on it. He has not discussed the evidence at all, but has contended himself with making certain "remarks in passing". The District Court being the final Court of appeal on the questions of facts, the learned Judge was bound to come to a definite finding on this issue, after considering the evidence of the parties bearing on it. The second issue framed by the trial Court was whether the said mortgage was

"intended to defeat or delay the claim of defendant 2 and is in the nature of a mala fide transfer."

The onus was placed on defendant No. 2, and there can be no doubt that this was clearly wrong. But this issue, such as it was, the learned District Judge has not thought fit to decide, he being of opinion that it "did not arise for decision in the case". As held in *Janki Das* v. *Gulzar* (1), following the decision of their Lordships of the Privy Council in *Mahomed Ali Mahomed Khan* v. *Mt. Bismilla Begam* (2), in cases of this kind the two essential points requiring decision are, whether the transaction on which the plaintiff (who had been unsuccessful in his objection before the executing Court) relies was for consideration and whether it had been effected in good faith, and that the onus of proving both these points lies on him. The learned District Judge should, therefore, have re-framed this issue and given a definite finding on it, after taking further evidence if he thought that the materials on the record were insufficient to enable him to decide it, or the parties had been prejudiced by the wrong allocation of onus.

The learned Judge has not decided the third issue relating to collusion, being of opinion that this question also was irrelevant. This question again has an important bearing on the case, in view of the fact that the alienor and the alienee are near relations. For the forgoing reasons this appeal must be accepted, the judgment and decree of the District Judge set aside and the case remitted to him for rehearing and disposal with reference to the foregoing remarks. Court-fee on the appeal shall be refunded; other costs shall be costs in the cause.

K.S. *Appeal accepted.*

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1. A I R 1932 Lah 174=131 I C 883=12 Lah 763.
2. A I R 1930 P C 255=128 I C 647 (P C).

A. I. R. 1933 Lahore 856

DALIP SINGH, J.

Radhe Kishan-Tirath Ram and *another* —Appellants.

v.

Fateh Mohammad and *another* — Respondents.

Misc. First Appeal No. 1643 of 1931, Decided on 13th July 1933, from order of Addl. Dist. Judge, Lyallpur, D/- 18th July 1931.

(a) **Provincial Insolvency Act (1920), Sections 54 (4) and 75—Order on application by Official Receiver under S. 54 (4)—Creditor has right of appeal.**

A creditor has a right of appeal from an order passed on an application by the Official Receiver under S. 54 (4): *AIR* 1925 *All* 549, *Foll*; *AIR* 1921 *Lah* 81, *Ref*. [P 856 C 2]

(b) **Provincial Insolvency Act (1920), S. 54 —Execution of mortgage, for sum more than double the real sum due, to near relation is undue preference.**

The execution of a mortgage, for a sum more than double of what is really due, to a near relative points both to the dishonest intention of the alienor to give undue preference to his creditor and to the mala fides of the alienee who obviously reserves the extra consideration for the concealed benefit of the insolvent and the transaction falls within S. 54. [P 857 C 1]

J. L. Kapur and *Nainsukh Gauba*—for Appellants.

Khurshaid Zaman for *M. A. Majid*—for Respondents.

Judgment.—In this case the Official Receiver applied under S. 54 (4), Insolvency Act, to have an alienation made on 13th October 1928, by one Sikandar adjudicated an insolvent on 6th March 1931, declared void. The learned Additional District Judge held that the alienation in question which was mortgage, was bad so far as Rs. 3,000 of the consideration was concerned but was good so far as Rs. 2,000 of the consideration was concerned and declared the transfer valid to the extent of Rs. 2,000 only. One of the creditors, Radha Kishan Tirath Ram, appealed making the Official Receiver a respondent. Subsequently the Official Receiver applied to be made an appellant and this was granted subject to all just exceptions. A preliminary objection has been taken that the creditor had no right to appeal and if the Official Receiver is to be taken as presenting the appeal, the appeal was time-barred on the date when he applied to be made a party. There is a ruling of this Court by a Single Judge reported in *Ishar Das* v. *Ladha Ram* (1), holding that the creditor is an aggrieved person in circumstances of this kind. That ruling is under the old Act. It followed an Allahabad ruling and an English ruling. The Legislature has since thought fit to alter the section. I prefer to follow the ruling reported as *Niadar* v. *Ramji Lal* (2), which holds that the creditor has a right of appeal in such circumstances. In the circumstances of this case moreover the Official Receiver having applied to be made an appellant I would in the circumstances extend time under S. 5 of the Limitation Act. The preliminary objection therefore fails.

The facts are as follows: Two days before the mortgage in question, that is, on 14th December 1928, Fateh Mohammad, the alinee, who is a near relative of the insolvent Sikandar, executed a promissory note for Rs. 2,000 in favour of Radha Kishan Tirath Ram, the appellant-creditor, who had attached certain property of Sikandar insolvent under a decree and had also applied for his arrest. The insolvent was released for the time being from the execution proceedings. On 16th December 1928, the insolvent executed the mortgage in favour of Fateh Mohammad for the Rs. 2,000 consideration arising from the promissory note mentioned above and for Rs. 3,000 prior debt alleged and found to be fictitious.

It is contended before me that S. 54 does not apply to the facts of the case and that the section governing the case, if any, is S. 53, and an interesting point has been raised, namely, that the petition is time-barred because the transferor was adjudged insolvent on 6th March 1931. The petition on which he was adjudged insolvent is dated 18th December 1928, and the act of insolvency alleged against him was this very alienation of 16th December 1928. It is contended that under the terms of S. 53, as it stood before it was amended by Act 10 of 1930, the period of two years was to be reckoned from the adjudication, and this is supported by the Full Bench ruling of this Court. Under the Act as amended by Act 10 of 1930 the time has to be reckoned now for two years from the date of the presentation of the petiition. It is contended on the other hand, that as limitation is a question of procedure only the present application would be governed by the section as amended by Act 10 of 1930. It is, however, unnecessary to go into this interesting question because it seems to me that the trans-

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1. A I R 1921 Lah 81=62 I C 924.

2. A I R 1925 All 549=88 I C 944=47 All 849.

action does fall within the terms of S. 54. By executing a promissory note Fateh Mohammad had become a creditor of the insolvent Sikandar for Rs. 2,000 and the transfer of property which was made gave him an undue preference over the other creditors, and the petition was presented within three months after the date of the said alienation. It seems to me clear on the fact that the execution of a mortgage for a sum more than double of what was really due to a near relative points both to the dishonest intention of the alienor to give undue preference to his creditor and to the mala fides of the alienee who obviously reserved the extra consideration for the concealed benefit of the insolvent. In this view of the case as a transfer cannot be partly in good faith and partly in bad faith I accept the appeal and set aside the alienation, but I order that Fateh Mohammad, who was a creditor for Rs. 2,000, should rank as a creditor for that amount as an unsecured debt along with the other creditors. No order as to costs.

K.S. *Appeal accepted.*

* A. I. R. 1933 Lahore 857

ADDISON AND AGHA HAIDAR, JJ.

Devi Dass—Decree-holder—Appellant.

v.

Jada Ram and *another*—Judgment-debtors—Respondents.

Misc. Second Appeal No. 1639 of 1931, Decided on 3rd July 1933, from order of Dist. Judge, Dera Ghazi Khan, D/- 2nd May 1931.

(a) **Hindu Law — Debts — Liability of son, grandson or great grandson.**

The liability of the son, grandson and great-grandson to pay the debts of their ancestors is not a personal one. [P 858 C 1]

* (b) **Hindu Law—Debts—Sons are liable for debts of father to extent of joint family property in their hands even though father dies during lifetime of grandfather—Civil P. C. (1908), S. 53.**

The sons are under a pious obligation to pay their father's debt to the extent of the family property in their hands. And this obligation is not taken away simply because their father dies in the lifetime of their grandfather. Hence the son's share can be attached and sold in execution of a decree obtained against them as representatives of their father : *AIR* 1926 *All* 220, *Diss from* : 33 *Bom* 89 and *AIR* 1932 *Lah* 211, *Ref.* [P 858 C 2]

Ajit Parshad for *M. L. Puri*—for Appellant,

Hargopal—for Respondents.

Addison, J.—One Uttam Chand incurred a debt in the lifetime of his father Pheru Mal. Uttam Chand died before his father. After the death of both Uttam Chand and Pheru Mal, the creditor obtained a decree for the amount due against Jada Ram and Haru Ram, the sons of Uttam Chand, as his legal representatives. In execution the joint family property was attached. It was objected that the property did not belong to their father but to the joint family of which the grandfather, Pheru Mal, was the manager. It was therefore not liable to be sold in execution of their father's decree. This objection was upheld in the lower Courts on the strength of *Binda Parsad* v. *Raj Ballabh Sahai* (1). The second appeal came before a Single Judge who, owing to the difficulty of the question involved, referred it to a Division Bench.

The decree was obtained against the sons as legal representatives of their deceased father Uttam Chand under the provisions of S. 52 of the Civil Procedure Code. S. 53 of the Civil Procedure Code, however, lays down that for the purpose of S. 52 property in the hands of a son or other descendant which is liable under the Hindu Law for the payment of the debt of the deceased ancestor, in respect of which a decree has been passed, shall be deemed to be the property of the deceased which has come into the hands of the son or other descendant as his legal representative. This section was obviously enacted in order that a creditor could follow the joint family property in the hands of sons or grandsons in all cases of execution. It is claimed, however, on behalf of the respondents that where a Hindu father incurs a debt and dies in the life-time of the father his sons are relieved from their pious obligation to pay the debt from the joint family property though in all other cases their liability to pay their father's debts, which are not immoral, was admitted before us. For the purpose of S. 53, it has to be seen, therefore, as to what property is liable under Hindu Law in the hands of sons or other descendants for the payment of the debt of a deceased ancestor. There is no doubt about the general proposition given in S. 290 of the Mulla's Hindu Law. Though the debt is incurred for the father's own personal benefit the sons are liable to pay it even in the life-time of their father provided that it has not been incurred for an illegal or immoral purpose. This liability arises from an obligation of religion and piety which is placed upon

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1. A I R 1926 All 220=91 I C 785=48 All 245.

sons and under Mitakshara Law to discharge their father's debts where they are not immoral. As the Mitakshara Law however is administered in British India, the liability of the son, grandson and greatgrandson to pay the debts of their ancestors is no longer a personal one. It is limited to their interest in the joint family property. It is clear that if Pheru Mal had died before Uttam Chand the family property in the hands of Uttam Chand's sons would be liable for the payment of Uttam Chand's debts. Again, it seems to me that *Shivram* v. *Sakharam* (2), is an authority for the proposition that if a money decree is obtained against the sons as representatives of their father in a case where the father was joint with his brothers the sons' share in the joint family property can be attached and sold to meet the father's debts provided it is not tainted with immorality or illegality. This is the case even where the debt is incurred for the sole purposes of the father. The proposition, therefore, contended for before us is that there is an exception to the general rule that sons are under a pious duty to pay their father's debts in the case where the father has died in the lifetime of the grandfather. There is one authority which supports this view, namely, *Binda Prasad* v. *Raj Ballabh Sahai* (1).

The reason given there is that the date of the father's death is the crucial date. That is, as the property of the father passed not only to his sons but to his father, it could not be liable for the payment of the debts of the deceased as the father of the deceased was not under a pious obligation to pay the debts of the deceased. With very great respect I am unable to follow the reasoning. I can see no reason why the sons should not remain under their pious obligation to pay their father's debts although their grandfather is alive. They are members of the joint family by reason of the fact that their father procreated them. They are liable to pay his debts to the extent of the joint family property in their hands. If, therefore, the grandfather is also dead they are liable to the extent of the entire family property in their hands. If their grandfather is still alive they will be liable to the extent of their share in the family property which undoubtedly accrues to them because of the death of their father. It is also true that at no stage can it be said that the property of one copercener passes to another coparcener. That takes away the foundation from the reasoning in the Allahbad case. At the same time the sons share with their father in the joint family property in the life-time of their grandfather. When their father dies their share increases and when their grandfather dies it still further increases. But that does not affect their pious obligation to pay their father's debt to the extent of the joint family property in their hands.

It was contended that in the Punjab a son could not sue for partition in the life-time of his father. This may be so but it has been held in *Nihal Chand Gopal Das* v. *Mohan Lal* (3), that a son's share can be attached and sold in execution of a decree against him in the life-time of his father. If his debts are not immoral obviously also his son's share can be attached and sold along with his own. In the present case therefore had the property of Uttam Chand been attached in his lifetime half the family property would certainly have been liable. I am unable to understand how the family property escapes liability completely merely because he dies in the lifetime of the grandfather. No foundation for the dictum that the date of the father's death is the crucial date has been pointed out to us. The rule is a simple one, namely the sons are under a pious obligation to pay their father's debt to the extent of the family property in their hands. Why should this obligation be taken away because their father died in the lifetime of their grandfather. The decree was obtained against the sons as representatives of the father and I would hold that under Hindu Law all the joint family property in their hands is liable for the payment of the debt of a deceased ancestor. For the reasons given I would accept the appeal with costs throughout and direct the executing Court to proceed against the joint family property in the hands of Jada Ram and Haru Ram, sons of Uttam Chand, against whom the decree was obtained in the capacity of legal representatives of their father.

Agha Haidar, J.—I agree.

K.S. *Order accordingly.*

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2. (1909) 33 Bom 39=1 I C 459.

3. A I R 1932 Lah 211=135 I C 197=13 Lah 455.

A. I. R. 1933 Lahore 859 (1)

JAI LAL AND MONROE, JJ.

In the matter of *Aseessment of Kangra Valley State Co. Ltd., Lahore.*

Civil Ref. No. 25 of 1932, Decided on 28th June 1933, from decision of Commissioner of Income-tax-Punjab, Delhi, and North-West Frontier Provinces, D/- 14th July 1932.

Income-tax Act (1922), S. 66 (2)—Rules for making application under Rr. 11 and 12—Commissioner must decide whether he and assignee are able to agree before settling finally.

Under the rules regarding applications under S. 66 (2), it is the duty of the Commissioner to settle the case in its final form only if no suggestion, addition or amendment is received by him within 14 days; but if a question does arise on the statement of the case it is clearly his duty to decide whether he and the assessee are able or unable to agree. [P 859 C 1]

Badri Das and *Sohan Lal*—for Assessee.

J. N. Aggarwal—for Commissioner of Income tax.

Order.—This is a reference to this Court by the Commissioner of Income-Tax under S. 66 (2), of the Income-tax Act 11 of 1922. The Commissioner of Income-tax prepared a draft statement of the case and sent it to Rai Bahadur Bakhshi Sohan Lal. On the 4th of July 1932, Bakhshi Sohan Lal wrote a letter to the Commissioner pointing out that certain facts had not been fully stated, setting out those facts and pointing out that certain documents had been produced and to these documents there was no reference in the statement of the case prepared by the Commissioner. Under the rules regarding applications under the above mentioned section it is the duty of the Commissioner to settle the case in its final form only if no suggestion addition or amendment is received by him within fourteen days, but if a question does arise in the statement of the case it is clearly from the wording of R. 12, his duty to decide whether he and the assessee are able or unable to agree. If they are able to agree of course no difficulty arises, and provisions are made by the rule of what should happen if they are unable to agree.

Instead of carrying out the instructions contained in R. 12 the Commissioner in this case settled the case in its final form without regard to the points raised in the letter of the 4th July 1932, and, so far as the information before us is, without any further communication to Rai Bahadur Bakhsi Sohan Lal. In these circumstances no course is open to us but to send the case back to the Commissioner in order that he may comply with Rr. 11 and 12 of the rules regarding the applications, and this we do, awarding to the assessee Rs. 32, costs of to-day, irrespective of the final result of this reference.

K.S. *Case sent back.*

A. I. R. 1933 Lahore 859 (2)

DALIP SINGH, J.

Mewa Singh—Defendant—Appellant.

v.

Tara Singh—Plaintiff—Respondent.

Misc. First Appeal No. 712 of 1932, Decided on 29th June 1933, from order of Senior Sub-Judge, Gujranwala, D/- 2nd May 1932.

Decree — Execution — Preliminary decree and final decree—Appeal from preliminary decree and compromise modifying such decree—Final decree as such cannot be executed unless fresh final decree is obtained.

Where a preliminary decree on which the final decree sought to be executed is based is modified by a compromise entered into in an appeal by the parties and accepted and incorporated in a decree by the High Court, the final decree is no longer executable and a fresh final decree must be obtained: *A I R* 1926 *Lah* 534, *Rel on*. [P 859 C 2]

Mehr Chand—for Appellant.

M. L. Batra—for Respondent.

Judgment.—It appears that the preliminary decree on which the present final decree sought to be executed was based was modified by a compromise entered into in appeal by the parties and accepted and incorporated in a decree by the High Court. Learned counsel for the appellant contends that the final decree is no longer executable and a fresh final decree must be obtained and cites *A. I. R.* 1926 *Lah*. 534, which supports him. The learned counsel for respondent contends that as the preliminary decree was only partially modified, the final decree must be taken to be automatically modified to incorporate the new preliminary decree.

No authority is cited for this proposition and it does not seem correct to me for a decree is one instrument and cannot be partially good and partially bad nor can it be automatically modified. I therefore hold that the decree is no longer executable and accept the appeal and dismiss the application for execution. No order as to costs.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 860

ADDISON AND AGHA HAIDAR, JJ.

Gulab—Plaintiff—Appellant.

v.

Mt. Sarwar Jan and *another*—Defendants—Respondents.

Second Appeal No. 2726 of 1928, Decided on 27th June 1933, from decree of Dist. Judge, Rawalpindi, D/- 12th October 1928.

Limitation Act (1908), Arts. 111 and 120—Sale of property by guardian—Money left with vendee to be paid to two minors on attaining majority—Suit by such guardian as reversioner for money—Limitation is governed by Art. 120 and not by Art. 111.

Plaintiff, acting as the guardian of two minor girls, sold a certain property. It was stipulated that the sale amount should remain with the vendee who was to pay it to minors on their attaining majority. One of the girls while still a minor married. Under the Customary law which governed the family of the vendors, she lost her right in the purchase money which devolved on her sister with the result that the whole of the said purchase money became the property of the younger girl. She also died while she was a minor. The plaintiff, as reversioner, became entitled to the whole of the purchase money which was lying with the vendee defendant and sued for the same:

Held: that Art. 111 did not apply because the plaintiff was not the vendor of the property, but had acted merely as the de facto guardian of the two minor girls under the Customary law, that the suit was governed by Art. 120 and that limitation ran from the date of the death of the younger girl. [P 861 C 1]

Khurshaid Zaman—for Appellant.

Gobind Ram Khanna — for Respondents.

Agha Haidar, J.—This appeal arises out of a suit for the recovery of a sum of Rs. 2,477-8-0. The trial Court dismissed the plaintiff's suit. The plaintiff went up in appeal and the learned Judge of the lower appellate Court affirmed the decree of the trial Court and dismissed the appeal, holding that the plaintiff's suit was barred by limitation. Having regard to the circumstances of the case the learned Judge ordered that the plaintiff-appellant would receive his costs from the defendants-respondents throughout. The plaintiff has come to this Court in second appeal.

On 12th February 1920, Gulab, plaintiff, acting as the guardian of the two minor girls, namely, Mt. Sarwar Jan and Mt. Chanon, daughters of one Kalu, sold 8 kanals 17 marlas of land to defendant 2 for a sum of Rupees 1,770. It was stipulated that this amount shall remain with the vendee who shall deposit it in the Punjab National Bank and that on minors attaining majority, the money shall be paid to them on their executing a receipt jointly with the plaintiff. It is admitted that the money was not deposited in the Bank by the vendee. In November 1920, Mt. Sarwar Jan, while still a minor married. Under the Customary law which governed the family of the vendors, she lost her right in the purchase money which devolved on her sister, Mt. Chanon, with the result that the whole of the said purchase money became the property of the younger girl, Mt. Chanon.

In December 1921, Mt. Chanon died while she was a minor. The plaintiff, as reversioner, became entitled to the whole of the purchase money which was lying with the vendee defendant. In order to obviate any objections that might be taken by the defendants, the plaintiff obtained a succession certificate on 14th October 1922. The plaintiff served the defendant-vendee with a notice demanding the money. On his refusal to pay, the plaintiff brought the present action on 12th November 1926. A number of pleas were raised in defence, but one of the pleas, with which we are concerned, in the present appeal, was one of limitation. Various issues were framed on these pleas and the trial Court decided all of them in favour of the defendant and dismissed the plaintiff's suit. The lower appellate Court in appeal set aside the findings of the trial Court on all the other issues but held that Art. 111, Limitation Act, applied to the case and therefore the plaintiff's suit was barred by limitation. The Court accordingly dismissed the appeal.

In second appeal it was argued by the learned counsel for the plaintiff-appellant that Art. 111, Limitation Act, did not apply because the plaintiff was not the vendor of the property, but had acted merely as the de facto guardian of the two minor girls under the Customary Law. His case is that, having regard to the terms of the sale-deed and the position of the parties to the sale transaction, a trust was created in favour of the two minor girls and that the defendant was holding the purchase money for the benefit of the girls. Mt. Sarwar Jan having married lost her right in the purchase money, and, on the death of Mt. Chanon in December 1921, the trust was exhausted and there was not cestui que trust left to claim the money. This being the position the plaintiff's right as a reversioner came into existence immediately on the death of Mt. Chanon in December 1921, and, as the present suit was instituted within a period of six years of the death of Mt. Chanon, it was within time, in view of Art. 120, Limitation Act, which applied to the case. This contention seems to be well-founded. Having regard to the history of the transaction and the facts and circumstances leading to the present suit, it appears that there is no article of Sch. 2, Limitation Act, which applies exactly to the case. This being so, the Court is thrown back upon the residuary Art. 120 and the period of limitation would therefore begin to run, when the right to sue accrued. Clearly the plaintiff could not bring a suit for the recovery of the trust money while Mt. Sarwar Jan remained unmarried or when Mt. Chanon was in life. Now Mt. Sarwar Jan having married and Mt. Chanon having died, the rights of the plaintiff came into existence after these two events had happened. This being so, the case is governed by Art. 120, Limitation Act, and the judgment of the lower appellate Court as regards the question of limitation cannot stand.

I would therefore allow the appeal and, setting aside the decree of the lower appellate Court, decree the plaintiff's suit for the recovery of Rupees 1,770 principal and Rs. 707-8-0 interest=Rs. 2,477-8-0, with costs throughout. There is a cross-appeal (No. 241 of 1929) regarding costs. Having regard to what has been stated above, this appeal must necessarily fail. Accordingly I dismiss it.

Addison, J.—I concur.

K.S. *Appeal allowed.*

A. I. R. 1933 Lahore 861

JAI LAL AND MONROE, JJ.

Lekh Raj and *others*—Plaintiffs — Appellants.

v.

Mt. Mehtab Kaur and *others* — Defendants—Respondents.

First Appeal No. 1273 of 1926, Decided on 26th June 1933, from decree of Senior Sub-Judge, Amritsar, D/- 1st February 1926.

(a) Family arrangement—Person in possession of property as trustee and not as member of family—Arrangement entered into by such person is no family arrangement.

Where a person occupied the position of a trustee in repect of a property and had no personal interest in it :

Held : he could not claim to be a member of the family which owned the property in respect of which there was any dispute and that any arrangement entered into by him in respect of such property could not be described as family arrangement. [P 862 C 2]

(b) Evidence Act (1872), S. 111—Person in position of active confidence — Burden of proving bona fides of transaction is on him.

Where the person holds position of active confidence over the other party to a transaction, the onus of proving the bona fides of the transaction is heavily on him. [P 862 C 2]

(c) Will—Power to sell property conferred only for special valid necessity—Sale as act of good management is not competent.

Where a person's powers under the will were strictly restricted and he could not sell the property except for special valid necessity, such as marriage of a daughter's son, daughter's daughter or other lawful expenses :

Held : that that did not include a power to sell the property as "an act of good management." [P 861 C 1]

J. N. Aggarwal, Asa Ram Aggarwal and *J. L. Kapur*—for Appellants.

Har Gopal, Nawal Kishore, Sohan Lal, Amin Chand Mehta, Bal Kishen and *Dev Raj Sawhney*—for Respondents.

Jai Lal, J.—The property in dispute was originally self-acquired of Murari Lal who made his will on 10th January 1905, reciting that he had no male issue, but if before his death a son is born to him, he shall be owner of his entire movable and immovable property with the exception of a house described as stable situated in the abadi of Amritsar, Lohgarh Gate, which was given to his grandson, Atma Ram, son of Kidar Nath, the husband of his daughter. The will further provided that if no son is born to Murari Lal, the entire movable and immovable property shall remain in possession of Mt. Deoki alias Mahtab Kaur, his widow, but Atma Ram shall be considered its owner and that if Atma Ram be not alive, his real brother shall be considered to be the owner of the property. Brij Lal, the real brother of Murari Lal, was appointed by him as the Sarbrah of the entire property and he was to look after it. The will provided that Mt. Mahtab Kaur should not be competent to alienate any movable and immovable property without the permission of Brij Lal except in the case of special valid necessity instances of which were given in the will. The other provisions of the will need not be recited for the purposes of this appeal.

Murari Lal died in 1907 and it appears that Atma Ram had predeceased him. At the death of Murari Lal his daughter Mt. Bal Kaur had two sons alive Mela Ram and Lekh Raj. Mela

Ram also died soon after the death of Murari Lal. On 9th April 1913, certain documents were executed between Mt. Mahtab Kaur, widow of Murari Lal, Mt. Bal Kaur, his daughter, and her husband Kidar Nath and also Brij Lal. By virtue of these documents, which are called "release deed" Brij Lal purported to give some property to Mt. Mahtab Kaur, while Mt. Bal Kaur, Lekh Raj, his two younger brothers, Munni Lal, and Dawarka Das, through Mt. Bal Kaur, professed to give a house situated at Amritsar in Katra Charat Singh and a tewela with three shops situated in the Bhiri Gali at Amritsar to Brij Lal. Brij Lal also executed a document on the same day giving certain property to Mt. Mahtab Kaur, Mt. Bal Kaur and her sons. The effect of these three deeds was that the property left by Murari Lal was divided between Brij Lal, Mt. Mahtab Kaur and Mt. Bal Kaur and her sons. It appears that after this arrangement was made Mt. Mahtab Kaur sold a large portion of the property given to her by virtue of the arrangement to others and Mt. Bal Kaur and her husband Kadir Nath sold a part of the property allotted to them and their minor sons to B. Karam Singh.

A full history of the manner in which the property was divided between Mt. Mahtab Kaur, Brij Lal and Mt. Bal Kaur and her sons and how it was subsequently disposed of is to be found at pp. 66 to 71 of the printed paper-book. It is not necessary to mention it in detail here except, as I have already stated that Mt. Bal Kaur and Kidar Nath sold a stable situated at Amritsar in Katra Charat Singh to Karam Singh for Rs. 9,000 on 20th February 1920 and Karam Singh sold the same property to Budh Singh. The suit out of which this appeal has arisen was then instituted by Lekh Raj and his five minor brothers through the guardianship of Lekh Raj for a declaration that the alineation made by Mt. Mahtab Kaur on 9th April 1913 in favour of Brij Lal was without consideration and valid necessity and also the subsequent alienations of the property made by Mt. Mahtab Kaur which had fallen to her share by the arrangement made on 9th April 1913; and also that the alienation made to Mt. Bal Kaur and Kidar Nath by Mt. Mahtab Kaur, on 9th April 1913, was invalid for similar reasons and that the subsequent alienations effected by Mt. Bal Kaur and Kidar Nath in favour of Karam Singh and by the latter to Budh Singh were also invalid. The suit in fact was for that the plaintiffs were the heirs under the will of the estate of Murari Lal and that arrangements made was divided between Mt. Mahtab Kaur on 9th April 1913 whereby the property Brij Lal, Mt. Bal Kaur and Kidar Nath was invalid and that the subsequent alienations of parts of the property which fell to the shares of the three parties respectively were also invalid. The trial Court has dismissed the suit, holding that the plaintiffs have no locus standi to sue because the arrangement made between the three parties mentioned above on 9th April 1913 was a family arrangement by virtue of which the property was divided and the suit was collusive, the real plaintiff being Kidar Nath who was a party to that arrangement.

The plaintiffs appeal and it is contended on their behalf that the view of the learned trial Judge is wrong that the transaction of 9th April 1913 could under no circumstances be described a family arrangement. This view, in my opinion, has force. Brij Lal occupied the position of a trustee in respect of the property left by Murari Lal. According to the will, he had no personal interest in the property, which was self-acquired of Murari Lal and was his separate property and no personal interest in it was given to Brij Lal by virtue of the will. He could not under the circumstances claim to be a member of the family which owned the property in respect of which there was any dispute. It is contended that Brij Lal was in possession in his own right of the property which was given to him by the arrangement even during the lifetime of Murari Lal. The evidence on this point is unreliable, but assuming that Brij Lal was in possession of the property and he claimed title to it by virtue of his adverse possession or even adverse title, he could not, by any stretch of language, be called a member of the family. His position was the same as of any stranger who might claim an adverse title to the property and therefore the arrangement made with him could not be called a family arrangement. Therefore the arrangement of 9th April 1913, could not be called a family arrangement. On the other hand, the position held by Brij Lal with reference to the legatees under the will was one of active confidence and the burden of proving the bona fides of the arrangement would lie heavily on him. This in my opinion has not been discharged and I feel no hesitation in holding that Brij Lal derived no title to the property which was given to him if the minor plaintiffs are entitled to take it under the will.

The important question which needs determination in this case is whether the plaintiffs are entitled to the estate of Murari Lal under the will. The plea of the defendants is that when Murari Lal made the will, Mt. Bal Kaur had only two sons in existence Atma Ram and Mela Ram and that Lekh Raj had not been born at that time. It was therefore urged that Lekh Raj could not have been in the contemplation of Murari Lal when he devised by virtue of the will that if Atma Ram predeceased Murari Lal then his brother, i. e., Atma Ram's brother, would be the owner of his estate. The appellants' case, on the other hand, is that Lekh Raj had been born at that time and that even if he had not been born, the will must be interpreted to mean that all the brothers of Atma Ram would benefit under it; that is to say, that the expression "brother" in singular must be deemed to include plural, as the intention of the testator was to benefit all his grandsons and not only Mela Ram. A further point was made on behalf of the appellants that the fact that in the arrangement of 9th April 1913 the then existing minor sons of Mt. Bal Kaur were made parties to the documents shows that the intention of the testator was to benefit all his grandsons which fact was recognized by all the parties affected by the will.

The position appears to be this: If Mela Ram alone took the estate of Murari Lal, then on his death his mother and his father would take his estate before the brothers and therefore the plaintiffs would have no locus standi to sue. If, on the other hand, Lekh Raj alone or along with hiis other brothers took the estate either jointly with Mela Ram or after his death, then the plaintiffs would have a locus standi to sue. Though this matter was raised in the pleadings of the parties, no evidence was led on it. The parties appear to have ignored this plea and the main question fought out was the question of the alleged family arrangement. In view of the importance of the plea it should, in my opinion, have been investigated and in the absence of any material on the record to enable me to express an opinion one way or the other on the merits of this appeal, it is necessary to have further inquiry made.

The question for determination would be whether Lekh Raj alone or along with his brothers was entitled to the property in dispute on the death of Murari Lal. In order to determine this question evidence will have to be taken as to the date of the birth of Lekh Raj. Murari Lal, it may be mentioned, admittedly died on 7th February 1907. Therefore, it will be necessary to ascertain whether Lekh Raj had been born on 10th January 1905, the date of the will. If not whether he had been born on 7th February 1907, the date of the death of Murari Lal. The date of his birth will have an important bearing on the interpretation of the will so far as the intention of the testator is concerned; in other words on the question whether Mela Ram alone was in contemplation of Murari Lal in case Atma Ram predeceased him or whether all the sons of Mt. Bal Kaur were intended to be benefited by him. The conduct of the parties to the arrangement of 9th April 1913 in recognizing the sons of Mt. Bal Kaur will also have to be considered in this connexion.

I would accordingly remand the case under O. 41, R. 25, Civil P. C., to the trial Court with directions to record the evidence of the parties on the question whether Lekh Raj alone or along with his sons is entitled to succeed to the estate of Murari Lal under the will. Return within three months. Ten days for objections. The question of costs will be considered on the receipt of the return. It will be convenient to dispōse of the case of Karam Singh and Budh Singh, respondents, at this stage. It appears that after the property which is now in the possession of Budh Singh was sold to Karam Singh, a suit was instituted against the latter for recovery of the purchase price from him, the minors through their father being the plaintiffs. This suit was decreed as a result of a compromise which was sanctioned and attested by the Court. It also appears that with the money recovered from Karam Singh, as a result of the compromise some residential property was acquired for the minors by their parents. When these facts were pointed out to Mr. Jagan Nath for the appellants, he frankly conceded that he could not attack the sale in favour of Karam Singh under the circumstances and withdrew the appeal against Karam Singh and Budh Singh. The appeal against both these respondents will have to be dismissed.

Reference may also be made to the contention of Mr. Nawal Kishore, counsel for respondent No. 10, an alienee of a part of the property in dispute from Mt. Mahtab Kaur. It was contended that this property was in posession of one Bulla Mal against whom a suit was instituted by Mt. Mahtab Kaur for recovery of the property, but without success. She then sold the property to Jiwan Lal who subsequently successfully ejected the trespasser Bulla Mal. It was contended that this was an act of good management on the part of Mt. Mahtab Kaur, as she passed a doubtful title to a stranger for consideration and that stranger incurred considerable expense in recovering the property, and that therefore the alienation should be upheld as an act of good management which according to counsel was the same thing as necessity and in any case the alienee Jiwan Mal or his heirs should be reimbursed so far as the expenses incurred by them in recovering the property are concerned. In my opinion there is no force in either of these contentions. Mt. Mahtab Kaur's powers under the will were strictly restricted. She could not sell the property except for special valid necessity, such as marriage of a daughter's son, daughter's daughter or other lawful expenses. I am unable to agree that this included power to sell the property as "an act of good management," assuming that the facts alleged by Mr. Nawal Kishore amounted to an act of good management. The sale by Mt. Mahtab Kaur was therefore incompetent under the will and must be set aside without any reimbursement such as is claimed by him for his client. This of course is subject to the plaintiffs having a locus standi to sue. The case is remanded.

Monroe, J.—I agree.

K.S. *Case remanded.*

A. I. R. 1933 Lahore 864

JAI LAL AND AGHA HAIDAR, JJ.

Mohammad Khan—Appellant.

v.

Chandi Shah and *others*—Respondents.

Second Appeal No. 1586 of 1928, Decided on 16th June 1933, from decree of Dist. Judge, Rawalpindi, D/- 14th March 1928.

Mortgage — Usufructuary mortgagee advancing further money to mortgagor can legitimately stipulate that land cannot be redeemed without payment of all mortgages — It is perfectly legitimate for a usufructuary mortgagee who advances money subsequently to his mortgagor to have a stipulation in the subsequent document that the land would not be redeemed unless the amount due to him under both the prior and the subsequent documents is paid up and hence the mortgagor cannot redeem the original mortgage alone unless the subsequent mortgages are also paid up : *Case law referred.* [P 865 C 1]

Kishen Dayal—for Appellant.

Mehr Chand Mahajan — for Respondents.

Agha Haidar, J.—This appeal arises out of a suit for declaration that Muhammad Khan, defendant 1, cannot redeem the land in suit without paying a sum of Rs. 3,542-15-3, due under three documents, to be presently mentioned. Both the Courts below have decreed the plaintiff's claim and Muhammad Khan has come up in second appeal to this Court. On 7th April 1891, two brothers, Hayat and Bakhtawar, mortgaged their land to Chandi Shah, plaintiff, and his brother Ram Das for a sum of Rs. 990. The mortgage was with possession and the profits accruing from the land were to be appropriated towards the payment of interest. Bakhtawar one of the brothers, redeemed his half-share by paying half of the mortgage money, apparently with the mutual consent of the parties. Consequently the share of Hayat remained under the possessory mortgage for half the amount, namely, Rs. 495. On 9th January 1897, Hayat took a loan of Rs. 99 from the mortgagees and promised to pay interest at the rate of Re. 0-13-6 per cent per mensem. But the document under which this transaction is alleged to have been entered into cannot be traced on the record, although reference is made to it in the judgment of the two Courts below. Apparently the Courts below took the existence of the document for granted because there is a recital in the document dated 16th June 1900, which contains a reference to it. Under this latter document of 1900, Hayat borrowed a sum of Rs. 163 from the mortgagee and promised to pay interest at the rate of Re. 0-12-0 per cent per mensem. Hayat is apparently dead and on 24th July 1924, his sons, namely, Gul Rang and Gul Hussain, defendant 3 and 4, have transferred the equity of redemption in the land to Muhammad Khan, defendant 1, for a sum of Rs. 1,500. In July 1925, Muhammad Khan vendee applied to the Revenue Courts for the redemption of the land in suit on payment of Rs. 495 being the amount due under the document of 1891. This application was granted by the Revenue Authorities.

On 14th November 1925, the present suit was instituted for a declaration that defendant 1, Muhammad Khan, could redeem the land only on payment of the whole amount due under all the three documents. The two Courts below, as already mentioned, have granted the declaration asked for. The sole point for determination in this second appeal is as to what is the nature of the two documents dated 9th January 1897, and 16th June 1900, and how far Muhammad Khan is bound to pay the amount due under these documents. As already mentioned, the document of 1897 is not to be found on the record, although there is a reference to it in the documents dated 16th June 1900. The parties are however agreed that, excepting some slight details which are of no importance, the terms of the document of 1897, which is an unregistered document, are practically the same as those of the document dated 16th June 1900. In the recitals this latter document is described as an additional mortgage and under its terms the mortgage of 1891 cannot be redeemed without the payment of amount due under the mortgages of 1897 and 1900. Such documents are well-known in the neighbouring provinces of the United Provinces where they are called Mashrutulrahns and it has been decided in a number of cases by the Allahabad High Court that it is perfectly legitimate for a usufructuary mortgagee who advances money subsequently to his mortgagor to have a stipulation in the subsequent document that the land would not be redeemed unless the amount due to him under both the prior and the subsequent documents is paid up: vide *Har Prasad* v. *Ram Chandar* (1), *Gaya Singh* v. *Surajbali Singh* (2), *Sita Ram* v. *Sheo Darshan* (3) and *Mt. Daulat Bibi* v. *Gajadhar Prasad Singh* (4).

To the same effect is the law laid down in *Punnu Ram* v. *Ghulam Hussain* (5) and *Mt. Jugesri Kaur* v. *Aftab Chand* (6). This being so, it follows that the mortgage of 1891 cannot be redeemed unless the amounts due under the two subsequent mortgages of 1897 and 1900 are paid up.

In this view of the case the appeal fails and I would dismiss it with costs.

Jai Lal, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 865

MONROE, J.

Sadhu Singh and *others* — Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 486 of 1933, Decided on 19th June 1933, from order of Sess. Judge, Ferozepore, D/- 22nd March 1933.

(a) Penal Code (1860), Ss. 325 and 304, Part 2—Conviction in alternative under Sections 325 and 304, Part 2 is not proper.

A conviction in the alternative under Ss. 325 and 304, Part 2 is not proper; if the evidence shows that an offence under S. 304, Part 2 has been committed, it is unnecessary to mention S. 325; if the evidence does not show an offence under S. 304, Part 2, this section should not be mentioned. [P 865 C 2]

(b) Penal Code (1860), S. 34—Fatal injury caused by some of accused in sudden fight—Author of injuries not known—All accused should not be convicted unless S. 34 applies.

Where fatal injuries are caused by some of the accused but the author of the injuries is not known, unless there is suggestion that S. 34 applies, each of the accused can be held responsible only for his own act and not for those of his co-accused. [P 866 C 1]

Mohsin Shah—for Appellants.

Basant Krishan for *Government Advocate*—for the Crown.

Judgment.—The four accused have been convicted under S. 325/304, Part. 2, Penal Code, and sentenced to five years' rigorous imprisonment each. I do not know what exactly the learned Sessions Judge means by convicting under S. 325/304, Part. 2. It is presumably a conviction in the alternative. If the evidence shows that an offence under S. 304, Part 2 has been committed, it is unnecessary to mention S. 325: if the evidence does not show an offence under S. 304, Part 2, this section should not have been mentioned. There is one fact clear namely, that Ujagar Singh was killed on 23rd January 1933 in the village Bhindar Khurd as a result of two contused wounds inflicted on his head. So far as the guilt of the accused is concerned, the learned Judge's finding is:

> "I have therefore to hold that the two fatal injuries were caused by some of the accused, but that on the material it was difficult to say as to which of them did so. The fight having been a sudden one and the perpetrator of the fatal blows not being determined by clear and reliable mate-

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1. AIR 1922 All 174=63 I C 750=44 All 37 (FB).
2. AIR 1924 All 832=75 I C 931.
3. (1926) 96 I C 197.
4. (1926) 96 I C 555.
5. AIR 1926 Lah 494=96 I C 630=7 Lah 297.
6. AIR 1928 Pat 562=112 I C 655=8 Pat 68.

rial, the accused can, in my opinion, be convicted of the offence under S. 32/304, Part 2, I. P. C., in the alternative only.'

I confess that I cannot follow this reasoning; there being no suggestion that S. 34, Penal Code, is applicable to this case, each of the accused can be held responsible for his own act, and not for those of his co-accused. When the evidence is considered, this conviction appears even more unsatisfactory. The learned Judge has found that a motive was invented by the prosecution, that the prosecution witnesses have converted a drunken brawl resulting in the exchange of blows and the death of the deceased into a deliberate and preconcerted murder, that the evidence was either of interested witnesses or of persons who had some animus against the accused. Excepting the statement that there was a drunken brawl of which there is no evidence, I agree with the learned Judge's view and a consideration of the evidence in detail has convinced me that it is entirely untrustworthy. It is impossible to hold that the story for the prosecution bears any resemblance to the truth. When all of it that must be discarded has been discarded, there is so little left, that to uphold this conviction I should be compelled to imagine what may have happened at the time at which the deceased met his death. Having therefore no sufficient evidence upon which I can act, I allow this appeal and acquit the accused.

K.S. *Appeal allowed.*

A I. R. 1933 Lahore 866

TEK CHAND, J.

Khushi Ram—Plaintiff—Appellant.

v.

Nand Lal and *others* — Defendants — Respondents.

Second Appeal No. 1540 of 1932, Decided on 20th June 1933, from decree of Dist. Judge, Gurdaspur, D/- 5th May 1932.

(a) Custom (Punjab)— Alienation of ancestral property — Minor reversioner has independent right to contest alienation and is entitled to extension of time under Limitation Act (1908), S. 6.

In the case of alienation of ancestral property, reversioner who is a minor on the date of alienation has an independent right to contest the alienation; and he is entitled to extension of time under S. 6, Limitation Act, notwithstanding the existence of nearer reversioners including his own father: *A I R* 1932 *Lah* 39, *Rel on.* [P 867 C 1]

(b) Custom (Punjab) — Alienation of ancestral property—Father reversioner acquiescing in alienation—Speculative and collusive declaratory suit by his son challenging alienation declaration should not be granted—Specific Relief Act (1877), S. 42.

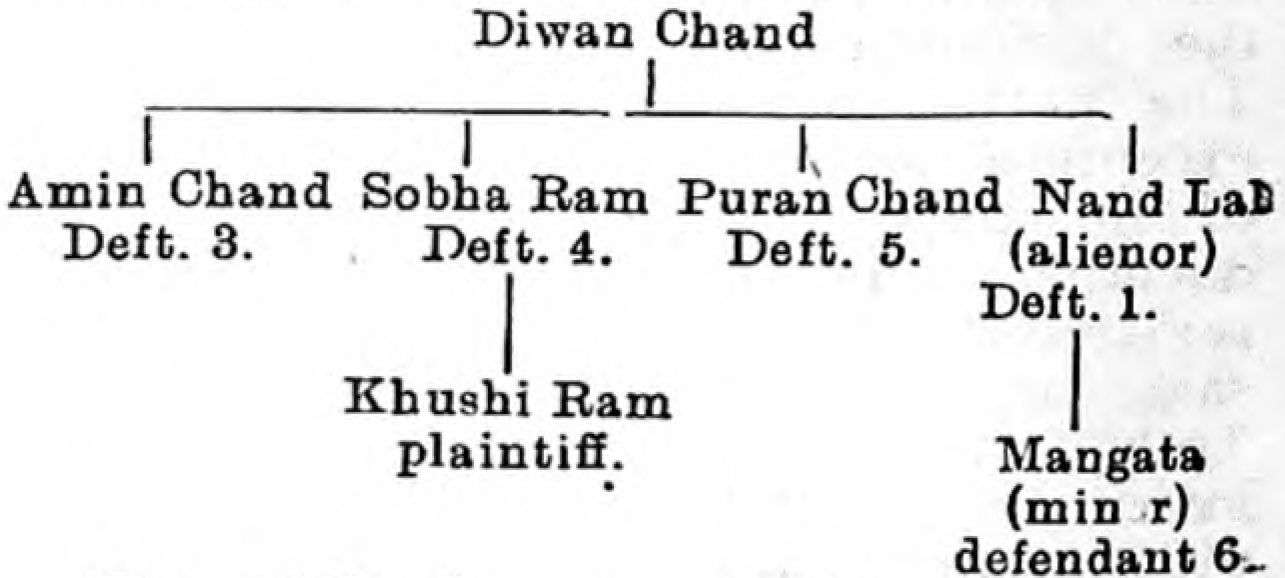
A person filed a declaratory suit which was purely speculative and had been instituted at the instance of his father and uncle, who had themselves acquiesced in an alienation and whose own right to contest it had become extinct by lapse of time:

Held: that the grant of a declaratory decree in such suits was discretionary with the Court and that in the present case the declaration asked for should not be granted. [P 867 C 1]

Charanjiva Lal Aggarwal—for Appellant.

Nawal Kishore—for Respondents.

Judgment.—The following pedigree-table will be helpful in understanding the facts of this case:



On 16th August 1917, Nand Lal sold 76 kanals and 10½ marlas of ancestral land for Rs. 5,000 to Beli Ram, defendant 2. The alienor is a Khatri by caste but it has been found by the Courts below that his family is governed by the rules of Punjab custom in matter of alienations. This point is no longer in dispute and it is conceded that under the (Punjab) Act 1 of 1920 his brothers, Amin Chand, Sobha Ram and Puran Chand, had the right to contest the alienation, on the ground that it had been effected without consideration and necessity, within six years from the date of the sale. This they failed to do and admittedly their claim to do so became barred by time on 16th August 1923. On the date of the alienation Nand Lal was childless, but in 1923 he got his son Mangta, defendant 6.

On 24th November 1924, the present suit was brought by Khushi Ram, son of Sobha Ram, for a declaration that the alienation had been effected without consideration and necessity and would not affect his reversionary rights after the death of the alienor. He pleaded that the suit was within limitation under S. 6, Limitation Act, as he was born on 20th February 1906, and was below 21 years of age on the date of the suit. The trial Judge held the suit to be timebarred and dismissed it on this and other grounds.

On appeal the learned District Judge has decided the plea of limitation only. He has found that as Sobha Ram, father of the plaintiff, was alive at the time of the alienation, the latter cannot take advantage of his minority under S. 6, and that the suit is governed by S. 7 under which it is beyond time.

There can be no doubt that the view taken by the learned District Judge is entirely incorrect, and Mr. Nawal Kishore for the respondents has frankly admitted that he is unable to support it. The property being ancestral the plaintiff had an independent right to contest the alienation, and as he was a minor at the time when the cause of action arose, he is certainly entitled to extension of time under S. 6, the existence of the nearer reversioners (including his father) notwithstanding. If any authority for this simple and well-settled proposition is required, reference may be made to the recent decision of the Letters Patent Bench in *Wali Chand* v. *Punjab Singh* (*A. I. R.* 1932 *Lah.* 39). As the plaintiff was below 21 years of age on the date of the institution of the suit his claim is within time.

This however does not settle the matter. As stated already, the alienor has got a son Mangta, defendant 6, who was in existence at the time of the suit and is still alive. A reference to the pedigree-table would show that there are several persons between the plaintiff and the succession, and his chances of inheriting the property are very remote indeed. There can be no doubt that the suit is purely speculative and has been instituted at the instance of his father and uncle, who have themselves acquiesced in the alienation and whose own right to contest it has become extinct by lapse of time. The grant of a declaratory decree in such suits is discretionary with the Court and I am of opinion that in the present case the declaration asked for should not be granted to the plaintiff, even though his suit is technically within time. I accordingly dismiss the appeal, but having regard to the fact that the District Judge had decided the case on the question of limitation only and that decision was wrong, I leave the parties to bear their own costs in this Court.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 867

TEK CHAND, J.

Ratta—Defendant—Appellant.

v.

Mt. Jai Kaur—Plaintiff—Respondent.

Second Appeal No. 1317 of 1929, Decided on 12th July 1933, from decree of Addl. Dist. Judge, Ferozepore, D/- 4th March 1929.

(a) Civil P. C. (1908), O. 6, R. 17 — Discretion exercised by lower appellate Court — High Court will not interfere in second appeal unless strong case is made out for so doing.

Where a District Judge exercises his discretion and refuses to allow an amendment of pleading, the High Court will not interfere with his order unless a strong case is made out for such interference. [P 868 C 1]

(b) Custom (Punjab) — Succession — Self-acquired property — Daliwal Jat of Moga tahsil, Ferozepore District — Collaterals are not entitled to succeed in presence of daughter.

There is no custom among Daliwal Jats of Moga-tahsil, Ferozepore District, by which collaterals can succeed to the self-acquired property of a male proprietor in the presence of his daughter. [P 868 C 1]

Ratan Lal Chawla for *M. C. Mahajan*—for Appellant.

Ram Lal Anand I—for Respondent.

Judgment.—The property in dispute belonged to one Preman, a Daliwal Jat of Tahsil Moga, district Ferozepore. Preman died sometime in 1885, leaving him surviving a widow Mt. Bholi and a daughter Mt. Jai Kaur, plaintiff. On Preman's death the property was mutated in the name of Mt. Bholi who remained in possession till her death in 1927.

In January 1928 the present suit for possession was brought by Mt. Jai Kaur, daughter of Preman, against Ratta, who is his sister's son, and alleges to have been adopted by Saman Singh, the paternal uncle of Preman. The trial Court dismissed the suit, but on appeal by the plaintiff the learned District Judge has passed a decree in her favour. In the pleadings it was not alleged by the defendant that the property in dispute was ancestral, but on appeal before the learned District Judge a request was made on his behalf for permission to amend the pleadings and to have the case sent back for further enquiry on this point. The learned Judge, however, declined to accede to this request, on which the defendant's pleader admitted that no special custom existed among the parties entitling the collaterals to exclude daughters from succession to the self-acquired property of their father.

On second appeal by the defendant the prayer for amendment of the pleadings was repeated before me. I have examined the written statement and have heard counsel at length. In my opinion no case has been made out for interference by me with the discretion of the learned District Judge refusing to allow the defendant to urge for the first time in appeal that the land was ancestral. The written statement had been drafted by a leading lawyer at Ferozepore and the case was hotly contested in the trial Court. If the appellant really intended to plead that the land was ancestral, it was his duty to do so clearly in the trial Court. In my opinion the learned District Judge has exercised a sound discretion in refusing to remand the case and have the case retried on a point which the appellant could have taken, but did not take, in the trial Court. The case must, therefore, be decided on the assumption that the property in dispute was self-acquired of Preman. Before the learned District Judge it was clearly admitted by the defendant's counsel that collaterals had no right to succeed to self-acquired property of a male proprietor in the presence of his daughters. No allegation has been made or affidavit filed, that the admission was not made in fact, and nothing has been urged before me why the appellant should be allowed to go behind it.

In my opinion there is no ground for interference in second appeal. I, therefore, dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 868

ABDUL RASHID, J.

Emperor

v.

Hussaina—Respondent.

Criminal Misc. Petn. No. 85 of 1933, Decided on 19th June 1933.

(a) Criminal P. C. (1898), S. 164 — Approver accepting tender of pardon can be examined under S. 164.

Once the approver has accepted a tender of pardon he stands on the same footing as any other witness with the exception that he is liable to forfeit his tender of pardon if he does not comply with the conditions on which the tender was made. There is no legal bar to his examination like any other witness under S 164. [P 869 C 1]

(b) Penal Code (1860), S. 193 — Contradictory statement by approver—Sanction cannot be refused—Criminal P. C. (1898), S. 339.

In a case where contradictory statements have been made on different occasions, sanction cannot be refused unless it is established that the approver made one of the two statements under undue influence. [P 869 C 1]

C. H. Carden Noad—for the Crown.

Mohsin Shah—for Respondent.

Order.—This is an application by the learned Government Advocate under sub-S. (3), S. 339, Criminal P. C., for sanction to prosecute Hussaina respondent for perjury on the ground that having accepted a tender of conditional pardon on 9th March 1932, he deposed to certain facts before Sayed Ijag Hussain Shah, Magistrate, First Class, Gujranwala, but retracted this statement before the Committing Magistrate, Sardar Lal Singh, on 6th April 1932.

During the course of an investigation connected with the murder of one Hakim a pardon was granted to the respondent Hussaina by Mr. Sri Krishna, Additional District Magistrate, on 9th March 1932, on the condition that he would make a true and full disclosure of all facts within his knowledge concerning the murder of the said Hakim. Two days after the acceptance of this pardon Hussaina was produced before Sayed Ijag Hussain Shah, Magistrate, First Class, who recorded his statement on solemn affirmation obviously acting under S. 164, Criminal P. C. In this statement he fully implicated Murad and himself as being concerned in the murder of Hakim. In the course of the commitment proceedings Hussaina, respondent, appeared as P. W. 1 on 6th April 1932 before Sardar Lal Singh, Magistrate, First Class, and completely resiled from the statement made by him on 11th March 1932. He deposed that he did not know Murad and had no knowledge whether Hakim was dead or alive, and that his previous statement was false and had been made under police pressure and threats. Steps have been taken on behalf of the Crown to start proceedings against the respondent Hussaina under S. 193, Penal Code, and in accordance with the provisions of S. 476, Criminal P. C., a complaint has been presented by Sardar Lal Singh, Magistrate, First Class, Gujranwala. The Public Prosecutor has also furnished the necessary certificate.

It has been contended on behalf of the respondent that sanction to prosecute should not be given as it was quite unnecessary to record Hussaina's statement on 11th March 1932 under S. 164, Criminal P. C. Reliance was placed in this connexion on *Emperor*

v. *Nga Bo Gyi* (1). With all respect I do not find myself in agreement with the views expressed in this ruling. Once the approver has accepted a tender of pardon he stands on the same footing as any other witness with the exception that he is liable to forfeit his tender of pardon if he does not comply with the conditions on which the tender was made. There is no legal bar to the examination of any other witness under S. 164, Criminal P. C., and I see no reason why the examination of the approver under this section should be open to any objection. The learned Government Advocate relies on *Emperor* v. *Parma Nand* (2). It has been remarked therein:

> "It might be very necessary to obtain a detailed statement of what the person accepting the pardon has to say in order to complete the investigation and inquiry and to ascertain what corroboration of his statement might be forthcoming, and it might very well be extremely difficult to wait for that information till the 'Magisterial inquiry commenced."

Reliance may also be placed on *A. I. R.* 1924 *Lah.* 90 in this connexion. I am of the opinion that in a case where contradictory statements have been made on different occasions, sanction cannot be refused unless it is established that the approver made one of the two statements under undue influence. I accordingly sanction the prosecution of Hussaina under S. 193, Penal Code, for giving false evidence either before Sayed Ijag Hussain Shah, Magistrate, First Class, on 11th March 1932, or before Sardar Lal Singh, Magistrate, First Class, on 6th April 1932.

K.S. *Prosecution sanctioned.*

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1. AIR 1925 Rang 286=89 I C 708=26 Cr L J 1396=3 Rang 224.
2. AIR 1933 Lah 321=(1933) Cr C 564=142 I C 776=34 Cr L J 469.

A. I. R. 1933 Lahore 869 (1)

ADDISON, J.

Emperor

v.

Ali Beg—Accused—Respondent.

Criminal Revn. No. 299 of 1933, Decided on 15th June 1933, from order of Dist. Magistrate, Dera Ghazi Khan, D/- 16th February 1933.

Arms Act (1898), Ss. 19 (f) and 29—Case under Arms Act in Dera Ghazi Khan District requires sanction of District Magistrate.

As provisions of S. 32, Arms Act 31 of 1860, were not in force in District Dera Ghazi Khan, the previous sanction of the District Magistrate is necessary under the second part of S. 29, Arms Act of 1878, for a prosecution under S. 19 (f); and a prosecution without such sanction is illegal. [P 869 C 2]

Des Raj Sawhney—for Petitioner.

Order.—This is a case where a person has been convicted under S. 19, Cl. (f), Arms Act, in the Dera Ghazi Khan District. The case has been forwarded to this Court by the District Magistrate to set aside the trial and to order a fresh trial on the ground that the case could not proceed without the sanction of the District Magistrate which had not been given. Under S. 29, Arms Act, sanction of the District Magistrate was only required for the first three months after the present Act came into force in any province, district or place to which S. 32, Cl. (2) of Act 31 of 1860, applied at the date when the present Act came into force. In most districts of the Punjab the provisions of S. 32, Arms Act, were operative when the present Act came into force. This was pointed out in *Sunder Singh* v. *Emperor* (1), where reference was made to Punjab Government, Home Department Notification No. 826 of 26th February 1875. This Notification is before me and it shows that S. 32 was in force in all districts in the Punjab, as at present constituted except the district of Dera Ghazi Khan, Simla, and Kangra and Isa Khel Tahsil of the Mianwali District. Apparently to such district or portion of a district, the second part of S. 29 applies, which means that the previous sanction of the Magistrate of the district is necessary for a prosecution under S. 19, Cl. (f), Arms Act. As Dera Ghazi Khan was a district where S. 32 was not in force it follows that the present prosecution was illegal as it had not the previous sanction of the District Magistrate.

I therefore accept the revision and set aside the conviction of Ali Beg under S. 19, Cl. (f), Arms Act, for possessing a revolver without a license. It is open to the District Magistrate to take such further action as he considers necessary.

K.S. *Revision accepted.*

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1. (1913) 24 P R 1913 Cr=14 Cr L J 688=21 I C 1008.

A. I. R. 1933 Lahore 869 (2)

BHIDE AND CURRIE, JJ.

Inayat—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 453 of 1933, Decided on 27th June 1933, from order of Sess. Judge, Lyallpur, D/- 18th March 1933.

S. N. DAR, B.A., LL.B.
Vakil High Court.
SRINAGAR (Kashmir)

Penal Code (1860), S. 304, Part 1—Evidence—Grave and sudden provocation.

Deceased, accused's younger sister, who had left her husband and was living under the care of accused was suspected to be of an immoral character. On the night of the murder at about 3 a.m. she had gone to meet a stranger in the wara at the back of the house, for a clandestine purpose. When the accused asked the deceased why she did not give up her evil ways she refused to listen to him and gave an insolent reply. There upon the accused gave a blow with a hatchet which caused her death :

Held : that the provocation received by the accused was in the circumstances almost as "grave and sudden" as it would have been had he seen the deceased in the act of sexual intercourse with a stranger and it was further aggravated by insolent reply given by the deceased and that the case properly fell within the purview of S 304, Part 1, I. P. C. [P 870 C 2]

Abdul Asiz—for Appellant.

Des Raj Sawhney—for the Crown.

Bhide, J.—The appellant, Inayat, a young Mirasi aged about 23, has been convicted under S. 302, Penal Code, of the murder of his sister Mt. Bego and has been sentenced to transportation for life. The appellant admitted at the trial that he killed Mt. Bego, but pleaded that he did so under grave and sudden provocation as he found her having sexual intercourse with a stranger. The learned Sessions Judge however did not believe this plea in view of a previous confession of the appellant recorded under S. 164, Criminal P. C., in which the plea had not been put forward. The story put forward in the latter confession was that Mt. Bego though married was not living with her husband and was suspected of bad character. On the night of the murder she was sleeping on a charpoy close to that of the appellant. At about 3 a. m., the appellant awoke and found that Mt. Bego was not on the charpoy. He went to the wara at the back of the house and found Mt. Bego talking to a stranger. He returned to the house in rage and picked up a hatchet which was lying there. In the meantime Mt. Bego also returned to the house. The appellant remonstrated with her for not giving up her evil ways. But she refused to listen to him. Thereupon he gave her 2 or 3 blows with the hatchet and killed her on the spot. The learned Sessions Judge has held this confession to be true and convicted the appellant under S. 302, Penal Code, on its basis.

After the murder, the appellant himself sent word to the lambardar and accompanied him to the thana, where the matter was reported to the police. In this report also the only provocation alleged was that Mt. Bego had been seen talking to a stranger. The next day the appellant was produced before Th. Lalit Chand, Additional District Magistrate, and made the confession referred to above. At the trial one eyewitness, Mt. Bano, was produced on behalf of the prosecution, but her statement differed in material particulars from the confession made by the appellant before Th. Lalit Chand. Mt. Bano is a neighbour of the appellant. (After discussing the evidence of Mt. Bano and holding it to be untrue, the judgment continued). The confession of the appellant seems to have been recorded by Th. Lalit Chand with all necessary precautions and appears to me to give a correct version of what really happened.

The learned counsel for the appellant urged next that even if the facts given in the confession before Th. Lalit Chand be accepted as correct they would amount to "grave and sudden provocation" in the circumstances of the case and the offence would fall under S. 304 (1), Penal Code. I think there is force in this contention. According to the confession of the appellant (which is the sole basis of his conviction) the deceased who was his younger sister had left her husband and was living under his care. She was suspected to be of an immoral character. On the night of the murder at about 3 a. m., she had gone out to meet a stranger in the wara at the back of the house, and there can be scarcely any doubt that this must have been for a clandestine purpose. Further, when the appellant asked the deceased why she did not give up her evil ways she refused to listen to him and gave an insolent reply. In my opinion the provocation received by the appellant was in the circumstances almost as "grave and sudden" as it would have been had the appellant seen the deceased in the act of sexual intercourse with a stranger and it was further aggravated by the insolent reply given by the deceased. In my judgment the case properly falls within the purview of S. 304, Part 1, Penal Code. I would accordingly alter the conviction to one under that section and considering all the circumstances including the youth of the appellant, would reduce the sentence to rigorous imprisonment for four years.

Currie, J.—I agree.

K.S. ***Sentence reduced.***

* A. I. R. 1933 Lahore 871

TEK CHAND, J.

Emperor

v.

Rai Singh Narain Singh—Accused—Respondent.

Criminal Appeal No. 1178 of 1932, Decided on 11th July 1933, on difference between Coldstream and Jai Lal, JJ., from order of Sess Judge, Hoshiarpur, D/- 14th July 1932.

(a) Criminal P. C. (1898), S. 417—Appeal against acquittal—To justify interference it is sufficient that finding is clearly wrong and unreasonable—Unreasonableness of finding need not amount to perversity or stupidity — But indication of error in order of acquittal should be clearer or more palpable than in order of conviction to justify interference—In appeal against acquittal benefit of doubt goes against appellant, whereas in appeal against conviction it goes in favour of appellant.

The Code of Criminal Procedure makes no difference between an appeal from an acquittal and from a conviction. In order to justify interference with a judgment of acquittal on a question of fact it is sufficient, if the finding is clearly wrong on the evidence and unreasonable in the opinion of the appellate Court, whether or not the unreasonableness amounts to perversity, stupidity or incompetence, or the Court below can be said to have obstinately blundered in coming to it; but sound principles of criminal jurisprudence require that the indications of error in the judgment of acquitta ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a conviction. When an accused has been acquitted by a Magistrate after hearing all the evidence against him, the presumption is that there was at least reasonable doubt and the appellate Court must be positively convinced that there was no such reasonable doubt, the benefit of all doubt shown to exist being against the appellant; whereas in an appeal from a conviction the benefit of all reasonable doubt has to be given in favour of the appellant: 7 *P R* 1904 *Cr* and 15 *P R* 1909 *Cr*, *Rel on.* [P 874 C 2]

***(b) Evidence Act (1872), S. 30—Approver's evidence corroborated by independent testimony against some accused but rejected in its entirety against another accused—Evidence must be rejected as against all accused—Criminal Trial.**

Where the evidence of the approver is eliminated as against one of the accused whose name has been falsely substituted by the approver, the whole fabric must fall to the ground and it should not be accepted even against the other accused though to some extent it is corroborated by independent testimony. [P 875 C 1]

(c) Criminal Trial—Accused having large number of injuries on his leg—Accused not explaining as to how he got wounds—No other evidence against accused—Held that accused's complicity in crime is not proved.

When the assassins were in the house where the occurrence took place, son of the murdered person fired shots. The accused had several injuries on his legs. No questions were put to the medical witness as to whether those injuries could have been caused by these shots. Accused was not able to give any satisfactory explanation as to how he had been wounded. There was no other evidence against him:

Held: that though the fact that he was not able to explain as to how he got the wounds was a point against him, this fact alone did not prove his complicity in the crime and that he should be acquitted. [P 875 C 2]

(d) Criminal Trial—Crime of serious and brutal nature committed by large number of persons should be investigated by senior and experienced officer.

For investigating a crime of a serious and brutal nature committed by a large number of persons in the heart of a populated place, a very senior and experienced officer should be specially deputed to carry on the investigation on the spot. [P 876 C 1]

(e) Criminal Trial — Investigating officer should not identify himself with one who is suspected by relations of deceased.

An investigating officer should not identify himself with a person who is suspected by the relatives and friends of the deceased of having a hand in the crime. [P 876 C 2]

Dewan Ram Lal—for Applicant.

Brij Lal and *Mohammad Rafiq*—for Respondent.

Judgment.—This is an appeal preferred by the Local Government under S. 417, Criminal P. C., from the order of the Sessions Judge, Hoshiarpur, acquitting Rai Singh, respondent, in a case in which he, along with three other persons, was tried under S. 302/149, Penal Code. The appeal was originally heard by a Division Bench of this Court, but as the Judges composing the Bench were divided in opinion, the case has been laid before me for final disposal under S. 429, Criminal P. C. It is established beyond dispute that on the night of 30th January 1932, a gruesome tragedy was enacted in the house of Siri Ram Ahluwallia, a rich money lender of the small town of Bhangala in the Dasuya Tahsil of the Hoshiarpur District. Shortly after midnight some persons entered his house armed with sharp-edged weapons, assaulted Siri Ram, his brother Bansi Lal, their wives, Mt. Daropati and Mt. Ram Rakhi, and two Mahomedan servants, Gullu, weaver, and Imam Din, kumhar. Of these Siri Ram, Bansi Lal and Gullu were killed almost instantaneously; and Mt. Daropati received a number of serious injuries, from the effects of which she died within a few hours. Imam Din and Mt. Ram Rakhi survived, but the former had a big gaping wound just above his hip bone, and the latter had one of her hands cut right through, while her neck, nose and other hand were badly injured.

The only other inmates of the house were the two sons and a daughter of Bansi Lal, of whom the eldest is Dina Nath, (P. W. 6). He is only nineteen years of age and had come to Bhangala from his school a day or two before the occurrence. On the fateful night he, Bansi Lal, Mt. Ram Rakhi and the servant Gullu slept in one room on the upper storey of the house, while Imam Din was in the adjoining room in the same storey. Dina Nath his younger brother, and sister, and Mt. Daropti, slept on separate charpoys in a room on the ground floor. Dina Nath has deposed that shortly after midnight he was awakened by a strange noise in the upper storey. He thought that his uncle Siri Ram, who was ill, had got a fit. He shouted to his father and mother, and also to the servant Gullu to find out what the matter was. There was no response. He then called Imam Din who replied that he would get up and go into the other room. He however never spoke again.

By this time, Mt. Daropati, who was sleeping in the same room as Dina Nath, was aroused and she went out of the room. As soon as she reached the deorhi, she screamed and shouted "Dont kill me, take whatever you want to take." On hearing this Dina Nath came out with a stick in his hand, but being frightened went inside and loaded his gun. After a short time he saw a stranger opening the door of the inner room from the deorhi. Dina Nath fired at him. The stranger cried and fell down. Dina nath shouted to Mt. Daropti, enquiring if the culprits were still there. She replied mumbling that some noise was going on, but she could not say whether anyone was there. Dina Nath then came out into the court-yard and fired another shot in the air. He then raised a hue and cry and after considerable time some persons came, one of them being Ghulam Mohammad Dafadar of the village watchmen, (P. W. 9), who was patrolling the streets at the time. Accompanied by him Dina Nath went up-stairs and was horrified to find his father Bansi Lal, his uncle Siri Ram and the servant Gullu lying dead and bleeding from numerous wounds, which appeared to have been inflicted with sharp-edged weapons. He also saw in the same room his mother, Mt. Ram Rakhi, severely wounded. Outside the chaubara was lying Imam Din with a deep incised wound just above the right hip-bone. He then proceeded to procure such medical aid as was available in the town. Near the doorway of a neighbouring house he found Mt. Daropati very seriously injured and shouting for him. She said that she had quietly walked out of the deorhi after the culprits had departed.

On hearing her cries, Mahajit Singh, who is a collateral of Siri Ram and Bansi Lal in the third degree, came out of his house, which is situate at a distance of about a hundred yards from theirs. He found Mt. Daropati lying wounded and bleeding in the street; he lifted her and took her into his own house, but she expired soon after. Dina Nath returned to the house with Dr. Chhajju Ram and a friend Daulat Ram. He and the doctor began to attend to the wounded persons, while Ghulam Mohammad Dafadar and Daulat Ram went to the police station at Mukerian, 4½ miles distant. They reached there at 4-45 a. m., and the first information report was recorded by the Sub-Inspector, Balwant Singh, (P. W. 36). The Sub-Inspector at once proceeded to the spot, and after the necessary formalities, he arranged to send the dead bodies and the injured persons to Dasuya. Assistant Surgeon Harnam Singh, (P. W. 1), conducted the post mortem examination, and under his advice Mt. Ram Rakhi and Imam Din were admitted into the hospital. On receipt of a telegram from Mahajit Singh, his wife Mt. Charan Kaur, (D. W. 1), who had gone to her parents' house in another village, proceeded at once to Dasuya, and there in the hospital, she attended on, and nursed, Mt. Ram Rakhi for several days.

Neither the two surviving victims, Mt. Ram Rakhi and Imam Din, nor Dina Nath had been able to identify any of the culprits, and in the first information report no clue was mentioned as to their identity. Very soon after the crime however it became clear that no loss of property whatever had taken place. At the time of the assault one of the victims, Mt. Daropati, was wearing a number of gold ornaments and the other, Mt. Ram Rakhi, whose hands were cut off, had gold bangles on, but none of these articles had been removed by the assailants. In the pocket of a coat which was hanging along one of the walls of the chaubara where Siri Ram, Bansi Lal and Gullu had been killed, there were currency notes of the value of more than Rs. 100, but not one of them had been taken away. There was a lot of cash, jewellery and other valuables in the house, but no attempt had been made to remove them, though the miscreants were several in number and had remained in the house for a considerable time. From these facts, the Sub-Inspector concluded that the object of the crime was not to commit dacoity, but to slaughter the inmates of the house. He therefore thought that the culprits were either enemies of the family or their debtors who had been pressed for repayment of their loans.

One of the principal debtors of the family was Rai Faiz Mohammad Khan, an aristocratic gentleman of influence and position in the locality, who has been described on the record as the "Rai Sahib of Bhangala." He owed Siri Ram and Bansi Lal about Rupees 20,000. He is the zaildar of the ilaqa, and was formerly an Honorary Magistrate. It is in evidence that for some years past the inhabitants of the town of Bhangala and the neighbourhood or at least a large section of them had felt themselves aggrieved by certain actions of the Rai Sahib and had been carrying on propaganda against him. A number of posters, describing his alleged misdeeds and misuse of Magisterial powers, had been printed and issued broadcast: see Exs. D.A., D.B., D. C. and D. D., printed at pp. 12 to 17 of the paper-book. It is also in evidence that a representation signed by no less than 4,380 persons had been submitted to Government alleging that the Rai Sahib was indebted to the extent of a lac or a lac and a half of rupees, that he was of licentious habits and had been abusing his Magisterial powers. As stated already, the Rai Sahib owed about Rs. 20,000, to the deceased, and shortly after the murder a rumour got afloat about his complicity in this crime. The Sub-Inspector has deposed that the relations of the deceased had strong suspicions against the Rai Sahib and complained about the matter to the Deputy Commissioner. The Sub-Inspector however did not question the Rai Sahib, as nothing definite was mentioned against him personally. But Umar Din and Hassa, two of his dependants, were sent for as suspects and remained under police surveillance for about a week.

Soon after the investigation had begun, the Sub-Inspector realized that the number of policemen available in the thana was insufficient for the investigation of a serious crime of this nature, in which a man of the position of the Rai Sahib had been suspected. He therefore asked the head-quarters to send additional police. Accordingly on the 4th February, Qutab Din, Head Constable, (P. W. 35), was sent to Bhangala with a number of policemen. Balwant Singh and Qutab Din both conducted the investigation till the 17th February when the former was transferred, making over sole charge of the case to Qutab Din. The evidence given at the trial by these two police witnesses discloses the curious fact that during the period that they both were at Bhangala carrying on the investigation, they did not co-operate with each other. As stated already, Balwant Singh had asked that his force be augmented, apparently with a view to carry on the investigation more vigorously, and in response to his representation Qutab Din had been sent. But Qutab Din deposes that he was "deputed specially to investigate the case" and had been authorized.

" to act according to his own views even though they were different from those of Sardar Balwant Singh."

He has stated that he made this clear to Balwant Singh and showed him the order of his appointment, which he interpreted as authorizing him to investigate the case independently. Qutab Din appears to have taken full advantage of this, and it is quite clear that he did act "independently." Instead of staying at the police chauki, he, curiously enough, took up his residence in the garden of the Rai Sahib, who, it was well known to the authorities, had been suspected of complicity in the crime, and it was in this garden, and with the assistance of the Rai Sahib's relatives and dependants, that evidence was procured, on which the prosecution mainly relied at the trial. The Deputy Superintendent of Police also visited Bhangala in the course of the investigation, and it is in evidence that at least on one occasion he too was entertained at tea by the Rai Sahib.

The eldest surviving member of the family of the unfortunate victims was Dina Nath, who, as stated already, was a lad only 19 years of age, and one of his near male relatives was Mahajit Singh. During the week following the murders, Mahajit Singh had been rendering such help to Dina Nath as was possible and he saw the Sub-Inspector frequently. On the 8th February, Mahajit Singh was questioned by the police. On the next day Ishar Singh, Saini of Chhanni Nand Singh, who is a tenant of Rai Mubarak Ali, a cousin of the Rai Sahib of Bhangala, and who was a debtor of Mahajit Singh was sent for and examined. The same day two other debtors of Mahajit Singh, named Gajjan Singh and Rai Singh, Sainis of a neighbouring village called Manjpur, and Partap Singh another Saini of the same place were also sent for and examined, and a search was made for one Dharmun, carpenter of Naushera. Eventually all these persons, including Mahajit Singh, were taken in custody. The investigating party came to the conclusion that in order to secure a conviction it would be necessary to have one or more approvers. One evening Ishar Singh was taken to the kothi of the Rai Sahib, where Qutab-ud-din, Head Constable had been staying and there he agreed to become an approver. The arrested persons, except Mahajit Singh, were then taken to Hoshiarpur and Ishar Singh and Dharmun were pardoned by the District Magistrate and their statements recorded by a Magistrate on 17th February 1932. After a few days, Mahajit Singh, Gajjan Singh, Partap Singh and Rai Singh were challaned on charges under S. 302/149, Penal Code, and eventually tried in the Court of Session at Hoshiarpur.

At the trial the prosecution examined the two approvers, Ishar Singh and Dharmun, and a number of other witnesses in corroboration of their evidence. The four assessors however were unanimously of opinion, that the approvers had not told the truth. The learned Sessions Judge also came to the same conclusion and held that the story, as related by them was "utterly unbelievable." He further held that if the statements of the approvers were excluded, the remaining evidence on the record was wholly insufficient to bring the guilt home to any of the accused. He accordingly acquited all four of them. The Crown submitted to the decision of the Sessions Judge so far as Mahajit Singh, Partap Singh and Gajjin Singh were concerned, but it filed an appeal in the High Court against the order acquitting the fourth accused, Rai Singh. The appeal was heard in the first instance by Coldstream and Jai Lal, JJ., but they were not agreed in their opinion. Coldstream, J., held that the offence against the respondent Rai Singh had been established and that he should be sentenced to death; Jai Lal, J., on the other hand, was in complete agreement with the findings of the Sessions Judge and came to the conclusion that the appeal should be dismissed. On this difference of opinion the case has come before me, and I have heard the learned Assistant Legal Remembrancer at very great length and have carefully examined the record. Before discussing the evidence, it is necessary to bear in mind the principles which should guide the appellate Court in dealing with appeals against acquittals. The leading Punjab case on the point is *King Emperor* v. *Chattar Singh* (1), in which it was laid down by Chatterji, J., (Clark, C. J., concurring) that

> "the Code of Criminal Procedure makes no difference between an appeal from an acquittal and from a conviction. In order to justify interference with a judgment of acquittal on a question of fact it is sufficient, if the finding is clearly wrong on the evidence and unreasonable in the opinion of the appellate Court, whether or not the unreasonableness amounts to perversity, stupidity or incompetence, or the Court below can be said to have obstinately blundered in coming to it; but sound principles of criminal jurisprudance require that the indications of error in the judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a conviction"

This rule has been followed in a long string of cases and it is not necessary to discuss them here. Reference may however be made to *Emperor* v. *Harnama* (2), in which Robertson, J., observed that

> "although there is nothing in S. 417, Criminal P C., which indicates that an appeal from an acquittal should receive any different treatment from any other appeal or class of appeals, there is in fact this marked distinction namely that when an accused has been acquitted by a Magistrate after hearing all the evidence against him, the presumption is that there was at least reasonable doubt and the appellate Court must be positively convinced that there was no such reasonable doubt, the benefit of all doubt shown to exist being against the appellant; whereas in an appeal from a conviction the benefit of all reasonable doubt has to be given in favour of the appellant."

Bearing these principles in mind, I shall now proceed to examine the case for the prosecution and the findings of the learned Sessions Judge. As stated already, the principal witnesses in the case are the two approvers Ishar Singh, (P. W. 4) and Dharmun, (P. W. 5). According to both of them the crime was organized by Mahajit Singh alone and it was at his instance that they, along with Gajjan Singh, Partap Singh and Rai Singh, respondent, went into the house of Siri Ram and committed this wholesale massacre.

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1. (1904) 7 P R 1904 Cr=97 P L R 1904.
2. (1909) 15 P R 1909 Cr=11 Cr L J 66=4 I C 864.

(After examining the evidence, his Lordship proceeded). The learned Sessions Judge has examined in great detail the story, as related by the approvers, and has pointed out numerous inherent improbabilities and apparent falsehoods in it, and after careful consideration I agree with his conclusion. There is no independent evidence on the record that there was any enmity between Mahajit Singh and his deceased collaterals. If such enmity had existed in fact, it should not have been difficult for the prosecution to procure disinterested testimony from a big place like Bhangala. (After discussing the evidence the judgment proceeded). The learned Assistant Legal Remembrancer has very fairly and frankly conceded before me that so far as Mahajit Singh is concerned, the only conclusion possible on the record as it stands, is the one which has been reached by the learned Sessions Judge. He urges however that it is quite likely that the murders were actually committed in the manner described, and by the persons mentioned, by the approvers, that they all had been really hired by an undisclosed enemy or debtor of the deceased, whose name has been purposely withheld by the approvers and that of Mahajit Singh introduced instead as the organizer of the crime. He argues therefore that even though the story, as given by Ishar Singh and Dharmun as to the part played by Mahajit Singh and as to the origin and motive of the crime be rejected in its entirety, it should be accepted against the other accused to the extent to which it is corroborated by independent testimony. I have given this argument much anxious thought and careful consideration, but find myself unable to accept it.

As rightly pointed out by the learned Sessions Judge, the very foundation of the case, as placed by the prosecution before the Court, is the part assigned to Mahajit Singh, and if it be conceded that the approvers falsely substituted his name, and he is eliminated, the whole fabric must fall to the ground. If it is conceded that the approvers are capable of falsely introducing the name of an innocent person as the real organizer and moving spirit of the conspiracy, what guarantee can there be that they have not done the same with regard to the other? And if to this is added the fact, that the whole story, as given by them, is full of inherent improbabilities and patent absurdities, and it is borne in mind that the principal approver Ishar Singh is a tenant of a cousin of the Rai Sahib of Bhangala, that it was in his garden that he and Dharmun were questioned by the police, and it was there that they agreed to become approvers, the conclusion becomes irresistible that either they had nothing to do with the crime, or if they had they have given a version of the occurrence which is full of so many palpable lies and patent falsehoods that it is impossible for a Court of law to place the least reliance on anything that they have deposed to. The approvers must therefore be eliminated altogether from consideration. The next question for decision is, whether excluding the approvers, there is enough evidence on the record to prove the complicity of the respondent Rai Singh in the crime. (After examining the effect of production of the kirpan by Rai Singh His Lordship held that it was impossible to draw any inference of criminality against Rai Singh and the judgment proceeded to consider the circurstance that Rai Singh had a number of small wounds on his leg). It is conceded by the learned Assistant Legal Remembrancer that the injuries on Rai Singh's leg are much too small for No. 1 cartridge, and as to the possibility of their having been caused by a discharge from a No. 4 cartridge, it is most unfortunate that no questions were put to the medical witness. It has been urged for the defence that the orifices, as noticed by the Assistant Surgeon, were too small even for a No. 4 cartridge. It is however quite possible that the wounds had partially healed and their size gradually reduced. But be that as it may, the circumstances disclosed on the present record are, in my opinion, insufficient to establish with any degree of certainty that Rai Singh had received these injuries from the shots, which Dina Nath had fired at the time when the assassins were in the house.

The fact that the respondent has not been able to give a satisfactory explanation as to how he had been wounded is certainly a point against him. But the learned Sessions Judge has not ignored this aspect of the case, and has held that there being no other evidence on the record, this fact alone does not prove the respondent's complicity in the crime, and after giving the matter careful consideration I cannot say that his finding is wrong or his ultimate decision unreasonable, so as to justify interference by the appellate Court. In my opinion, Rai Singh was rightly acquitted and I dismiss the appeal. Before concluding, I consider it necessary to say that I whole-heartedly share the regret of the learned Assistant Legal Remembrancer that a crime of such seriousness and brutality, committed by a large number of persons in the heart of a populated place like Bhangala, should remain unpunished, but I cannot help observing that this unfortunate result is due, in no small measure, to the highly unsatisfactory manner in which the investigation was conducted. The circumstances of the case required that from the very outset a very senior and experienced officer should have been specially deputed to carry on the investigation on the spot. We find however that at first matters were left in the hands of a Sub-Inspector in whom, for reasons which it is not necessary to go into here, his immediate officers had little or no confidence and for whose suspension orders were passed soon after. This Sub-Inspector seems to have felt himself unequal to the task with the resources at his disposal, and had applied to the head quarters for further assistance.

As a result of this representation, one would have expected that at that stage at least, a senior and more resourceful officer should have been sent to Bhangala. But curiously enough a Head Constable was super-imposed on the Sub-Inspector with instructions to act independently. The Sub-Inspector remained in nominal charge, but the investigation was really conducted by the Head Constable, and he from the very beginning seems to have identified himself with the Rai Sahib of Bhangala, who was suspected by the relatives and friends of the deceased of having a hand in the crime. He took up his residence in the Rai Sahib's garden, which he made the base of his operations. The evidence, on which the prosecution relied, appears to have been procured largely with the assistance of the relatives, servants and dependants of the Rai Sahib, and the recoveries were witnessed by them. One of the approvers was a tenant of a cousin of the Rai Sahib and it was in his garden that he had agreed to turn King's witness. In making these observations I should not be understood as saying that there was any truth in the rumour that the Rai Sahib of Bhangala had anything to do with the crime. He did not appear before the Court as a witness or in any other capacity, and in these proceedings I have assumed as indeed I was bound to do that he was innocent. It may be that the allegations against the Rai Sahib had been made without any foundation whatever, perhaps wildly, possibly maliciously by his enemies. But with all this, the fact remains that at that time the relatives and friends of the deceased had been openly, and to the knowledge of the police and the executive authorities, accusing him of complicity in this crime, and it was also well-known that he had a grudge against Mahajit Singh, who had taken a prominent part in the agitation for his removal from the office of Honorary Magistrate. It is therefore most unfortunate that the investigating officials should have thought fit to openly ally themselves with the Rai Sahib and carried on the investigation, as if it were, under his auspices. It is hardly necessary to say that evidence obtained in these conditions bore ab initio an irreplaceable stamp of suspicion, and any person of ordinary intelligence should have realized that it was not likely to carry conviction in a Court of law.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 876

BHIDE, J.

Mt. Karam Bibi and *others* — Decree-holders and Plaintiffs—Appellants.

v.

Mehr Ali Khan and *others*—Judgment-debtors and Defendants—Respondents.

Misc. First Appeal No. 2311 of 1929, Decided on 8th November 1932, from order of Sr.Sub-Judge,Lyallpur, D/- 27th April 1929.

(a) Power of Attorney—Power to execute decree given by decree-holder — Death of such decree-holder — Execution cannot be obtained without power of attorney from legal representative—Execution.

Where a decree-holder who has given a power of attorney to execute the decree dies, it is not possible to prosecute the execution on behalf of the legal representatives of the deceased decree-holders without a power of attorney from legal representative himself. [P 878 C 1]

(b) Power of Attorney— Power of attorney to be construed strictly.

The powers of the attorney have to be construed strictly. [P 878 C 2]

(c) Execution—Mesne profits can be realized by application in execution Court.

Mesne profits can be realized by an application to the executing Court: 28 *P L R* 179, *Foll*; 29 *P R* 1902, *Dist* and 63 *I C* 43, *Appr*. [P 879 C 2]

(d) Mesne Profits—Realization—Limitation runs from date of delivery of possession—Limitation Act (1908), Art. 181.

Limitation for ascertainment and realization of mesne profits, is governed by Art. 181, Sch. 1, Lim. Act and the period of limitation runs from the date on which the possession is delivered: *AIR*

1926 *Lah* 685; 6 *I C* 125 and *AIR* 1928 *Pat* 598, *Ref.* [P 879 C 2]

(e) Power of Attorney—Construction.

Where a power of attorney in a suit empowers a person to file appeal, to take out execution and conduct all other necessary proceedings arising out of the litigation, that power is sufficient for the person so empowered to file an execution application for determination and realization of mesne profits. [P 878 C 2]

Abdul Karim—for Appellants.

Iqbal Singh—for Respondents.

Judgment.—This appeal arises out of execution proceedings relating to the realization of mesne profits of certain land. The material facts bearing on the present appeal are briefly as follows: A decree in certain specified shares was passed in favour of four persons, viz. Mt. Karam Bibi, Mohammad Abdulla, Mohammad Hussain and Khair Din. During the pendency of the appeal from the decree in the Chief Court, an application was made by the judgment-debtor for stay of execution and the application was granted by that Court in the following terms by order dated the 5th January 1917: "Execution for possession will be stayed only on the petitioner giving security for mesne profits". Execution was accordingly stayed. The decree of the Court of first instance was eventually confirmed by the High Court on 30th November 1922. On 19th January 1923 the first application for execution of the decree was made. This application, however, did not contain any prayer for realization of mesne profits with which alone we are concerned in appeal. For the purposes of this application a transfer certificate was obtained for taking proceedings in the Gurdaspur district against the defendants who were residing there. The second application for execution was made on 21st November 1923. In pursuance of this application Mohammad Hussain and Akbar Ali (a son of Khair Din, decree-holder, who had died in the meantime) were put in possession of certain property in the Lyallpur district. This application too did not contain any prayer for realization of mesne profits. The third application for execution was made on 19th December 1925. In this application prayer was made for the first time for realization of mesne profits. The application also asked for recovery of costs. This application was, however, dismissed in default on the same day. A further application to the same effect was made on 21st December 1925. Sheikh Abdul Aziz, Senior Subordinate Judge, Lyallpur, before whom this application came, held that as a transfer certificate for recovery of costs had been already issued for the Gurdaspur district the application could not be entertained. The application was accordingly dismissed on 19th April 1926. The fifth application for execution is dated 10th December 1926, but was actually presented in Court on 5th January 1927. This application was also for recovery of costs and mesne profits. Various objections were raised by the representatives of the judgment-debtor (who had died in the meantime). The learned Subordinate Judge held that the application for execution was not duly presented on behalf of all the decree-holders, that mesne profits could not be realized by an application in execution proceedings as they were no part of the original decree in this case, and that the application was in any case time-barred. The application was accordingly dismissed and it is from this decision that the present appeal has been preferred.

During the pendency of the present appeal Mt. Karam Bibi withdrew her claim and her appeal was accordingly dismissed on 29th May 1930. A preliminary objection was raised on behalf of the respondents that the original application for execution out of which the present appeal has arisen was on behalf of Mt. Karam Bibi only and she having withdrawn her appeal, the other appellants have now no locus standi to maintain this appeal. This objection is connected with the learned Senior Subordinate Judge's finding that the application for execution before him was not duly presented. This finding is attacked by the appellants in this appeal. It will be convenient to dispose of both these points together. I have noted above that there were four decree-holders, viz., Mt. Karam Bibi, Mohammad Abdulla, Mohammad Hussain and Khair Din. All these persons had executed powers of attorney of comprehensive character in favour of one Ata Mohammad empowering him to conduct the suit and take all necessary proceedings arising out of it, e. g., appeal, execution, etc. These are on record of the suit. This Ata Mohammad had also engaged Mr. Abdul Karim as a pleader in the trial Court. But his power of attorney is not now forthcoming and its precise scope cannot be ascertained. The appeal in the High Court from the originnal decree was filed by Ata Mohammad. Mr. Abdul Karim, however, appeared in the High

Court only on behalf of Akbar and Asghar, sons of Khair Din, one of the decree-holders who had died. The other decree holders had apparently engaged another counsel. The power of attorney in favour of Mr. Abdul Karim shows that he was engaged by Akbar and Asghar for appearance at Lahore only apparently only for the purposes of the appeal then pending. Bearing in mind the above facts, we have to see whether the execution application dated 10th December 1926, with which we are concerned was properly presented. That application is rather clumsily drafted. The application begins with the words "I, Mt. Karam Bibi, etc., etc.," and gives the impression that it is on behalf of Mt. Karam Bibi alone. But in the latter portion all the decree-holders are mentioned. The application was signed by Ata Mohammad, as a "mukhtar" for all the decree-holders. It was also signed by Mr. Abdul Karim, Advocate. Two of the original decree-holders, viz., Mohammad Abdullah and Khair Din are dead and Ata Mohammad admittedly holds no power of attorney from their legal representatives. It was conceded by the learned counsel for the appellants that Ata Mohammad's power of attorney could not enable him to prosecute the execution on behalf of the legal representatives of the deceased decree-holder without a power of attorney from the legal representatives themselves. As regards Mr. Abdul Karim, advocate, his power of attorney filed in the original suit is missing and its precise scope is unknown. His power of attorney in the High Court was limited to appearance at Lahore and could not consequently be taken to give him any authority to take execution proceedings in the Senior Subordinate Judge's Court at Lyallpur. For some reason or other no fresh power was taken by Ata Mohammad or Mr. Abdul Karim from the legal representatives. It seems therefore clear that neither Ata Mohammad nor Mr. Abdul Karim had any authority to prosecute the execution application in the Court of the Senior Subordinate Judge on behalf of the legal representatives of the two deceased decree-holders, Mohammad Abdullah and Khair Din. It follows also that they have no power to prosecute the appeal on their behalf.

Mt. Karam Bibi having withdrawn her appeal we are, therefore, left only with the fourth decree-holder, Mohammad Hussain who was one of the original decree-holders and is still alive. This Mohammad Hussain had given a comprehensive power of attorney to Ata Mohammad, when instituting the original suit. This power of attorney is still on the record and it shows that Ata Mohammad was empowered to file appeal, take out execution and conduct all other necessary proceedings arising out of the litigation. I do not see why this power should not be held to be sufficient to enable Ata Mohammad to prosecute the execution application, which is now under appeal on behalf of Mohammad Hussain. The learned Subordinate Judge has held that when the power was executed, the parties could not possibly have in mind the possibility of any question of mesne profits arising out of a stay order by the Cheif Court and hence the original power of attorney was not sufficient for the purposes of the present application. It is true that powers of attorney have to be construed strictly, but when the power of attorney in favour of Ata Mohammad authorized him to take all necesary proceedings in the litigation, I do not see any adequate grounds for holding that the present application does not fall within the scope of that document. No authority in point has been cited. I must accordingly dissent from the view of the learned Senior Subordinate Judge on this point.

The learned counsel for the respondents urged that the provisions of O. 21, R. 15, Civil Procedure Code, were not complied with and hence the application was not in order. This argument really rests on the assumption that the application was made by Mt. Karam Bibi alone in the interests of all the decree-holder. But, on a persual of the application as a whole, it seems to me that the application purported to be on behalf of all the decree-holders. If the application was by Mt. Karam Bibi alone, some reason would have been given for her doing so, but no such reason is given, nor is O. 21, R. 15, Civil Procedure Code, mentioned anywhere in the application. In the heading no doubt Mt. Karam Bibi's name is mentioned, but the word "etc". occuring elsewhere appears to have been omitted there by mistake. The use of the words "decree-holders" in the plural throughout in the remaining part of the application together with the signature of Ata Mohammad as a Mukhtar for all the decree-holders, leaves no doubt, to my mind that the application purported to be on behalf of all the deree-holders. Ata Mohammad had been conducting proceedings for all the decree-holders on the strength of the power of attorney and there was no reason why he should have taken out execution on behalf of Mt. Karam Bibi alone, if he had done as he wold have described himself as a mukhtar for Mt. Karam Bibi alone and not on behalf of all the decree-holders. It is not true that one of the original decree-holders, viz. Khair Din was dead but the necessity of obtaining a fresh power of attorney was probably overlooked or Mr. Abdul Karim may have thought that he having been engaged by Khair Din's legal representatives in the Chief Court could also present the application on their behalf. However that may be, as I have stated above, it seems to my mind clear that the application really purported to be on behalf of all the decree-holders and it is unnecessary to discuss the provisions of O. 21, R. 15, of the Civil Procedure Code. As Ata Mohammad had a power of attorney of a comprehensive character from Mohammad Hussain, I hold that the execution application as well as the present appeal were properly instituted on behalf of Mohammad Hussain and can proceed so far as his share is concerned. On behalf of the respondents it was urged that execution was not as a matter of fact stayed as a result of the High Court's order as no security bond was filed by the judgment-debtor. There is, I think, no force in this contention. It is true that the security bond is not now forthcoming; but the evidence discussed by the learned Senior Subordinate Judge leaves no doubt that the security was given and that it was as a consequence of the High Court's order that execution proceedings were stayed.

The next point for consideration in this appeal is whether the mesne profits can be realized by an application in execution or whether a separate suit is necessary as held by the learned Senior Subordinate Judge. The learned Senior Subordinate Judge has relied upon *Khazan Singh* v. *Khushal Singh* (1), [*Ghulam* v. *Mahomed* (2), seems to have been referred to by mistake instead of *Khazan Singh* v. *Khushal Singh* (1), in the judgment of the learned Senior Subordinate Judge] a Single Bench ruling of the Punjab Chief Court under the Code of Civil Procedure of the year 1882. That ruling seems to be opposed to the view taken by this Court in *Jawala Singh* v. *Sunder Singh* (3), the facts of which were practically on all fours with the present case. It was held in that ruling that mesne profits can be realized by an application to the executing Court. *Allah Din* v. *Chiragh Din* (4), a Division Bench ruling of this Court also seems to support the same view.

The last point for decision is the question of limitation. In the Court below it was apparently urged that there was no period of limitation for ascertainment and realization of mesne profits. This position was not, however, taken up before me. It was urged before me that limitation is governed by Art. 181, Sch. 1 of the Indian Limitation Act, and that the period of limitation runs from the date on which the possession was delivered, i. e. 10th December 1923. In support of this contention the following authorities were relied upon: *A. I.* R. 1926 *Lah.* 685, *Gangadhar* v. *Lachman* (5) and *A. I. R.* 1928 *Patna* 598. On behalf of the respondents, it was argued that these rulings referred to restitution under S. 144, Civil Procedure Code. But I do not think that that would make any difference as far as the principle is concerned. Although the present case would not strictly come under S. 144, the restitution must be held to be ordered under S. 151 Civil Procedure Code, [*Cf. Allah Din* v. *Chiragh Din* (4)], so that the application would still be one under the Code of Civil Procedure and Art. 181 would apply. The period of limitation would run from the date of delivery of possession as held in *A. I. R.* 1928 *Pat.* 598 as the mesne profits due could not be ascertained till that date. But the present application, though it is dated 10th December 1926, was actually presented on 5th January 1927. Possession having been delivered on 10th December 1923, the period of limitation available under Art. 181, had thus expired before this application was presented. The learned counsel for the appellants had to concede this point but he urged that the present application should be looked upon as a continuation of the application dated 21st December 1925, which also contained a prayer for ascertainment and realization of mesne profits, but was dis-

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1. (1902) 29 P R 1902=83 P L R 1902.
2. (1902) 25 P R 1902=29 Cal 167=29 I A 51 (P C).
3. A I R 1927 Lah 346=103 I C 328.
4. (1921) 63 I C 43.
5. (1910) 6 I C 125.

missed only on the technical ground that a transfer certificate had already been issued to a Court at Gurdaspur for execution of the decree. But the fact remains that the application dated 19th December 1925 was dimissed on 19th April 1926, and the proceedings were not merely stayed. It appears further that the question whether execution should proceed with respect to mesne profits was also considered by the learned Subordinate Judge who passed the order dated 19th April 1926 and it was held by him that he had no jurisdiction to proceed in the matter as long as execution was going on in the Gurdaspur District. This order may or may not be correct, but the fact remains that the appellants did not get it set aside. Under the circumstances, I do not see how the application presented on the 5th January 1927 can possibly be held to be continuation of the application dated 21st December 1925. The application dated 5th January 1927 was time-barred according to the very authorities relied upon by the learned counsel. Consequently the appeal fails. In view of all the circumstances I leave the parties to bear their costs.

M.N. *Appeal dismissed.*

A I. R. 1933 Lahore 880

ADDISON, J.

Deputy Commissioner, Jhang — Petitioner.

v.

Ganga Ram and *others* — Opposite Parties.

Civil Ref. No. 1 of 1933, Decided on 9th June 1933, from order of Deputy Commissioner, Jhang, D/- 21st December 1932.

Punjab Land Alienation Act (1900), Sections 2 (3) and 16—Prohibition in S. 16 does apply to date trees attached in execution—(But see A. I. R. 1933 Lah 589).

Fruit trees (date trees) giving annual produce and standing on agricultural land though not expressly mentioned or included in the definition of land given in S. 2 (3) are not liable to attachment and sale in execution of decree against the owner who is a member of an agricultural tribe. A decree-holder can therefore attach each year the fruit of the date trees as part of the produce of the land just as he can attach wheat but he cannot attach the trees and sell them in perpetuity with a view to the fruit, i. e. produce, being gathered by him in perpetuity. Such a sale, is prohibited not only by S. 15 but by S. 3 and comes within S. 16 of the Act: *AIR* 1920 *Lah* 351, *Rel on.* [P 880 C 2; P 881 C 1]

Ganesh Datta—for Opposite Parties.

Order.—One Ganga Ram has a money decree against certain members of an agricultural tribe. The decree-holder has not attached the land of his judgment-debtors but he has attached cretain date trees growing on that land, the intention being to sell the date trees independently of the land, the purchaser being put in a position to own the fruit trees in perpetuity though he will have no right in the land. This order of the Junior Subordinate Judge, Jhang, dated the 19th November 1932, attaching these date trees and ordering them to be sold by auction, has been forwarded by the Deputy Commissioner, Jhang, under the provisions of S. 21 (A) of the Punjab Alienation of Land Act to this Court with the recommendation that the order be set aside as it amounts to an order to sell the land of a member of an agricultural tribe which is barred under S. 16 of the Punjab Alienation of Land Act. This subject has already been before me in Revision Petition No. 397 of 1930 decided on 17th December 1930 and there I held that these date trees were as much land as the land to which they were attached and could not be sold independently of the land. I am still of the same opinion and have no doubt that *Amir Khan* v. *Lahiri Mal* (1), was properly decided by Wilberforce, J. Fruit trees giving annual produce and standing on agricultural land, though not expressly mentioned or included in the definition of land given in S. 2 (3), of the Punjab Alienation of Land Act, are not liable to attachment and sale in execution of a decree against the owner who is a member of an agricultural tribe. The argument to the contrary is merely plausible. It is true that members of an agricultural tribe can sell trees as timber without the sanction of the Collector. That is merely produce of the land. Fruit of date trees is as much produce of the land as wheat and under S. 15 of the Punjab Alienation of Land Act no member of an agricultural tribe can alienate or charge the produce of his land for more than one year at a time unless the sanction of the Deputy Commissioner has been obtained. The produce of land is defined in the explanation to that section as meaning crops and other products of the earth, standing or ungathered on the land, or which have been reaped or gathered. It follows from this that a decree-holder can attach each year the fruit of the

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1. A I R 1920 Lah 351=58 I C 638=108 P R 1919.

date trees as part of the produce of the land just as he can attach wheat but he cannot attach the trees and sell them in perpetuity with a view to the fruit, i. e. produce, being gathered by him in perpetuity. It is clear from this discussion that the legislature never intended to give permission to members of agricultural tribes to sell fruit trees apart from the land. It was not the intention that a member of an agricultural tribe owning (say) a grove of mango trees could sell these trees to a non-agriculturist with a view to the purchaser enjoying the permanent benefit of the produce. That practically would mean the sale of the land. Such a sale, it must be held, is prohibited not only by S. 15 but by S. 3 of the Punjab Alienation of Land Act, and comes within S. 16 of the Act. For the reasons given I accept the petition and set aside the order of the Subordinate Judge attaching the trees with a view to their permanent sale.

R.K. *Petition accepted.*

A. I. R. 1933 Lahore 881

Shadi Lal, C. J. and Abdul Qadir, J.

Mt. Premkaur and *others*—Defendants—Appellants.

v.

Banarsi Das—Respondent.

Letters Patent Appeal No. 42 of 1933, Decided on 29th May 1933, from order of Bhide, J., D/ 9th May 1933.

Guardians and Wards Act (1890), S. 7—Discretion exercised by single Judge in appointment of guardian will not be interfered with in exercise of appellate jurisdiction.

Where a guardian for a minor is appointed by a single Judge in exercise of his discretion, though an appeal is competent from his order, the fact that the making of the order is a matter of discretion is a good ground for refusing to exercise the appellate jurisdiction, unless the appellant succeeds in establishing a strong case, such as would justify interference in appeal: *A I R* 1924 *Lah* 412 and 35 *Mad* 1, *Rel on*; 17 *All* 438, *Ref.* [P 881 C 2]

Brij Lal, *Ram Saran* and *Harnam Singh*—for Appellants.

J. N. Aggarwal, *C. H. Carden Noad* and *Ram Lal*—for Respondent.

Shadi Lal, C. J.—The facts of this case lie within a narrow compass. On 28th April 1933, the Additional District Judge of Lahore, while holding that the two younger children, Mt. Kulwanti and Kul Bhushan should, in view of their tender age, be left with their mother, Mt. Prem Kaur, made an order, under the Guardians and Wards Act, that the eldest boy Kuldip "should be restored to the custody of his father where he will have a chance of getting properly educated."

Against this judgment Mt. Prem Kaur preferred an appeal, which has been admitted to a Single Bench, and also made an application asking the Court to stay execution of the order regarding Kuldip pending the decision of the appeal. The application has been dismissed by Bhide, J., and against his judgment Mt. Prem Kaur has preferred this appeal under Cl. 10 of the Letters Patent. It is unfortunate that the children should suffer on account of the disputes between the parties, but the various affidavits presented to this Court make it clear that there is no reasonable prospect of their composing their differences. This appeal must, however, fail on the short ground that the appellant has not succeeded in establishing a strong case, such as would justify our interference with the discretion of a Judge of this Court. It has been held by the Allahabad High Court that where an order is made in the exercise of his judicial discretion by a Single Judge, that order does not amount to a "judgment" within the meaning of Cl. 10 of the Letters Patent, and that no appeal lies from it: vide inter alia, *R. Wall* v. *J. E. Howard* (1). This Court, while not going so far as to hold that an order dealing with a matter of discretion is not appealable, has laid down that though an appeal is competent, the fact that the making of the order was a matter of discretion may be a good ground for refusing to exercise the appellate jurisdiction: vide, inter alia *Nanak Chand* v. *Sajjad Hussain* (2). The same principle has been adopted by the Madras High Court in *Tuljaram Row* v. *Alagappa Chetti* (3). Upon a careful consideration of all the circumstances I have reached the conclusion that no adequate ground for interfering with the discretion of the learned Judge has been established. I would accordingly dismiss the appeal with costs.

Abdul Qadir, J.—I agree.

K.S. *Appeal dismissed.*

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1. (1895) 17 All 438=1895 A W N 89.
2. A I R 1924 Lah 412=71 I C 824.
3. (1912) 35 Mad 1=8 I C 340 (F B).

A. I. R. 1933 Lahore 882

BHIDE, J.

Ghulam Hussain—Petitioner.

v.

Makhan Lal—Opposite Party.

Civil Misc. Petn. No. 144 of 1933, Decided on 9th June 1933 in Civil Appeal No. 1297 of 1932, Decided on 5th January 1933 by Bhide, J., reported in *A. I. R.* 1933 *Lah.* 536.

(a) Limitation Act (1908), Art. 169 — "Notice of appeal"—Whether refers to first notice or to subsequent notice as to date fixed for hearing—*Quaere.*

Quaere.—Whether the expression "notice of appeal" in Art. 169, Lim. Act refers to first notice as regards the appeal having been filed or to the subsequent notices as to the dates fixed for hearing. [P 882 C 2]

(b) Limination Act (1908), Art. 169 — Application to rehear appeal decreed ex parte — Conditions necessary pointed out — Civil P. C. (1908), O. 41, R. 21.

In order that an application to rehear an appeal which has been decreed ex parte may be allowed, it is necessary that the applicant should not have engaged any counsel, that he was not duly served with notice of the appeal within the meaning of Art. 169, Lim. Act, and that he presented the application within 30 days from the date on which he came to know of the decree passed on appeal. [P 882 C 2]

Ram Lal No. 1—for Petitioner.

H. C. Kumar—for Opposite Party.

Order.—This is an application for the rehearing of an appeal which was heard ex-parte and decreed against the petitioner. The petitioner was admittedly served with notice of the appeal for the 5th December 1932, which was the "Farzi" or preliminary date for the appeal. According to the petitioner's affidavit, he came to this Court on that day but learnt on making enquiry that no date had yet been fixed for the hearing of the appeal and that he would receive notice again in due course. But no such notice was issued to him again and he only learnt from the respondent on 23rd February 1933, that the appeal had been ex parte and decreed against him. He then engaged Lala Ram Lal Anand (1) as his counsel and put in the present application for the re-hearing of the appeal, on the 1st March 1933. The learned counsel for the respondent contended that the petitioner having been duly served for the 5th December 1932, the present application is barred as it was not presented within 30 days of the date of the decree as required by Art. 169 of the Indian Limitation Act. The learned counsel for the petitioner on the other hand urged that as the petitioner had not engaged any counsel he was entitled to get notice of the "pakka date", i. e., the date fixed for the hearing of the appeal, according to the proviso to R. 8 in Chap. 3-A, Volume 5, Rules and Orders of the High Court, and as no such notice was given, the petitioner was entitled to present his application within 30 days from the date on which he came to know of the decree. According to his affidavit, the petitioner came to know of the decree on 23rd February 1933, and the present application having been presented on the 1st March 1933, was, therefore, within time.

The decision of the question of limitation in this case depends upon the meaning to be attached to the expression "notice of the appeal" as used in Art. 169 of the Indian Limitation Act. Does this expression merely refer to the first notice as regards the appeal having been filed or to the subsequent notices (if any) as to the dates fixed for hearing? In *Lal Devi* v. *Amar Nath* (1), it was held by Chevis J., that the analogous expression "where the summons was not duly served" occurring in Art. 164 of the Indian Limitation Act referred to the first summons relating to the suit issued to the defendant and not to notices as to subsequent dates of hearing. A similar view was taken in *Surjit Singh* v. *C. J. Torrie* (2). These rulings would seem to support the contention of the learned counsel for the respondent. The point is not perhaps free from difficulty, but even assuming that a fresh notice was necessary for the purposes of Art. 169, according to the proviso to R. 8 in Chap. 3-A, Rules and Orders of the High Court, referred to above, the petitioner had to prove that he had not engaged any counsel by the time when the appeal was heard. (After considering the entries on the envelope containing the brief of the counsel for the petitioner, his Lordship held that the statement made by the petitioner's counsel as regards the date of his engagement seemed to be wholly unconvincing and proceeded). However even if it were held for the sake of argument that the petitioner had not engaged any counsel and was not duly served with notice of the appeal within the meaning of Art. 169 of the Indian Limitation Act, he had still to prove that he preferred the present application within 30 days from

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1. A I R 1920 Lah 261=57 I C 15.
2. A I R 1924 Lah 666=76 I C 14.

the date on which he came to know of the decree passed on appeal. (After discussing the evidence regarding the allegation of the petitioner that he learned about the decision of the appeal from the respondent, the judgment proceeded). After carefully considering the facts of the case I must say that I am not satisfied that the petitoner had not engaged a counsel for the appeal, nor that he had no knowledge of the decree till the 23rd February 1933 and learned about it from the respondent on that date. It was incumbent on the petitioner to prove that his application was within time and in my opinion he has failed to do so. I accordingly dismiss the application, but in view of all the circumstances make no order as to costs.

K.S. *Application dismissed.*

A. I. R. 1933 Lahore 883

BHIDE AND CURRIE, JJ.

Nur Mohammad Roshen Din — Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 329 of 1933, Decided on 15th June 1933, from order of Sess. Judge, Attock, D/- 17th February 1933.

Penal Code (1860), Ss. 302 and 304, Part 2 —Merciless and determined beating — No bones broken and no weapons other than hands and feet used—Several injuries inflicted—Conviction must be under S. 304, Part 2.

Where the beating given to the deceased was of a most merciless and determined nature and a large number of injuries was inflicted but no bones were broken and no weapon other than hands and feet were used by the accused :

Held : that the accused must be held to know that by administering such a thrashing he was likely to cause death and that the offence would fall under Part 2, S. 304. [P 884 C 1]

Ghulam Mohyuddin—for Appellant.

Mohammad Akhbar Khan — for the Crown

Currie, J.—The appellant, Nur Mohammad has been convicted of the murder of his wife, Mt. Roshan Jan and sentenced to transportation for life. The appellant and his wife had been married for some nine or ten years and had lived on amicable terms and had three children by the marriage. According to Mt. Roshan Jan's uncle, Mian, P. W. 4, about eight or ten months before the murder they became estranged. The appellant suspected his wife of a liaison with Rahmat Shah, a Tahsil Chaprasi, who was his murshid or spiritual guide. He accordingly started beating her. Eight or ten days before the offence the girl took refuge with her uncle who however restored her. On the day of the occurrence, 6th September 1932, the appellant was proceeding to Campbellpur, with his wife and two children, one of whom was a baby in arms. He was seen by Qalandar Khan, Lambardar, P. W. 3, and Amar Das, P. W. 2, beating the woman who was lying face down on the ground. Qalandar Khan went up and told him to desist saying: "You scoundrel, you will be hanged or transported for this. Why are you beating her ?" The appellant said that he was beating her because the woman refused to go any further on the way to Campbellpur. He however then desisted and carried her on his shoulder to the village. It appears that she was unconscious at the time as Amar Das states that she was neither screaming nor weeping. Her uncle was informed and arrived there to find her husband sitting beside her weeping and grief stricken. The unfortunate woman did not recover consciousness. She was taken to hospital on the 7th September and expired without regaining consciousness on the 8th September.

The appellant in his statement alleged that she died in consequence of fever which she had been getting after the birth of her last child. There is nothing to support this story. The medical evidence shows that the deceased had received no less than twenty-five injuries: five of these are bruises on the face and five are bruises or contusions on the head, two are bruises on the neck and four on the chest, seven on the arms, one on the middle of the back and one on the left thigh. None of these injuries resulted in the fracture of any bone, but the brain membranes were congested and the brain was covered all over with blood clots. Both lungs were congested and covered with blood clots and the heart was covered with blood. In the opinion of the doctor death was due to shock and haemorrhage caused by injuries to both the lungs and brain. In his opinion the injuries to the chest would have collectively proved fatal and similarly the injuries to the head. There was nothing to support the suggestion put forward by the learned counsel for the appellant that the effusion of blood might have been due to excitement. It is clear that it was due to the result of the injuries inflicted by the appellant.

On behalf of the appellant it is urged that his offence does not come under

S. 302, Penal Code. That contention, in my opinion, is sound. No bones were broken and no weapon other than the appellant's hands and feet were used. The beating however was obviously of a most merciless and determined nature and it would appear that the appellant went on beating the unfortunate woman after she was lying senseless on the ground. In view of the very large number of injuries inflicted I think it must be held that he knew by administering such a thrashing he was likely to cause death. The offence therefore would fall under Part 2, S. 304. I would therefore alter the conviction to one under that section and reduce the sentence to one of seven years' rigorous imprisonment.

Bhide, J.—I agree.

K.S. *Conviction altered.*

A. I. R. 1933 Lahore 884

COLDSTREAM, J.

Mehr Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 521 of 1933, Decided on 20th April 1933, from decision of Sess. Judge, Mianwali, D/- 1st April 1933.

(a) Penal Code (1860), S. 225-B—Complaint of offence under S. 225-B can be made by any person who is aware of facts.

Although in cases under S. 225-B the proper person to make the complaint is the officer from whom the escape or rescue has been effected still a complaint by another person aware of the facts is not a nullity. [P 885 C 2]

(b) Criminal P. C. (1898), Ss. 248 and 494—Withdrawal of case by prosecution.

It is always open to the prosecution to withdraw a case with the permission of the Court. [P 885 C 2]

(c) Criminal P. C. (1898), S. 4 (1) (g)—Complaint.

A Magistrate is competent to make a complaint as a common informer. [P 885 C 2]

Facts.—On 2nd August 1932, a warrant of arrest was issued by Lala Sultan Singh, Subordinate Judge, Fourth Class, Mianwali, against one Mehr Singh, a judgment-debtor, on application of a decree-holder Mathra Dass. On 9th August 1932, the Bailiff reported that he duly arrested Mehr Singh and that Mehr Singh was prepared to accompany him, the Bailiff, to Mianwali when a number of persons forcibly rescued him, one of these a man named Mehr Khan striking the Bailiff. On this report and without further inquiry the learned Subordinate Judge filed a complaint under Ss. 186 and 225-B, Penal Code, against Mehr Singh.

Grounds.—Mehr Singh appeared before me as an appellant against this order. His case was argued by Mr. Mul Raj and I have heard the Public Prosecutor for the Crown. The complaint under S. 186, Penal Code, in my opinion, should not have been made. No overt act on the part of Mehr Singh is alleged in the report of the Bailiff and there is authority, e. g., *A. I. R.* 1925 *Lah.* 139, *Jaswant Singh* v. *Emperor*, that mere passive conduct does not amount to an offence under S. 186. The learned Public Prosecutor has agreed that S. 186 cannot apply to the alleged action of Mehr Singh. I accordingly order the withdrawal of the complaint under this section. As I understand the law however I am unable myself to pass any final order as regards the complaint under S. 225-B, Penal Code. It is not a section referred to in S. 195, Criminal P. C., at all. I therefore cannot deal with it either under S. 195 (5), Criminal P. C., myself or under S. 476 (B). At the same time my attention has been drawn to a ruling of the Calcutta High Court. That is *Taru Babu* v. *Emperor* (1), in which it was held, when a Subordinate Judge had sent to a Magistrate for trial a person who it was alleged had committed an offence under S. 225-B, Penal Code:

> **" The question arises whether he (the Munsif) had power so to do. In my opinion he had not. Firstly, because the section in pursuance of which the accused persons were charged was S. 225-B, I. P. C., (I. P. Court in the ruling appears to be a misprint). That is a section which is not mentioned in S. 195, Criminal P. C. Therefore for that reason the Munsif would not have power to send the accused for trial for that offence."**

That ruling was under the old Code, but I do not see that the amended section would affect its applicability and I do not see any difference between sending the man to the Magistrate and making a complaint against the man to the Magistrate. The Calcutta ruling certainly mentions other "more important" grounds for setting aside the order of the Munsif, but the words from it which I have quoted appear completely unambiguous and to mean that a Court cannot complain if an offence under S. 225-B is committed against one of its servants. I do not myself understand why this is so. S. 195, Criminal P. C., is to the effect that no Court shall take cognizance of any offence under certain specific sections of which

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1. (1917) 18 Cr L J 117=37 I C 469.

S. 225-B is not one except on the complaint of a Court. I do not understand with all deference to the Calcutta ruling how it can be taken to mean that no Court can make a complaint to another Court except with reference to one of the particular offences specified in the section. S. 225-B, Penal Code, is a cognizable offence and it appears to me that a complaint could legally be made of such an offence to a Magistrate by any person. As no appeal lies to me against the Subordinate Judge's order of complaint under S. 225-B, Penal Code, I would myself have let the order remain, but for the clear wording of the Calcutta ruling which I have quoted above. Under the circumstances, I forward this case to the High Court with the recommendation that if the law is that a Civil Court cannot make a complaint of an offence under S. 225-B, Penal Code, that part of the complaint made by the learned Subordinate Judge be withdrawn. Mr. Mul Raj argued before me that the Bailiff's report did not reveal that any offence has been committed by Mehr Singh. He pointed out the note under "practice"—"evidence"—in Ratanlal's commentary to this section "prove": (1) that the accused offered some resistance or illegal obstruction, and (2) "that he did so—to escape.

The Bailiff's report shows that all the overt acts were committed by others and not by the petitioner; but the same learned commentator under his commentary on the same S. (3), "escapes from any custody by which he is lawfully detained," quotes an instance where it was held that this offence was committed by a person who left the peon who had arrested him while the peon was asleep because it was the arrested man's duty to submit to the law. It seems to me therefore that there is prima facie a case against Mehr Singh petitioner and that the case should proceed though I may add that Mehr Singh's offence is little more than technical and that before me the decree-holder in the case has filed an application to the effect that Mehr Singh has paid up the full decretal amount. The alleged offence was also committed eight months ago and their Lordships may consider that further proceedings are not necessary. It is a pity that a complaint under S. 186 was not made against Mehr Khan if in reality he beat the Bailiff, but I am not prepared to do so at this stage as it would presumably be impossible to obtain medical evidence after so many months that any injury was inflicted and without medical evidence there will be little chance of a conviction.

Order.—Sections 195 and 476, Criminal P. C., have no application. A Magistrate is competent to make a complaint as a common informer: see Ss. 4 (1) (g), 190 (1) (a), 200 and 252 of the Code. In *Emperor* v. *Balmakund* (2), this Court pointed out that "every person including the presiding officer of a Court has power to make a complaint as a rule": see p. 685. It is always open to the prosecution to withdraw a case with the permission of the Court (Ss. 248 and 494, Criminal P. C.). In cases like this the proper person to make the complaint is the officer from whom the escape or rescue has been effected, but a complaint by another person aware of the facts is not a nullity. There is no ground for interference at this stage. Let the record be returned.

K.S *Reference answered.*

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2. A I R 1928 Lah 510=110 I C 109=29 Cr L J 652=9 Lah 678.

A. I. R. 1933 Lahore 885

TEK CHAND AND COLDSTREAM, JJ.

Mt. Sadiqa Begam—Plaintiff—Appellant.

v.

Ata Ullah — Defendant—Respondent.

First Appeal No. 1746 of 1930, Decided on 27th April 1933, from decree of Senior Sub Judge, Lyallpur, D/- 12th April 1930.

(a) Mahomedan Law—Divorce—Agreement between busband and wife entitling wife to divorce in case of second marriage by husband is valid.

An agreement between a husband and his wife that if the former married another wife, the first wife would be entitled to divorce, is permitted by Mahomedan law and is not opposed to public policy. [P 887 C 2; P 889 C 1]

(b) Contract Act (1872), S. 16—Undue influence—Strong motive to execute agreement raises no presumption of undue influence.

The mere fact that a party to an agreement has very strong motive for executing it raises no presumption that he has been unduly influenced. [P 888 C 1]

(c) Evidence Act (1872), S. 21—Admission.

An admission against the interest of the party making it must be regarded as true until it is clearly proved to be untrue. [P 888 C 2]

(d) Evidence Act (1872), S. 45 — Expert evidence—Where one expert is contradicted by another, their evidence has little value.

Where several experts give the evidence expected in favour of the parties by whom they were called it can carry little weight, for one expert is contradicted by the other. [P 889 C 2]

J.N.Agarwal, Hem Raj Mahajan and *Malik Muhammad Amin*—for Appellant.

Mehr Chand Mahajan, Abdul Aziz and *Muhammad Aslam Khan* — for Respondent.

Coldstream, J.—The plaintiff in this case Sadiqa Begam, was married to the defendant Ata Ullah, a widower, on 28th April 1932, at Gujranwala where Ata Ullah's father was stationed as Extra Assistant Commissioner. The marriage was unhappy from the beginning owing, according to the plaintiff, to the cruel behaviour of Ata Ullah. In April 1923 when Sadiqa Begam was about to be confined, her husband, who lived in Gujrat, insisted on her leaving Gujranwala (where she had been living with her parents with occasional visits to her husband) and joining him in Gujrat. The journey was a trying one and Sadiqa Begam's child was born a few hours after she reached Gujrat on the night of the 6th April.

The friction between the husband and wife estranged their families. Sadiqa Begam apparently found the strict conventions relating to the behaviour of woman and the custom of purdah observed by her husband and his family irksome, while her husband's female relations—his sister Fazal Begam, his mother Aishan Bibi and grandmother Mt. Ghulam Bibi—looked with disfavour upon any departure from old-fashioned ideas on these subjects and on Sadiqa Begam's fondness for pretty clothes. The desirability of Ata Ullah's taking a second wife began to be discussed, an idea repellant to Sadiqa Begam who, in May 1923, left Gujrat for Lyallpur where her father has been posted as Additional District Magistrate. In July Ata Ullah came to Lyallpur and spoke to her about the proposal that he should marry again, telling her that his mother was anxious he should do so. The result was that on 17th July 1923 two deeds were executed by Ata Ullah and Sadiqa Begam. Ata Ullah's deed (P-2) declared that if he married another wife, Sadiqa Begam would be entitled either to divorce him, receiving the dower of Rs. 10,000, which had been fixed at the time of the marriage, or to live separately from him and his new wife with a monthly allowance of Rs. 75. The deed executed by Sadiqa Begam (P-18) after acknowledging the deed made by her husband in her favour, promised faithfulness and obedience to her husband, particularly in the matter of visits to her own relations. Sadiqa Begam remained with her father until September 1923, when her husband came to Lyallpur and took her home to Gujrat. In November, however, her father came to Gujrat and after some unpleasantness with Ata Ullah took his daughter back to Lyallpur.

A month later the defendant went to Lyallpur and (according to the plaintiff) pressed his father-in-law to return the deed he had executed. The husband and wife returned to Gujrat in January 1924 and lived together there until July or August. According to the plaintiff she had been cruelly mal-treated by her husband who did his best to obtain possession of his deed (P-2) which she refused to surrender. Hearing of this her brother came to take her to Kasur where her father, who had retired from service, was then living. Her child, however, was forcibly retained by her husband and his sister. In December the infant was restored to her mother in Kasur. In March 1925, Sadiqa Begam returned to her husband in Gujrat where she lived with him in a house outside the city (Karim Manzil), while her mother-in-law and sister stayed in a house in the town. She was comparatively happy for a time but in 1926 her husband (so she asserts) resumed bad habits, going so far on one occasion as to introduce a prostitute into the house. On her discovering this she was beaten. After this there was constant quarrelling. On the 31st July 1926, Ata Ullah and Sadiqa Begam went on a trip to Srinagar in Kashmir where they lived in a house boat. They were joined by Khalifa Kamal Din (who was Secretary to the Municipal Committee in Gujrat and had been living as a tenant in Karim Manzil) and Abdul Mannan (or Manan), (the plaintiff's cousin). On the 12th August when they were at Gandar Bal, Ata Ullah saw his wife in a shikara (the local fishing boat or punt) with Kamal Din. This provoked a serious quarrel in which Abdul Mannan intervened with the result (this is Ata Ullah's case) that Sadiqa Begam signed a document (D-16) on the same day stating that if her husband found any sort of defect in her, the agreement of 17th July 1923 might be considered as cancelled. This document is alleged by Sadiqa Begam to be a forgery. On 26th August Ata Ullah saw his wife massaging Mannan's legs, but the consequent quarrel was smoothed over. On 29th August (I give the husband's version) Ata Ullah, on an unexpectedly early return to the house-boat, found his wife and Kamal Din in circumstances admitting no doubt of their misconduct.

The plaintiff's story is that when her husband boarded the house-boat she was innocently passing along the varandah of the boat, without her burqa on, to look after her child and prevent her falling into the water. Next day Ata Ullah started with his wife for Gujrat where they arrived on the night of the 31st August. On the 1st or 2nd September, Ata Ullah went to Lahore, when he returned the following morning he was handed a letter from his wife (D.-17) beseeching him to forgive her for the "mistake committed by her in Srinagar" and promising to behave in future towards her husband like "an obedient maid servant". This letter, like the document of 12th August, is declared by Sadiqa Begam to be a forgery. On the 5th September, in response to a telegram sent by the defendant to his father-in-law her brothers Abdul Aziz and Abdul Salam and her cousin Abdul Rashid came to Karim Manzil, forcibly abducted Sadiqa Begam, and took her to Lahore. The same day Ata Ullah reported at the police station that his wife had committed adultery with Kamal-ud-Din at Srinagar and that she had been abducted by her brothers and cousin. On 6th September Sadiqa Begam served a notice on her husband asking for Rs. 5,000, the "prompt" portion of her alleged dower. On the 17th January 1927 Ata Ullah married again. On the 18th Sadiqa Begam executed a formal deed of divorce (P. 3) which she sent to her husband on the following day (D-14).

On 19th July 1927, Sadiqa Begam instituted against her husband the suit from which this appeal arises alleging that a dower of Rs. 10,000 had been fixed at her marriage, that as her husband had maltreated her, she had refused to live with him until he executed the deed on 17th July 1923 (P. 2) in her favour, that he had married again, and that she had divorced him in exercise of the power conferred on her by her husband. The plaint asked for a declaration that she was no longer Ata Ullah's wife, for a decree for Rupees 10,000 on account of dower, or Rupees 5,000, the prompt portion of her dower, as well as a decree for recovery of her ornaments, clothes etc. valued at Rs. 5,000. The suit was lodged in the Court of the Senior Subordinate Judge, Lyallpur.

The defendant pleaded that the Lyallpur Court had no jurisdiction in respect of the claim for the return of the jewellery. He denied that a dower of Rs. 10,000 had been settled at the time of the marriage, the only dower fixed being the "lawful" or "Sharai" dower of Rs. 32-4-0. He alleged that he had signed the deed of 17th July 1923, under undue influence exercised by his father-in-law and pleaded that it was invalid because it was opposed to Mahomedan law and public policy and that his wife had misconducted herself at Srinagar, which misconduct, taken together with his wife's declaration of 12th August 1926 (D-16), had the effect of absolving him from the obligation created by the deed executed by him on 17th July 1923. (After stating the issues and the findings of the Subordinate Judge, His Lordship discussed evidence and concluded). I am unable to find anything in the plaintiff's story which supports the learned Subordinate Judge's conclusion (if this is his conclusion) that the defendant treated his wife well and that Sadiqa Begam had no just cause for apprehending the introduction of another wife into her husband's house. The document of 17th July 1923, is by itself evidence that a second marriage was in contemplation. We have it from the defendant that when he was betrothed to Sadiqa Begam, another marriage was being considered, and it is adimtted that the defendant and his mother and grand-mother did not approve of Sadiqa Begam's modern notions. There was nothing socially shameful or improper in a young man's desire to take a second wife (he was permitted four as a strict Mahomedan) and I believe Sadiqa Begam's evidence that Ata Ullah frequently mentioned a second marriage to her and stated that the proposal was strongly supported by his mother—evidence which is corroborated by her witness Sheikh Abdul Aziz Puri (P. W. 9).

No doubt the documents P-2 and D-18 signed by the defendant and the plaintiff constituted a contract greatly in favour of the wife. Sadiqa Begam, besides promising to perform her wifely duties, merely undertook to obey her husband's female relatives and not to visit, except with her husband's permission, persons from whom convention required her to keep purdah. But an agreement such as P-2 is permitted by Mahomedan law and it certainly cannot be said to be opposed to public policy. I am unable to see anything "monstrous" or mad in the deed which, in my opinion, was a reasonable one for a husband to execute in favour of a wife who looks for treatment such as emancipated Indian Women naturally consider they have a right to insist upon. The learned Subordinate Judge appears to have overlooked the fact that the specially favourable treatment insured to Sadiqa Begam was to be contingent on her husband's re-marriage during her life. (His Lordship discussed evidence and proceeded). The document shows that Ata Ullah was impulsive and ready to make extravagant promises but for his counsel's contention that it was used as a lever to extort the agreement Ex. P-2, there is no justification in the evidence. In describing how he came to execute this agreement Ata Ullah does not mention this document. The direct evidence of the plaintiff is, in my opinion, conclusively corroborated by the defendant's own description of the deed Ex. P-2 in his letter of September 1924 (P-14) written to the plaintiff's brother Sheikh Abdul Aziz. In this he says:

> "I executed an agreement in favour of your sister . . . . . at the slightest inducement of your parents."

At that time he took credit for his act. "This", he goes on to say, "bears out my nobility". There is no mention here of undue influence, or compulsion, or misunderstanding, or misrepresentation. Obviously, the defendant wanted his wife to come back to him and to persuade her he signed the document. But there was no compulsion. He could have sued for restitution of conjugal rights and the mere fact that a party to an agreement has a very strong motive for executing it raises no presumption that he has been unduly influenced. It is significant that after executing P-2 Ata Ullah did not at once remove his wife from Lyallpur but left her with her father until September. He made no attempt to repudiate the deed. On the other hand, as already made clear, he referred to it more than a year afterwads as a noble action. For all these reasons, I find that the document P-2 was not executed by the defendant under undue influence but of his own free will—after deliberation and consultation with his grand-mother—and with a full knowledge of what he was doing.

In view of the admission in the document of 17th July 1923 regarding dower, the onus of proving that a dower of Rs. 10,000, was not fixed at the time of the parties' marriage was rightly placed upon the defendant. This admision could not estop the latter from repudiating it, but it is a proposition which cannot be disputed that an admission against the interest of the party making it must be regarded as true until it is clearly proved to be untrue. Besides the clear and unambiguous admission in P-2, which was not an invalid document, there is also in support of the plaintiff on this point the defendant's letter of September 1924 (P-14), to which I have referred above, which admits the execution of the document P-2 more than a year after its execution and without any qualification. The plaintiff put into the witness-box the Imam (P. W. 2), who officiated at the marriage. His evidence is that a dower of Rupees 10,000 was announced at the time of the marriage. No reason is apparent why Babu Jan Muhammad P. W. 3, a man of respectable position, who gives the same evidence, should perjure himself. Mian Muhammad Hanif P. W. 6, and Sheikh Muhammad Afzal P. W. 8, are also respectable men. They prove admissions by defendant regarding the dower. There is also the evidence of the plaintiff's brother, P. W. 11, who was not cross-examined on the question of dower. It is true that dower of the plaintiff's sisters Mt. Asghari Begam and Mt. Azmat Begam was only Rs. 1000 (see Abdul Manan, P. W. 12), in each case, but from the plaintiff's father Sheikh Abdul Rehman P. W. 14, we have it that the dower fixed for the plaintiff's brother Abdul Majid was Rs. 35,000, and the dowers of the wives of Muhammad Rashid and Muhammad Said, sons of the plaintiff's second cousin, were Rs. 10,000. It cannot therefore be argued that Rs. 10,000 was an incredibly large amount to be settled for the plaintiff. Sheikh Abdul Rehman also states that no writing was executed about the dower in the case of any of his daughters (he has two other married daughters).

The absence of such a contemporary record was no doubt the reason for mentioning the sum when the plaintiff prevailed on her husband to execute P-2. The defendant did not produce his grand-mother or mother, in consultation with whom, according to his father-in-law, the settlement was made. The facts that the dower fixed for his first wife was only Rs. 4,000 and that he was not rich (there is evidence that his income is only about Rs. 2,000 per annum) are not sufficient to rebut the presumtion arising from his own admission.

I agree with the learned Subordinate Judge's view of the defendant's evidence regarding the fixing and amount of the dower and finding that defendant has not proved the falsity of his formally recorded admission that it was settled at Rs. 10,000 at the time of his marriage, I hold it established that the plaintiff's dower, whether it was first determined at Gujranwala or Gujrat was settled at Rs. 10,000 at the time of her marriage. For the respondent Mr. Mehr Chand Mahajan does not dispute the correctness of the lower Court's decision as to the validity under the Mahomedan law of an agreement empowering a wife to divorce herself from her husband under certain specified contingencies, but he contends that in this case the agreement was vitiated by the fact that the husband not only empowered his wife to divorce him but created onerous obligation on his part in the provision of a separate residence and a maintenance allowance enforceable at his wife's pleasure in the alternative. Such a contract, Mr. Mehr Chand argues, was clearly in restraint of marriage and therefore invalid. There is no force in this contention for the plaintiff is not attempting to enforce this alternative, but only the stipulation that she will have the right of divorce. The alternative provisions are clearly separable. It is not disputed that if the plaintiff did write the letter D-16 dated 12th August 1926 releasing her husband from his agreement if he found her conduct improper, and did afterwards misconduct herself, the defendant is not bound by his deed of 17th July 1923 and his wife has no right to exercise the power of divorce conferred by it upon her. It remains only to determine whether the lower Court is wrong in its decision that the document D-16 is not a forgery but written by the plaintiff and that the plaintiff misconducted herself at Srinagar. On these two questions of fact the whole case hinges. In support of the allegation of misconduct the letter D-17 of 2nd September 1926 said to have been handed to Ata Ullah on his return to Gujrat from Lahore on the 2nd September by a servant (now dead) is evidence of great importance. As already stated, this document is repudiated by the plaintiff who declares it to be a forgery like D-16.

The expert evidence relating to the handwriting in D-16 and D-17 has been fully described by the learned Subordinate Judge. The defendant called as his witnesses Mr. Charles Hardless (D. W. 18) and his partner Mr. Tuck (D. W. 10), while the plaintiff produced Mr. Charles Hardless's brother Phillip (P. W. 17). These gave the evidence expected in favour of the parties by whom they were called. The value of such evidence in the Indian Courts has frequently been discounted: see for instance *Hari Singh* v. *Lachhmi Devi* (1), but in this case it is obvious that it can carry little weight for one expert is contradicted by the other. We have ourselves examined the disputed documents with great care and compared the handwriting with that of the several exhibits admitted to have been written by the plaintiff. This careful scrutiny and a consideration of the other evidence described in the lower Court's judgment and of the circumstances has convinced me that both D-16 and D-17 are genuine documents written by Sadiqa Begam. Certainly, the signature in both is not traced from one original as suggested by the plaintiff's expert witness. If they are forgeries they were fabricated before 8th January 1927—for it is obviously these documents that are referred to in the defendant's reply (D-2), written before 6th January 1927 to the plaintiff's notice of 6th December 1926 demanding payment of her prompt dower of Rs. 5,000.

It is not disputed by appellant's counsel that it is these documents which are referred to in that reply as having been executed by the plaintiff of her own accord and free will. According to the plaintiff she never signed her name as Sadiqa Khatun (the signature of the writer of D-16 and D-17) but always as Sadiqa Begam. (She disputes the genuineness of the document D-19 produced by defendant purporting to be written by Sadiqa Khatun). The documents admitted to be in the plaintiff's handwriting are signed Sadiqa Begam and we may assume that this was the name she commonly signed. If a forgery was to be perpetrated, an unusual form of signature would not have been adopted by the forger. Nor, if deeds were to be forged for the purpose of a defence to the plaintiff's suit, it is likely that the forger would be content with the language of the document D-17 and refrain from a perfectly clear admission of adultery on a date mentioned. In my opinion, the

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1. A I R 1921 Lah 126=59 I C 220.

appellant has failed to show the lower Court's decision on this point the genuineness of D-16 and D-17 to be wrong. With that decision, I have no hesitation in concurring. (The rest of the judgment is not material for the report).

Tek Chand, J.—I agree.

R.K. *Appeal dismissed.*

A. I. R. 1933 Lahore 890

DALIP SINGH, J,

Jethu Ram and *others* — Plaintiffs — Appellants.

v.

District Board, Ambala—Defendant—Respondent.

Second Appeal No. 2089 of 1930, Decided on 26th October 1932, from decree of Dist. Judge, Ambala, D/- 2nd July 1930.

(a) Jurisdiction—Question of jurisdiction.

The point of jurisdiction can be raised at any time. [P 890 C 2]

(b) Punjab District Boards Act (20 of 1883), S. 34—Suit in civil Court for refund of money wrongfully recovered by one side or other from one party to contract is not barred by S. 34.

Section 34 speaks of the compensation and abatement of rent allowable under the Act and refers to Ss 10, 11 and 15 and similar sections. It does not mean a suit for refund of money wrongfully recovered by one side or the other from one party to the contract. Hence the jurisdiction of the civil Court is not barred by S. 34 in respect of such a suit. [P 890 C 2]

(c) Punjab District Boards Act (20 of 1883), S. 14—"Approach" includes approach from highway to landing place.

The word "approach" includes an approach from the highway to the landing place. It is not limited to the distance between the landing place and the river bank. [P 890 C 2]

(d) Punjab District Boards Act (20 of 1883), S. 91 — Statutory obligation must remain on person on whom it is imposed by statute unless shifted by private contract.

Section 91 is a statutory obligation; if that statutory obligation is not shifted by any private contract that must remain on the person on whom the statute imposed it. [P 891 C 1]

Niamat Rai—for Appellants.

M. L. Batra—for Respondent.

Judgment.—These two connected appeals can be disposed of in one judgment. So far as the appeal of Jethu Ram, etc., is concerned, the case is concluded by the finding of fact on the question of the absence of any obstruction during the period concerned. The learned counsel for the appellants contends that the learned District Judge has not considered the matter. He then proceeds to say that he has not considered the evidence. He then read a long passage in the judgment where the evidence had been considered. He then contended that wrong inferences had been drawn and that the evidence had not been properly weighed, but all this has nothing to do with this Court. The appeal, therefore, fails and is dismissed with costs.

As regards the appeal of the District Board, the first point raised by the learned counsel for the appellants is that the jurisdiction of the Civil Courts was barred and he relies on S. 34. The learned counsel contends that the point was not raised previously nor in the grounds which is correct. That is no reply as the point of jurisdiction can be raised at any time. He next contends that Ss. 10 and 11 refer only to compensation and not to abatement of rent. This is correct but seems to be irrelevant. He then contends that abatement of rent means that where a lessee has suffered a loss in the collection of tolls and applies for a reduction of rent on that ground, such a suit is barred from the cognizance of a Civil Court. This seems to me to have no meaning for such a suit would not succeed in any Court. I have never heard that it was a defence to a contract that the one side or the other had incurred a loss in carrying it out. However, it seems to me clear that the contention of the appellants has no force, for S. 34 speaks of the compensation and abatement of rent allowable under this Act and refers to Ss. 10, 11 and 15 and similar sections. It does not mean a suit for refund of money wrongfully recovered by one side or the other from one party to the contract. Therefore, the Civil Courts have jurisdiction.

The really important point is the next question, namely, that the word "approach" does not include what the District Judge has held it to include, namely, an approach from the highway to the landing place. According to the learned counsel "approach" means the distance between the landing place and the river bank, and he fortifies himself with reference to S. 14. It is impossible for me to state the reply of the learned cousel for the respondents; but as far as I can see, there is nothing in the Act to limit the word "approach" in the manner contended for by the learned counsel for the appellants. It would seem perhaps remarkable that the owner of a piece of land walking on that piece of land should become liable to pay a toll, but the Act so provides. I fail to see why the mere distance of the place makes any difference and after all the distance between the river bank and the landing place might be very considerable and a person strolling on one bank of the river with no intention to cross the ferry might under the Statute be liable to pay the toll. I therefore repel this contention.

The next point raised by the learned counsel for the appellants was that the onus lay on the other side to prove what the "approach" was, but this seems to me a finding of fact: see at p. 5, line 50 of the paper book, the sentence beginning "as to the exact locality of the route to ferry." This finding has been upheld by the learned District Judge and hence there is no force in this contention. There is also no force in the contention that S. 91 bars any evidence on the point. This is a statutory obligation; if that statutory obligation was not shifted by any private contract the statutory obligation must remain on the person on whom the Statute imposed it. I, therefore, dismiss the appeal but I do not allow the respondents costs of this appeal.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 891

TEK CHAND, J.

Gowardhan Das—Defendant — Appellant.

v.

Nirmal Mal and *others* — Plaintiffs—Respondents.

Second Appeal No. 174 of 1932, Decided on 28th June 1932, from decree of Dist. Judge, Multan, D/- 6th November 1931.

Accounts—Question as to which of defendants is accounting party should be decided at time of passing preliminary decree.

In a suit for accounts the question as to which of the two defendants is the accounting party is essentially a matter for decision at the stage when the preliminary decree for rendition of accounts is to be passed. [P 891 C 2]

M. L. Puri—for Appellant.

Fakir Chand and *S. C. Manchanda*—for Respondents.

Judgment. — The plaintiff, Nirmal Mal Ganesh Das, brought a suit for rendition of accounts against (1) Tulsa Ram, (2) Gowardhan Das, (3) Heman Ram, son of Tulsa Ram, and (4) Chanda Ram, son of Gowardhan Das, on the allegation that the defendants carried on business as commission agents, that the plaintiffs had dealings with them and had sent them certain quantities of grain for sale, and that the defendants have failed to render accounts.

Tulsa Ram admitted that the plaintiff had dealings with him and Gowardhan Das but that the partnership between these two had been dissolved on a certain date, and that with the consent of the plaintiff the liability on these dealings had been taken over by Gowardhan Das, and his son, Chanda Ram. Gowardhan Das, while admitting that there had been a dissolution of partnership between him and Tulsa Ram, pleaded that both of them were liable to render account to the plaintiff and to make good to him the sum that might be found due. Heman Ram and Chanda Ram denied their connection with the dealings or liability to the plaintiff. One of the issues framed was, whether the liability of the plaintiff had been transferred to Gowardhan Das and Chanda Ram with the plaintiff's consent. The trial Judge found this issue in the affirmative so far as the transfer to Gowardhan Das was concerned. He accordingly exonerated Tulsa Ram, Chanda Ram and Heman Ram, and passed a preliminary decree in favour of the plaintiff against Gowardhan Das alone. Gowardhan Das preferred an appeal to the District Judge and in his memorandum of appeal urged that issue No. 1 had not been rightly decided and that Tulsa Ram had been wrongly exonerated from liability. The learned District Judge has dismissed the appeal refusing to go into the question as to whether Tulsa Ram and Gowardhan Das were jointly liable to render account to the plaintiff.

Gowardhan Das has come up on second appeal and has contended that the question as to whether Tulsa Ram was jointly liable with the appellant to render account to the plaintiff was a matter directly and substantially in issue in this case and the learned District Judge has erred in not deciding it. After hearing both counsel I am of opinion that this contention is well founded and must succeed. Mr. Fakir Chand for Tulsa Ram has frankly conceded that the question as to which of the two defendants is the accounting party is essentially a matter for decision at the stage when the preliminary decree in a suit of redition of accounts is to be passed. He has also admitted that as the two defendants were litigating on this point and that an issue had been framed and evidence led the matter would be res judicata in further litigation between his client and Gowardhan Das. In these circumstances it is obvious that it was necessary for the learned District Judge to come to a definite finding on this question in the appeal before him. I therefore accept the appeal, set aside the judgment of the learned District Judge and remand the case to him for rehearing and disposal in accordance with the foregoing remarks. Court-fee on this appeal shall be refunded. Other costs shall be costs in the cause.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 892

ADDISON AND AGHA HAIDAR, JJ.

Idu and *others* — Plaintiffs — Appellants.

v.

Kanwar and *others*—Defendants—Respondents.

Second Appeal No. 899 of 1928, Decided on 24th November 1932, from decree of Dist. Judge, Ambala, D/- 13th December 1927.

Civil P. C. (1908), O. 7, R. 14 and O. 13, R. 1 (2)—Document produced at late stage rejected by trial Court—Discretion exercised by trial Judge will not be interfered with unless such discretion has been exercised capriciously or arbitrarily.

The acceptance or rejection of a document produced at a late stage is a matter entirely within the discretion of the Court. Hence where a trial Court rejects a document which is produced at a late stage the High Court cannot interfere with the exercise of the discretion unless it is satisfied that the discretion has been exercised capriciously in an arbitrary manner and contrary to well-recognized judicial principles. [P 893 C 1]

Barkat Ali--for Appellants.

Mohd. Amin and *Akbar Ali* — for Respondents.

Agha Haidar, J.—This appeal arises out of a suit for a declaration that the plaintiffs are entitled to 17 out of 25 shares in a certain shamilat land. Both the Courts below have dismissed the plaintiff's suit. They have come up to this Court in second appeal.

Certain partition proceedings were pending in the Revenue Courts and as the point regarding the extent of the plaintiff's share in the shamilat was raised the Revenue Court referred the plaintiffs to the civil Court. Hence the present suit. Three of the defendants, namely, Maluk or Malak, son of Wazir, Arju and Imamuddin at an early stage of the case entered into a compromise with the plaintiffs giving up their share and agreeing that the suit may be decreed against them. The trial Court did not notice this point. The learned Judge of the lower appellate Courts however has observed in his judgment that as the plaintiffs did not place any proper materials by way of evidence on the record, they were not entitled to a declaration, as the shares of Maluk or Malak, Arju and Imamuddin could not be specified. In my judgment a declaration could be granted to the plaintiffs, in respect of the shares whatever they were of these three persons. As already mentioned the matter is pending in the Revenue Court and the civil Court is simply asked to give a declaration to the plaintiffs. If the declaration is granted to the plaintiffs in respect of the interests of the three defendants the plaintiffs can go back to the Revenue Court and ask the Revenue Officer to give effect to the said declaration by allotting the plaintiff the fractional shares of these three parties. And when proper materials are placed before the Revenue Officer I have no reason to doubt that he would be able to grant the plaintiffs proper relief. I would therefore grant the declaration to the plaintiffs in respect of the shares of Maluk or Malak, Arju and Imamuddin whatever may be their extent and allow the plaintiff's appeal in respect of those shares.

Mr. Barkat Ali on behalf of the appellants has asked to revise the findings of the two Courts below in the matter of rejecting the copy of a certain Wajibularz which his clients wanted to produce. The 25th November 1926 was fixed by the trial Judge for the plaintiffs to produce certain copies of the Revenue Records. On 25th November and 4th December 1926, summons were scrutinised and 13th December 1926 was fixed for recording the evidence. The plaintiffs did nothing either on 25th November or on 13th December 1926. There were certain pourparlers for compromising the whole suit. But these proved abortive and at the request of the parties the Court adjourned the case till 31st January 1927. It was on this date that the plaintiffs came into Court and asked for permission to file the copy of a certain Wajibularz. The trial Judge held that since the plaintiffs had not filed this copy on the proper date the Court could not receive it in evidence, as it was produced too late. The learned Judge of the lower appellate Court has recorded his reasons and has in conclusion, agreed with the order of the trial Judge in refusing to admit the copy of the Wajibularz in evidence. Mr. Barkat Ali has argued that the Courts below were in error, and that the copy should have been admitted although it was produced at a late stage. He further stated that the other side could have been easily compensated in the matter of costs. I am not prepared to accept this contention. It was conceded by Mr. Barkat Ali that the acceptance or rejection of the copy in the present case was a matter entirely within the discretion of the Court. This being so, this Court cannot interfere with the exercise of the discretion of the Courts below unless it is satisfied that the discretion has been exercised capriciously, in an arbitrary manner and contrary to well-recognised judicial principles. Mr. Barkat Ali has failed to criticise the procedure adopted by the Courts below on the grounds indicated above. I would therefore refuse to interfere with the discretion exercised by the Courts below as, in my judgment, they were perfectly justified on the materials before them in passing the order refusing to admit the copy of the Wajibularz in question in evidence after the proper date had expired.

The result therefore is that the appeal is allowed in respect of the shares of Malak, Arju and Imamuddin and a declaration is granted to the plaintiffs in respect of their shares. These three persons have not put in appearance in this Court, although they were duly served. The appellants shall pay the costs of the contesting respondents. In other respects the appeal stands dismissed.

Addison, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 893

TEK CHAND AND MONROE, JJ.

Hasan Mohammad & another—Plaintiffs—Appellants.

v.

Ahmad Bakhsh—Defendant — Respondent.

Second Appeal No. 1476 of 1932, Decided on 18th June 1933, from decree of Dist. Judge, Ludhiana, D/- 4-6-1932.

Limitation Act (1908), Arts. 142 and 144—Suit for possession on ground that defendant is tenant — Tenancy not proved and defendant found to be in possession for more than 12 years before suit—Suit is barred by time.

Where plaintiff sues for recovery of possession of certain property from the defendant alleging that the defendant is his tenant, but fails to prove the tenancy and it is proved that the defendant has been in possession for more than 12 years before suit, the suit is barred by Art. 142 if it is to be based on dispossession of the plaintiff by the defendant as such dispossession ought to have taken place within the period of 12 years next before the suit. [P 894 C 1]

Achhru Ram—for Appellants.

R. C Soni—for Respondent.

Monroe, J.—This suit was brought to recover possession of a house at Ludhiana and now comes before us on second appeal. The plaintiff's allegation was that the defendant was their tenant and had set up an adverse title. The defendant denied the tenancy and asserted that he had been in possession as owner for more than 40 years and that as the plaintiffs had not been in possession within 12 years, the suit was barred by time. The trial Court found that the house belonged to the plaintiffs, that no tenancy had been proved and that the defendant has been in adverse possession for more than 12 years. On appeal the learned Judge agreed that it had not been proved that defendant was tenant to the plaintiffs. He also held that the house formerly belonged to and was in the possession of Gauns Ali Shah and that the plaintiffs are now the legal representatives of Gauns Ali Shah. He does not find definitely how long the defendant has been in possession, having the admission of one of the plaintiffs in his evidence that the defendant has been erroneously in possession since 1911. The learned Judge states that the real question is whether the plaintiffs have a subsisting title in the house, and discusses authorities bearing on the point whether in a claim for possession where a tenancy or permissive possession is not established it is necessary for the plaintiff to prove that he has been in possession within 12 years. Before the learned Judge the following amongst the other cases: *A. I. R.* 1922 *Lah.* 432, *A. I. R.* 1928 *Lah.* 896 and *A. I. R.* 1930 *Lah.* 330, were cited to show that proof of such possession was necessary to entitle the plaintiff to succeed; to support the contrary view: *Jaichand Bahadur* v. *Gordar Singh* (1), followed in *A. I. R.* 1927 *Lah.* 32 and *A. I. R.* 1927 *Mad.* 287, were cited; and the argument for the appellants before us was that the present case falls within Art. 144, Limitation Act, and that when the plaintiff has proved his title the onus of showing that the defendant has been in adverse possession for 12 years is on the defendant, if he is successfully to defeat the plaintiff's claim. I do not question this proposition, but I fail to see why it should be applied to this case. The learned District Judge has found that the plaintiffs have failed to prove that the defendant was at any

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1. A I R 1919 All 403=52 I C 866=41 All 669.

time their tenant and that on the facts as found if the plaintiffs can frame a cause of action it is that their predecessors in title were at sometime, certainly prior to 1911, dispossessed by the predecessors of the defendant, and that as a result their only possible cause of action is barred by Art. 142, Limitation Act.

It seems to me that the view taken by the learned District Judge is justified by the facts. Even if the extraordinary view suggested by the appellants were taken that it is immaterial that the plaintiffs have failed to prove tenancy the alleged repudiation of which is the cause of action and that by showing that their predecessors in title were owners in possession about 40 years ago, I should be prepared to hold that for more than 12 years before action was brought the defendant has been in possession of the property to the exclusion of the plaintiffs, claiming to be owners, and this view is supported by the evidence of some of the plaintiffs' witnesses.

The defendant's statement that the house was given to him by Ghauns Ali Shah, the plaintiffs' predecessors in title is actually confirmed by the evidence of the plaintiffs' witness, Qasam Ali who is familiar with the history of the property—this gift must have been made before 17th July 1897, the date of Ghauns Ali Shah's death. The plaintiffs endeavoured to support their case by the production of a rent deed executed by the defendant in their favour in the year 1919 alleging that the house in dispute was included in the rent deed—it has been established beyond question that the deed related to two shops and had nothing to do with the house in dispute. The plaintiffs' assertions in this respect were nothing short of fraudulent. Accordingly I would refuse this appeal with costs.

Tek Chand, J.—I agree that this appeal should be dismissed with costs on defects found, the suit is clearly barred whether Art. 142 or Art. 144 is applicable.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 894

DALIP SINGH AND AGHA HAIDAR, JJ.

Shiromani Gurdwara Parbandhak Committee and *another*—Appellants.

v.

Uttam Singh and *others*—Respondents.

First Appeal No. 2421 of 1929, Decided on 24th March 1933.

Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 18 and 2 (4) (i), (ii)—Land granted by original proprietor to Gurdwara and specified person performing service entitled to benefits out of land—Devolution of succession from one officer holder to another and names appearing in Record of Rights—Right, title and interest of holder appertains to Gurdwara and not to him personally.

A land was granted by the original proprietor to a Gurdwara and a certain person who was to play on musical instrument during the time of religious services was to enjoy the benefits of the land. He had three others who were his chelas who helped him in his work, and on his death, his widow and the chelas continued to work, and enjoy the land and subsequently the land was enjoyed by persons who were holding office as ragis in the Gurdwara. Further the names of petitioners who claimed the land as their personal property were shown in the Record of Rights in which the remark was that the muafi was made in the names of Ragis singing in the Gurdwara:

Held: that the presumption under S. 18 (1) (g), Gurdwaras Act, that the right, title or interest claimed by the persons whose names are entered in the Record of Rights appertained to the Gurdwara applied that the petitioners were office holders as defined in S. 2 (4) (i), that the devolution of succession was from one office holder to another and that petitioners could not claim it either as full proprietors or as permanent occupancy tenants. [P 896 C 2]

Charan Singh and *Gurcharan Singh*—for Appellants.

Fakir Chand and *Chandra Gupta*—for Respondents.

Agha Haidar, J.—By notification No. 892 dated 28th April 1926, Gurdwara Qila Anandgarh Sahib, situate in tahsil Una in the district of Hoshiarpur, was declared a Sikh Gurdwara. Notification No. 220-G, dated 12th March 1927, contained a consolidated list in which all rights, titles and interests in the property in suit, as required by S. 3 (1), Sikh Gurdwaras Act, 8 of 1925, were duly published. Three petitions under S. 5, Sikh Gurdwaras Act, were presented to the Local Government in which claims were put forward in respect of the properties specified in notification 2. Petition No. 378 was by one Chhajja Singh. This petition was dismissed and we are not concerned with it any longer. Petition No. 387 was put in on behalf of the proprietors of the village Mataur, in which they claimed proprietary rights in the land in suit. The respondents admitted the claim of the proprietors and the matter was compromised between the petitioners and the respondents. In the present appeal we are not concerned with this petition.

The present appeal arises out of petition No. 377 in which there was a contest between the seven petitioners, who signed the petition on the one hand, and the Shiromani Gurdwara Parbandhak Committee and the Committee of Managemnt of Gurdwara Anandgarh, hereinafter referred to as the objectors, on the other. The property, in respect of which we are called upon to adjudicate, is mentioned in para. 2 (a) of the petition and consists of 18 ghumaons of land. The case seems to have been conducted both before the Tribunal as well as in this Court by counsel who did not clearly appreciate their respective legal positions and were constantly shifting their ground, with the result that the whole argument was a record of confusion from the beginning to the end. For instance. in para. 2 (a) of the petition, the petitioners alleged that they "had a right of occupancy under S. 5 (1) (a), Punjab Tenancy Act, (16 of 1887) paying no rent," while their counsel in his statement dated 13th September 1928, before the Tribunal, without having amended the plaint or even making a suggestion asking for an amendment, stated that the petitioners were ragi pujaris, and that they were in occupation of the property claimed as private proprietors and not as pujaris. Counsel for the petitioners-respondents in this Court stated that his clients claimed as occupancy tenants and not as proprietors. There was a similar confusion in the arguments on behalf of the counsel for the objectors.

The case for the petitioners, as ultimately put before this Court, is that they claimed to be the full proprietors of the land in suit, while the objectors pleaded that the petitioners and their predecessors-in-title had been office-holders of the Gurdwara and their possession of the land in suit was on behalf of the said Gurdwara, that the muafi was granted to the petitioners who were ragis of the gurdwara for the benefit of the gurdwara on condition that they should perform the daily musical service in the gurdwara, and that, since some of the petitioners had ceased to perform their service in the gurdwara after the year 1913, their names were removed from the list of ragis according to the settlement of 1913-14. It was further pleaded that, as the petitioners had deliberately failed to perform their duties at the gurdwara in the year 1923, they were not entitled to the land in suit. The judgments separately delivered by the three members of the Tribunal are not all unanimous. The learned President was clearly of opinion that the individual members of the body of ragis were not occupancy tenants under S. 5 (1) **(a)**, Punjab Tenancy Act, or under any other section of any old or present Act. He however granted a decree to the petitioners, holding that they were entitled to remain in possession of their shares of the agricultural land in dispute until they were ousted by the proprietors. One of the members held that the petitioners were occupancy tenants under S. 8, Punjab Tenancy Act, 16 of 1887. As to the rest he agreed with the President. The other members held that the occupancy holding in suit was attached to the shrine and that the gurdwara was the real occupancy tenant. He further held that the petitioners were permanent tenants who could not be ejected from the lands in their possession in these proceedings All the three members of the Tribunal however agreed in passing a decree, declaring that the petitioners were entitled to remain in possession of their shares of the agricultural land until they were ejected by the proprietors. This decree is dated 9th July 1929, and is signed by all the members of the Tribunal.

There is some oral evidence which has been led on behalf of the petitioners as well as by the objectors. This evidence however is not of much value and the case can be disposed of satisfactorily by a reference to the documentary evidence.

It appears that in the year 1805 one Sardar Suba Singh, a pious Sikh proprietor of the village Mataur, made a grant of a muafi in suit for the benefit of one Bhai Prem Singh in his capacity as a ragi. The terms of the grant were that Bhai Prem Singh was to sing and play upon musical instruments at the time when the religious service was held in the gurdwara in the morning and evening. Bhai Prem Singh however alone could not properly play the sacred music, and therefore he was obliged to associate with himself a number of other musicians to help him. These musicians were to participate in the profits accruing from the land in suit, as their fees and wages. On his death Bhai Prem Singh was succeeded by his widow, Mt. Sahib Devi, with whom the surviving ragis, who called themselves chelas of Bhai Prem Singh, continued to work at the gurdwara. On the death of Mt. Sahib Devi the ragis, for the time-being, succeeded to the land; but, as I shall show later on, their possession of the land was throughout in the capacity of ragis and on the distinct understanding that they would continue to serve the gurdwara by playing the sacred music in it. Ex. R-13 is:

"an extract from the register of muafis, in perpetuity, for life and till existence of religious institutions relating to tahsil Una, District Hoshiarpur, released till the end of the year 1852-53."

Under the column marked "Name of muafidar with parentage, etc.," we find that the muafi is entered in the names of the ragis of Gurdwara Anandpur, Sahib, under the management of the Managing Committee of the gurdwara of Anandpur Sahib. In column 10 there is an entry that the muafi had been granted in perpetuity by way of donation in the names of the ragis of the gurdwara of Anandpur. In the column of "Remarks" it is mentioned that the management of the land is in the hands of the Committee. It is clear therefore from the contents of this document that the muafi was given to the ragis attached to the gurdwara and not in their personal and private capacity. In other words, the real muafidar was the religious institution called the Gurdwara Anandgarh and the ragis were merely the office-holders of the gurdwara who were to benefit from the proceeds of the property as such ragis.

Exhibit R-15 is a copy of an agreement dated 22nd January 1881, executed either by some of the present petitioners or by their predecessors. In this document the signatories described themselves as the heirs of Mt. Sahib Devi, the widow of Bhai Prem Singh, who had died, and it is pointed out that they had to play music at the gurdwara and were to officiate as shabad kwans, and that, if any party to the agreement failed to do shabad khwani, he would be deprived of his share. At the conclusion of this document there is an important provision that, if there was no lawful representative of any one of the four shabad khwans, a new ragi shall be appointed in his place with the consent of the heirs and successors of Mt. Sahib Devi, deceased, and of the mahant of the gurdwara. This recital is significant in that it refers to the dominant position occupied by the gurdwara, and the lawful appointment of a new ragi was to depend upon the consent and sanction of the mahant of the gurdwara for the time-being. This agreement was given effect to in Ex. R-14 of the year 1882-83.

On 20th January 1913, there were certain review proceedings before Mr. Shuttleworth, Settlement Officer. In these proceedings a statement (Ex. R-4) was made by some of the present petitioners or their ancestors (vide pedigree table, Ex. R-2, printed at pp. 61-64 of the paper book). This statement contains a clear admission that the signatories of the statements were ragis of the Gurdwara Anandpur and that they were holding the land as muafi in consideration of their services as ragis. The origin of the grant, the names of the grantor and of the grantee together with the object for which the grant was made are clearly mentioned and it is definitely stated that the ancestors of the signatories were the servitors of the gurdwara and knew the ragi. The documnet concludes with the following significant remarks:

"According to the above agreement, we mutually agreed that one who did not learn shabad khwani or failed to do shabad khwani by attending the gurdwara, would be deprived of his share and his share would go to other shabad khwan."

A perusal of this document as a whole puts the matter beyond doubt that the grant was really intended for the benefit of the gurdwara, and that the ancestors of the petitioners and the petitioners themselves were the "office-holders" of the gurdwara who were to enjoy the income of the muafi on condition that they rendered musical service to the gurdwara. On 6th December 1913, the matter came up before Mr. Shuttleworth, settlement officer, who ordered that the muafi should continue according to the agreement arrived at by the ragis, and that:

"only those ragis who know and practice rag should alone be given the benefit of the muafi in equal shares and absentees and non-performers excluded."

This order clearly shows that the enjoyment of the muafi by the petitioners and their ancestors was not in their own interest as private individuals but was dependent upon their performing the service of singing rags in the gurdwara. If the property had been the personal and private property of the petitioners there was no occasion whatsoever for any limitations and restrictions being put upon its mode of . enjoyment. Instructions were issued on 1st January 1914, for giving effect to the order of Mr. Shuttleworth, and it was again repeated that the muafi was made in the names of the ragis (who sang in the gurdwara) in equal shares, as agreed upon by themselves. The patwari and the girdawar, in due course, gave effect to the order. In this connection Ex. R-22 is important. It is an extract from the statement of muafis and pensions in respect of mauza Mataur, tahsil Una, district Hoshiarpur, attached to the Record-of-rights of the settlement of 1914. The names of the petitioners and their ancestors are given in column 2 which bears the heading "Name with description of muafidar." In column 12 under the heading "Conditions of Muafi" there is to be found the following entry:

> "This land is mauf in the names of the ragis entered in Col. 2 till the existence of the Gurdwara of Anandpur under the order of the Settlement officer dated 24th June 1881."

In the column of "Remarks" we find an entry of these words:

> "The muafi is made in the names of ragis singing in the Gurdwara under the order of the Settlement Officer dated 6th December 1913."

Thus the documentary evidence, which consists of the admissions made by the petitioners themselves or their predecessors, and the revenue records of unimpeachable authority leave no room for doubt that the claim put forward by the petitioners is wholly baseless, that the land in dispute was granted by the original proprietor, Sardar Suba Singh, to the gurdwara and the petitioners were to enjoy the benefit arising out of the grant merely as servitors of the said gurdwara. On behalf of the petitioners reliance was placed on Ex. P-7 which is a copy of a judgment dated 31st March 1882, by Mirza Muhammad Azam Beg, Extra Assistant Settlement Officer, Hoshiarpur. This was a suit for the ejectment of the petitioners or their predecessors by the proprietors of the village. In this judgment the suit of the proprietors was dismissed and it was held that the defendants had occupancy rights in the land and were successors of Prem Singh and Mt. Sahib Devi. It may be mentioned here that the gurdwara was not represented in this litigation and therefore any findings recorded by the Extra Assistant Settlement Officer cannot bind the gurdwara in the present litigation. As a piece of evidence the document has very little value and in a way goes against the claim now put forward by the petitioners. In the concluding portion of the judgment the Extra Assitant Settlement Officer observed that, so long as this troup of ragis and the darbar of Anandpur co-existed, the occupancy rights would also subsist. This sentence militates against the case of the petitioners, inasmuch as it makes their interests, whatever they are, inter-dependent upon the existence of the gurdwara. If the rights of the petitioners had been independent of the gurdwara this observation in the judgment would have no meaning.

The attention of the Court was drawn by the counsel for the petitioners-respondents to Ex. R-21, in which the land is shown as muaf in the name of Mt. Sahib Devi, wife of Prem Singh, under the order of the Commissioner dated 22nd July 1854, for life. This document should not be isolated but must be read along with the documents which preceded and followed it and in the light of such comments as I have made.

Counsel for the objectors-appellants invited our attention to the provisions of S. 18, Sikh Gurdwaras Act, and argued that the petitioners-respondents were office-holders as defined in Ss. 2 (4) (1) and (2) and that, as their names appeared in the Record-of-rights, there was a presumption that the right, title or interest claimed by them really appertained to the gurdwara. He relied upon the provisions of S. 18, Sub-S. (1), Cl. (a) of the Act. This contention seems to be well-founded and is supported by the entries in Ex. R-13 (at pp. 90-93) and Ex. R-22 (at pp. 70-71). Reliance was also placed on behalf of the objectors-appellants on Cl. (g), Sub-S. (1), S. 18. The revenue records show that Mt. Sahib Devi succeeded to the land in suit on the death of Prem Singh and enjoyed the income of the property along with the associates or chelas of her deceased husband, Prem Singh, and that, on her death, these chelas succeeded her. Thus there has been devolution of succession from one office-holder to his successor in office, as such, on at least two consecutive occasions and the objectors therefore rightly invoked in aid the provisions of S. 18 (1) (g), Sikh Gurdwaras Act.

The result therefore is that the petitioners' claim fails on the finding that the land was originally granted by Sardar Suba Singh to the gurdwara for the purpose of maintaining and carrying on its worship and other religious observations. I would therefore allow this appeal and, setting aside the decree dated 9th July 1929, passed by the First Sikh Gurdwaras Tribunal, dismiss the petition with costs.

Dalip Singh, J.—I agree.

K.S. *Appeal allowed.*

A. I. R. 1933 Lahore 898

ADDISON AND BHIDE, JJ.

Santa Singh and *others*—Plaintiffs—Appellants.

v.

Mt. Santi and *others*—Defendants—Respondents.

First Appeal No. 708 of 1927, Decided on 28th February 1933, from decree of Senior Sub-Judge, Amritsar, D/- 24th February 1927.

Custom (Punjab) — Succession — Amritsar District—Jats—Daughters and their sons do not inherit self-acquired property.

Daughters or their sons are not entitled to inherit even the self-acquired property of the father or grandfather amongst Jats of Amritsar District: *A I R* 1927 *Lah* 241; *A I R* 1926 *Lah* 142 and *A I R* 1925 *Lah* 556, *Rel on.* [P 898 C 2]

J. L. Kapur, *J. N. Aggarwal* and *Des Raj Sawhney*—for Appellants.

M. C. Mahajan, *Jowahar Singh* and *Shamair Chand*—for Respondents.

Addison, J.—The plaintiffs are collaterals of Nihal Singh, deceased, in the sixth degree. Mt. Santi, widow of Nihal Singh, gifted two-thirds of her deceased husband's estate in favour of her daughter's son, Ganda Singh, and she gifted the remaining one-third in favour of her sister's sons, Nand Singh, Chanda Singh and Teja Singh. The plaintiffs brought this suit for the usual declaration that these gifts would not affect their reversionary rights after the death of the widow. The trial Judge has held that it has not been proved that the property is ancestral qua the plaintiffs. He further held that with respect to the self-acquired property of Nihal Singh his daughter's son, Ganda Singh, defendant, is the preferential heir and that therefore it would be usless to give the plaintiffs a decree as their suit was merely speculative in that there was little or no chance of their ever inheriting the property. The result was that the suit was dismissed and the plaintiffs have appealed.

In the Riwajiam of 1865 nothing apparently is said as regards the daughter's right to succeed when there is no male issue but the power of gift in favour of a daughter was very restricted and could not be exercised without a written document and the consent of the collaterals. In the Customary law of the Amritsar District prepared in 1914, questions 60 and 61 deal with the succession of daughters. It is clear from them that amongst most tribes daughters do not succeed to ancestral or self-acquired property of their father in any circumstances. There are very few exceptions to this rule, with which we are not concerned, as Jats according to the Customary law follow the general rule.

This Customary law has been discussed at very great length in two judgments of a Division Bench reported as *Labh Singh* v. *Mango* (1). It was held that among Handal Jats of the Amritsar District a custom existed prohibiting the succession of daughters to the inheritance of their father, whether that inheritance consisted of movable or immovable property or property acquired or ancestral. It was also pointed out by the Judges who decided that case that the decision of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (2), had in the past not been understood. They discussed whether the Riwajiams of the Amritsar District of 1865 and 1914 were imperfectly compiled or inaccurate and came to the conclusion that they were not. In fact *Labh Singh* v. *Mango* (1) deals with every question which was raised before us. With great respect I am in agreement with the decision come to then and I would hold that daughters or their sons are not entitled to inherit even the self-acquired property of the father or grandfather amongst Jats of this district. The evidence produced is of no value and there is nothing which can be relied on except the replies to questions 60 and 61 in the Customary law. That however is a strong piece of evidence in favour of the plaintiffs' case, as held by their Lordships of the Privy Council.

The same view had already been taken with respect to this Customary law by two other Division Benches. In *Narain* v. *Jowahir Singh* (3) a Division Bench held that among Kambohs of the Amritsar district a daughter was not entitled to succeed to the self-acquired property of her father to the exclusion of the collaterals while another Division Bench in *Nadhan Singh* v. *Mt. Rajo* (4), held that by custom prevailing among Sandhu Jats of the Amritsar District, daughters are ousted by collaterals of the last male owner in the matter of succession to self-acquired property. These three decisions of Division Benches are relevant under the provisions of S. 13,

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1. A I R 1927 Lah 241=100 I C 924=8 Lah 281.
2. A I R 1916 P C 129=38 I C 354=44 I A 89=44 Cal 749=45 P R 1917 (P C).
3. A I R 1926 Lah 142=89 I C 724.
4. A I R 1925 Lah 556=85 I C 783.

Evidence Act, as instances where this custom has been judicially recognised. It is true that the Settlement Officer who compiled the Customary law of 1914 was of the opinion that in reality daughters had a right to exclude agnates with respect to self-acquired property though that right was seldom asserted, but it is not his private opinion that is of importance but the replies of the various tribes. In this respect the discussion of Campbell, J., at p. 304 (of 8 *Lah.*) is of importance and I agree with him that there is nothing to show that either Riwajiam was unreliable. For reasons given, I would accept the appeal and decree the plaintiffs' suit with costs in this Court. Parties can bear their own costs in the trial Court.

Bhide, J.—I agree.

V.S. *Appeal allowed.*

A. I. R. 1933 Lahore 899

BHIDE AND CURRIE, JJ.

Godha Waryam—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 170 of 1933, Decided on 23rd May 1933, from order of Sess. Judge, Lyallpur, D/- 31st January 1933.

(a) Evidence Act (1872), S. 25—Report by accused at police station that he had killed deceased—Prosecution relying on such statement for conviction of accused—Report is inadmissible.

Accused made a report at the police station that he had killed the deceased. The prosecution relied on this for his conviction:

Held: that the test for deciding whether the report is or is not admissible in evidence is whether it is or is not in the nature of a confession, i. e., whether it supports any inference as to the guilt of the appellant and is relied upon as such, and that as it was relied upon by the prosecution as an admission of the very criminal act with which the appellant was charged and for no other purpose it must be held to be inadmissible in evidence: *A I R* 1918 *Lah* 69; *A I R* 1919 *Lah* 471 and *A I R* 1925 *Bom* 529, *Ref.* [P 900 C 1]

(b) Penal Code (1860), Ss. 302 and 304—Benefit of doubt—Held on facts that accused was entitled to benefit of doubt—Benefit of doubt.

There was no other evidence on the record on which the accused was convicted excepting a statement made before the committing Magistrate. This statement was that on the night of the murder he saw three thieves coming to his cattle-shed. One of them untied a buffalo and was taking it away. He shouted out to the thieves and gave two blows with a chuha to the culprit who was taking away the buffalo. The other culprits escaped:

Held: that as there were there culprits the appellant may have felt reasonable apprehension of death or grievious hurt if he did not use adequate force promptly and that in the absence of any reliable evidence on behalf of the prosecution as to the circumstances in which the offence was committed the brief statement made by the appellant was by itself not sufficient to support a conviction even of culpable homicide. [P 900 C 2]

Mohammad Amin Malik and *Abdur Razzaq*—for Appellant.

V. N. Sethi—for the Crown.

Bhide, J.—The appellant, Godha, along with Sanatta, Suja son of Salabat, and Suja son of Nadari, were charged in this case under S. 302, Penal Code, with the murder of Chakri, a youth aged about 17. Godha alone has been convicted and sentenced to death. The deceased Chakri was married to Mt. Suba, a sister of Sanatta, while Mt. Raja, a sister of Chakri, was married to Sanatta. The latter was living with Sanatta and when Mt. Suba came of age, Nawab, father of Chakri, asked Sanatta to send her to live in his house. Sanatta refused to do so and asked for her divorce on the ground that Chakri had another wife. Sanatta also turned out his own wife, but when Nawab asked him to divorce her, he refused to agree. This led to ill-feeling between the parties. Godha, appellant, who is married to another sister of Sanatta, Sanatta himself and some others went to Nawab's house to discuss the matter, but no settlement could be arrived at and Sanatta and Godha swore that they would see that they got the divorce in a few days.

On the night of the murder Suja, son of Salabat, and Suja, son of Nadari, took out Chakri on the pretext of going to a mosque to hear the kalma being read. Later, he is alleged to have been taken to the cattle-shed of Godha and there murdered by Godha and the other accused persons by inflicting blows with "chuhas."

There were two alleged eye-witnesses. One of these two was Said (P. W. 4), but he denied having identified the culprits, whom he only saw running away. Lal (P. W. 2) the other eye witness, is an uncle of the deceased and the learned Sessions Judge has given cogent reasons for disbelieving this witness. The learned Sessions Judge in convicting the appellant Godha, has relied solely on a report made by Godha himself at the police station, soon after the occurrence. In this report Godha stated that while he was sleeping in his cattle-shed, where his buffaloes were tethered, three persons, came and untied one of the buffaloes and were taking it away. He shouted out and chased them. The appellant then gave a blow with a chuha, which he had with him on the head of the culprit who was leading the buffaloes. The culprit fell down and he gave him another blow while he was lying on the ground. The other companions of the culprit ran away. It was a dark night. The appellant lighted a match and then discovered that the culprit was Chakri and that he had already expired.

The learned counsel for the appellant has urged that the above report being in the nature of a confession made to a police officer was inadmissible in evidence. In support of this contention he has relied upon *Harji* v. *Emperor* (1), *Emperor* v. *Harnam Singh* (2) and *Emperor* v. *Shafi Ahmad* (3). The learned counsel for the Crown, on the other hand, contended that the statement was exculpatory and was therefore admissible. In my opinion, the test for deciding whether the report is or is not admissible in evidence is whether it is or is not in the nature of a confession, i. e., whether it supports any inference as to the guilt of the appellant and is relied upon as such. In the present instance, the appellant stated in the report that he gave blows to Chakri with a chuha which resulted in his death and this statement is, I think, clearly in the nature of a confession. It was relied upon by the prosecution as an admission of the very criminal act with which the appellant was charged and for no other purpose. In the circumstances it seems to me that the above report made by the appellant to the police must be held to be inadmissible in evidence.

There is no other evidence on the record on which the appellant's conviction could be upheld. The appellant made a very brief statement before the Committing Magistrate which was to the same effect as the report made by him to the police and he adhered to this statement in the Sessions Court. This statement was that on the night of the murder he saw three thieves coming to his cattle-shed. One of them untied a buffalo and was taking it away. He shouted out to the thieves and gave two blows with a chuha to the culprit who was taking away the buffalo. The other culprits escaped. This statement is supported by the evidence of Thiraj, D. W. 2. It was suggested that even accepting this statement of the appellant, he exceeded his right of private defence of property and would therefore be at least guilty of culpable homicide. The learned counsel for the appellant has however urged that on the above statement, the appellant cannot be said to have exceeded that right and has cited *Ismail* v. *Emperor* (4), in support of this argument. After carefully considering the facts, it seems to me difficult to convict the appellant on the basis of the above brief statement, in the absence of further details as to what really happened. Thiraj, D. W. 2, did not actually see the occurrence but only heard from the appellant what had happened. There were three culprits and the appellant may have felt reasonable apprehension of death or grievious hurt if he did not use adequate force promptly; it was a dark night and it cannot be presumed that the appellant deliberately aimed the blows at the head of the deceased. In the absence of any reliable evidence on behalf of the prosecution as to the circumstances in which the offence was committed it seems to me that the brief statement made by the appellant is, by itself not sufficient to support a conviction even of culpable homicide.

I would accordingly give him the benefit of the doubt and accepting the appeal acquit him.

Currie, J.—I agree.

K.S. *Appeal accepted.*

A. I. R 1933 Lahore 900

ADDISON AND BHIDE, JJ.

Chain Singh—Plaintiff—Appellant.

v.

Maghar Singh and *another* — Defendants—Respondents.

First Appeal No. 1133 of 1926, Decided on 13th February 1933, from decree of Senior Sub-Judge, Lyallpur, D/- 15th February 1926.

Hindu Law — Widow — Alienation—Husband dying tenant of granted lands—Widow acquiring proprietary interest by payment of instalments—Payment not out of husband's estate—Property is widow's self-acquired one and her alienation cannot be challenged.

A was given some land by way of a yeoman's grant in the year 1900. His status remained that of a tenant till his death. His widow acquired

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1. A I R 1918 Lah 69=45 I C 273=19 Cr L J 513=4 P R 1918 Cr.
2. A I R 1919 Lah 471=48 I C 867=20 Cr L J 87=35 P R 1918 Cr.
3. A I R 1925 Bom 529=89 I C 1046=26 Cr L J 1478=49 Bom 642.
4. A I R 1926 Lah 23=91 I C 70=27 Cr L J 38=6 Lah 463.

the status of a proprietor in 1912 by payment of the necessary instalments according to the conditions of the grant and she alienated the property some years afterwards and it was not proved that the instalments were paid out of the income of the property of *A*:

Held: that the property was the self-acquisition of the widow and the alienation could not be challenged by reversioners: *A I R* 1932 *Lah* 144, *Dist*; *A I R* 1932 *Lah* 444, *Foll*.

[P 901 C 2]

D. C. Ralli—for Appellant.

Mehr Chand Mahajan — for Respondents.

Bhide, J.—Civil Appeals Nos. 1133 and 2625 of 1926, arise out of two suits of a similar character which were tried and disposed of together by the trial Court. Chain Singh who was the plaintiff in both the cases, sued for a declaration that certain alienations of land made by a widow named Mt. Bisso shall not affect his reversionary rights on the death of the widow. The suits have been dismissed by the Court below on the finding that the land in dispute was acquired by Mt. Bisso herself and the plaintiff had no locus standi to challenge the alienations. From this decision the plaintiff has preferred the present appeals.

There were several issues framed in these suits; but the learned counsel for the appellant has confined his argument to the finding of the trial Court on one point only, viz., that the land in dispute was acquired by Mt. Bisso herself. The material facts bearing on this point are briefly as follows: Budha Singh, husband of Mt. Bisso, was given some land in the colony area in the Lyallpur District by way of a yeoman's grant in the year 1900. His status remained that of a tenant till his death. His widow Mt. Bisso acquired the status of a proprietor in 1912 by payment of the necessary instalments according to the conditions of the grant and the alienations in dispute were made some years afterwards. In the Court below it was alleged that the instalments were paid out of the income of the property of Budha Singh, but no evidence was produced during the course of the trial in support of the allegation. The appellant sought to rely on an admission said to have been made by Mt. Bisso in another case to the effect that the instalments were paid out of the income of the property of her husband. But the statement was neither put to Mt. Bisso nor proved in the present case. The only question which need therefore be considered is, whether the property can be held to be that of Budha Singh although the instalments were paid and the proprietary rights were actually acquired by Mt. Bisso. The learned counsel for the appellant argued that the acquisition made by a widow becomes an "accretion" to the husband's estate. But he was unable to cite any authority in support of his contention except, *A. I. R.* 1932 *Lah.* 144. The facts of that case are however distinguishable as on the death of the original grantee in that case, his son had paid an instalment and an order had been recorded stating that proprietary rights had been conditionally conferred upon him and that no malikana would be taken from him. It was after the death of the son that some more instalments were paid by his widows and the purchase was completed. The case thus appears to have been decided on its peculiar facts. The facts of the present case seem to be on all fours with those in *Sardar Ali Shah* v. *Ghene Shah* (1), in which the property in dispute was held to be "self acquired" in the hands of a widow in similar circumstances. A similar view has been taken in some earlier rulings of the Punjab Chief Court and this Court, which have been referred to in that ruling. I am unable to find any good ground for taking a different view in the present case.

The appellant had relied on a custom enabling him to challenge even an alienation of self-acquired property by the widow; but the learned counsel for the appellant confessed his inability to support this plea on the evidence as it stands on the record. I would accordingly dismiss both the appeals with costs.

Addison, J.—I agree.

M.N. *Appeals dismissed.*

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1. A I R 1932 Lah 444=142 I C 847=13 Lah 820.

A. I. R. 1933 Lahore 901

ADDISON AND AGHA HAIDAR, JJ.

Mt. Champa—Plaintiff—Appellant.

v.

Official Receiver, Karachi and *others* —Defendants—Respondents.

First Appeal No. 770 of 1927, Decided on 20th June 1933, from decree of First Class Sub-Judge, Delhi, D/- 7th February 1927.

(a) Hindu Law—Joint family — Manager of joint family business has implied authority to contract debt for such business.

Where a family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the existence of the family: *Case law referred.* [P 903 C 1]

(b) Hindu Law — Joint family business — Debts due to fall of rate of exchange and other extraneous causes and consequent insolvency--Whole property is liable for debts including shares of minors and right of widow for maintenance should be postponed to payment of debts—Hindu Law—Maintenance.

Where a joint family trading business has been adjudicated insolvent and its debts are due to the fall of the rate of exchange and other extraneous causes, the whole property of the family can be sold in order to pay off these debts, and the shares of the minor co-parceners are also liable, while the right of widow to maintenance and residence must be postponed to the payment of these debts. [P 904 C 1]

(c) Civil P. C. (1908), O. 1, R. 3 — Adjudication of joint family business as insolvent and property vesting in Official Assignee—Suit against Official Assignee by widow having right of maintenance challenging necessity for incurring debts—Creditors are also necessary party and permission of insolvency Court is necessary for such suit—Provincial Insolvency Act (1920), S. 28 (2)—Hindu Law —Widow.

Where a joint family business is adjudged insolvent and the properties vest in the Official Assignee and a widow who has a right of maintenance sues the Official Assignee to enforce her right in the property in his hands by challenging the necessity for incurring the debts, the creditors are also necessary parties. And such a suit lies only with the permission of the insolvency Court: *AIR* 1919 *Sind* 42, *Rel on.* [P 904 C 1]

(d) Hindu Law — Widow — Right of maintenance—Family property is not liable in absence of charge.

Unless there is a charge the family property is in no way liable for widow's maintenance. In fact without a charge, widow's right is one of an indefinite character which is enforceable only like any other liability: *A I R* 1924 *All* 40 and *AIR* 1930 *Lah* 708, *Dist.* [P 905 C 1]

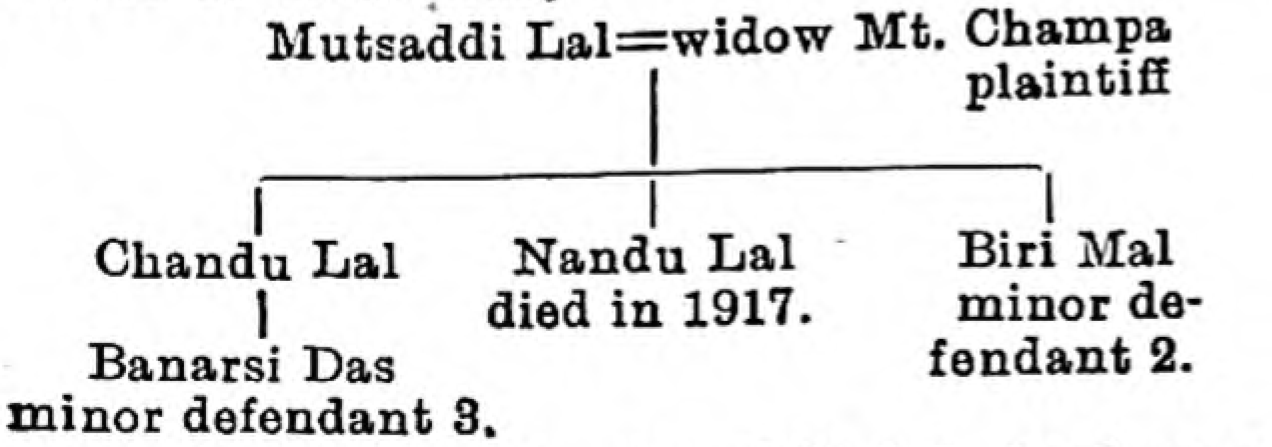
(e) Hindu Law — Maintenance — Claim is provable in insolvency—Provincial Insolvency Act (1920), S. 34.

A claim for maintenance or residence is capable of valuation as much as an annuity which is admittedly provable in insolvency. [P 905 C 1, 2]

Kishan Dayal—for Appellant.

Har Gopal and *Bhagwan Das*—for Respondents.

Addison, J.—The following pedigree table is necessary:


Mutsaddi Lal=widow Mt. Champa plaintiff
Chandu Lal
Nandu Lal died in 1917.
Biri Mal minor defendant 2.
Banarsi Das minor defendant 3.

Defendant 1 is the Official Assignee, Karachi. This family carried on an ancestral family business by the name Mul Chand-Mutsaddi Lal: Chandu Lal was for a long time the manager thereof. The firm was adjudicated insolvent in Karachi in the year 1922. This suit has been brought by Mt. Champa as the widow of Chandu Lal's father and her claim is for recovery of maintenance for three years before suit as well as for a sum to be fixed for her future maintenance and made a charge on the estate. She also claims a declaration that she is entitled to continue to reside in the family dwelling house at Delhi.

The Official Assignee pleaded that the liquidation of the debts incurred in due course of the ancestral business of the family left nothing out of the estate against which the plaintiff could enforce her rights, those rights not taking precedence over such debts. He also pleaded that the suit could not proceed without the sanction of the Insolvency Court at Karachi and that maintenance could not be recovered in a suit against the Official Assignee. The trial Judge held that the bringing of the suit required the leave of the Insolvency Court and that it was therefore incompetent. He further held that the creditors were necessary parties as the question between them and the widow was, whether the debts were incurred for family necessity, and for this purpose the Official Assignee did not represent the creditors. He also held that the failure of the business was due to Chandu Lal's negligence of it and the abnormal fall in the price of the goods stocked owing to a fall in the exchange rate. He then went on to say that the Official Assignee had not proved the object or purpose for which each debt was raised, while the plaintiff had not been able to show that they were contracted for immoral purposes. On these findings he dismissed the suit with costs, and plaintiff has appealed.

It seems to me that this appeal can be decided on the question as to whether the debts were incurred for family necessity. The evidence clearly establishes that the family business failed because the fall in the rate of exchange caused a 50% reduction in the price of the goods stocked while for other reasons the value of the goods fell further. There is no evidence on which the Judge was justified in holding that the failure was partly due to Chandu Lal's neglect in looking after the business. There is some general evidence of his debauchery which, in my opinion, is false. All that is established from the books is that he was taking Rs. 500 or so a month out of the business for his living expenses: and at the same time he was giving Rs. 300 to the plaintiff for her living expenses. The firm was a big one and these figures show that the family was living on a very moderate scale and that Chandu Lal was not even extravagant. It is therefore established on the record that the family business failed owing to a heavy fall in the price of goods by reason of the rate of the exchange changing and other causes. It must therefore be held that the debts were incurred in the ordinary course of the family business by the manager.

This finding is sufficient to dispose of the case. In *Raghunathji Tarachand* v. *Bank of Bombay* (1), it was held that the rule of Hindu law that debts contracted by a managing member of a joint family are binding on other members only when they are for a family purpose is subject to at least one important exception. Where a family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the existence of the family. Their Lordships of the Privy Council in *Ramkrishna Muraji* v. *Ratan Chand* (2), held that a mortgage of property of the joint family for the purpose of discharging debts incurred in carrying on the business is binding upon the joint family including minor members, if the mortgagee, acting honestly and with due caution, has made reasonable inquiries which led him to believe that there was a real necessity so to borrow and it is not necessary for him to see that no part of the money is applied in discharging debts due to speculative transactions.

Their Lordships again held in *Niamat Rai* v. *Din Dayal* (3) that where the managing member of a joint Hindu family sold part of the joint property for the full value and applied part of it to discharge debts incurred in carrying on business to which the joint family had succeeded, and invested the balance in the business, the manager had authority to raise the money, not only to discharge debts arising out of the family business, but to obtain money needed to carry it on. It was for him to decide whether the money should be raised by mortgage or sale, and whether it was better to raise money to continue the business or to close it down. It was not for the lender or purchaser to go into questions of that kind. The Madras High Court in *Official Receiver* v. *Ramchandrappa* (4) has held that in a Hindu joint trading family, where there are one or more minor members and the manager is not the father, and the adult members, including the manager, have been adjudicated insolvents, the power of the manager to dispose of joint family property for debts incurred for trading purposes, passes to and becomes exercisable by, the Official Receiver, so as to bind the minor's shares. The matter is well expressed on p. 398, Edn. 9 of Mayne's Hindu Law:

> "On the other hand, the manager of a trading family has wider powers than those of the manager of a non-trading family. There is no deviation from the fundamental principle that what is done must be for the benefit or necessities of the family, but acts such as the incurring of debts and drawing of negotiable instruments are necessities to a trading family, while they would not be to a non-trading family. Even where the debts in fact are incurred merely for the personal purposes of the manager, they will bind the family if they are within the ostensible authority of the manager as conducting the family business. So it is that those who deal with him and to whom he incurs debts are not put upon inquiry as to whether the debts were incurred for the benefit or necessities of the family, so long as they are incidental to the family business."

At p. 260 of Mulla's Principles of Hindu Law, Edn. 7, it is said that the manager of a joint family has an implied authority to contract debts and pledge the credit and property of the family for the ordinary purposes of the family business. Such debts, if incurred in the ordinary course of business, are binding on the family property including the interest of the minor co-parceners therein. But the manager alone has such authority. In Gour's Hindu Law, Edn. 2, at p. 778, it is said that where the liability is incurred by the manager of a joint family business in the ordinary course of that business, the creditor or the alienee is not bound to inquire whether the liability is incurred for legal necessity or for the benefit of the family. Again, at p. 560, the same author says: So again the widow must subordinate her right of residence to a transfer by whomsoever made for a family necessity. So the house must go with the

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1. (1909) 34 Bom 72=2 I C 173.
2. A I R 1931 P C 136=132 I C 613=58 I A 173 =53 All 190 (P C).
3. A I R 1927 P C 121=101 I C 373=54 I A 211 =8 Lah 597 (P C).
4. A I R 1929 Mad 166=114 I C 345=52 Mad 246.

rest of the family assets on the manager's insolvency due to losses incurred in a family business.

The law is therefore not ambiguous. In the present case it is the family trading business which has been adjudicated insolvents. Its debts were due to the fall of the rate of exchange and other extraneous causes. The whole property of the family therefore can be sold in order to pay off these debts, and the shares of the minor coparceners are also liable, while the right of the widow to maintenance and residence must be postponed to the payment of these debts. This finding is sufficient by itself to dispose of this appeal. The trial Judge has said that the Official Assignee has not proved beyond doubt that nothing is likely to be left from the estate after the payment of his liabilities, but it was mentioned at the Bar that the secured creditors have sold the property mortgaged with them while the Official Assignee has declared a final dividend in respect of the unsecured creditors. This means that all the property has been disposed of and obviously in these circumstances there can be no decree without impleading the transferees.

I also agree with the finding of the trial Judge that the creditors are necessary parties in a suit of this nature and that, though the Official Assignee represents, for most purposes, the general body of the creditors, he would not do so in a case like the present as the question which arises to be decided is that of family necessity in the case of each debt.. This is a circumstance which is of no concern to the Official Assignee. He is only concerned with the amount of the debt of the creditors not with the question whether it was raised for family necessity. It was held in *Louis Dreyfus* & *Co.* v. *Jan Mahomed* (5), by the Sindh Judicial Commissioner's Court that there is authority for holding that a trustee in bankruptcy and the bankrupt are privies, but there is no authority for holding that the trustee in bankruptcy and the creditors of the estate are privies. The mere fact that the Official Receiver takes the estate for the benefit of the creditors is not enough to bring about this relationship. This seems to me to be the correct position. In any case it is certain that the Official Assignee does not represent the secured creditors with whom a very large portion of the estate has been mortgaged and who have sold the mortgaged property in execution of decrees obtained by them. Chandu Lal, (P. W. 8), establishes that the property had been mortgaged to the extent of 3 lacs of rupees or more. The property mortgaged with them certainly does not vest in the Official Receiver. What the widow is trying to do is to get a charge upon a portion of the property of the family. How can that be done without the secured creditors who are not represented by the Official Receiver and who have sold a large portion of the property belonging to the family in execution of their decree? The suit was misconceived and was properly dismissed. Further, the decision of the Court below that the suit only lay with the permission of the Insolvency Court, Karachi, is, in my opinon, correct. S. 28 (2), Insolvency Act, runs as follows:

> "On the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided; and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose."

This has to be read with S. 34 (2) of the same Act which runs as follows:

> "Save as provided by sub-S. (1), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act."

It will be seen that these words are very wide and include all liability, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent. The family firm was adjucated insolvent and the members thereof were personally liable at the time for the widow's maintenance. The property was not liable as there was no charge upon the estate. This may be done by decree of a Court or by agreement or by will, but until it is done she has only a claim to obtain a charge which may be defeated for various reasons—see in this connexion para. 569 of Mulla's Hindu Law. The argument on behalf of the appellant was that leave of the Insolvency Court was not necessary as the right of the widow to claim maintenance was a right against the estate and was thus distinguishable

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5. A I R 1919 Sind 42=49 I C 421=12 S L R 61.

from the rights of the creditors. This seems to me to beg the question; for she has only an inchoate right against the estate until the estate has been charged therewith. She may never attempt to get a charge on the estate, but be content with the payment of money to her by the members of the family. Unless there is a charge the family property is in no way liable for her maintenance. In fact without a charge, the widow's right is one of an indefinite character which is enforceable only like any other liability. Such authorities, therefore, as *Maharana Kunwar* v. *E. V. David* (6) and *A. I. R.* 1930 *Lah.* 708 are not in point.

The learned counsel for the appellant put this in another way. He said that she did not claim through the insolvent and that her claim was for part of the ownership of the property. She was not a secured creditor, but wanted to be made a secured creditor. This argument appears to me to be against him and to imply that his client is at present, until a charge is obtained, an unsecured creditor. The learned counsel for the appellants also relied on *Linton* v. *Linton* (7), where it was held that future weekly or monthly payments of alimony, payable by a husband by virtue of an order of the Divorce Court were not capable of valuation and were not a debt or liability within the meaning of S. 37, Bankruptcy Act, 1883. The reasons for this decision are given at p. 245 of the report as follows:

> "The power is given in consideration of the husband's ability to pay, irrespectively of his having any realized property, and it is a power to make him pay out of his earnings by means of his own personal exertions. That shows what this kind of alimony was intended to be by the legislature. A man's personal earnings after his bankruptcy do not go to his creditors: he keeps them himself notwithstanding his bankruptcy. He is as well able to pay alimony of this kind after his bankruptcy as before."

The case however of a widow in Hindu law is totally different. She is not asking that money be paid to her out of personal earning, but that the estate be charged. In the English case it was pointed out that the claim for alimony had to be met out of the personal earnings of the person against whom the order was made and had nothing to do with his property. There is therefore no analogy between that case and the present case. I also consider that a claim for maintenance or residence is capable of valuation as much as an annuity which is admittedly provable in insolvency. It follows that the widow's right of residence and maintenance was a liability, present and future, to which the insolvent firm was subject when it was adjudicated insolvent. The position of the widow. therefore in this respect is no higher than that of a creditor and it follows that she should have obtained the leave of the Insolvency Court before bringing the present suit. For the reasons given I would dismiss the appeal with costs. The Court below will see that the court-fees are collected in the usual way.

Agha Haidar, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 905

ADDISON AND AGHA HAIDAR, JJ.

Ghulam Mohammad—Defendant—Appellant.

v.

Abdul Rashid—Plaintiff—Respondent.

First Appeal No. 563 of 1928, Decided on 31st January 1933, from decree of First Class Sub-Judge, Lahore, D/- 23rd January 1928.

(a) Practice—Pleadings—Court should insist on proper pleadings or otherwise reject them.

The Judges should pay attention to the pleadings which are filed in their Courts and call upon counsel for the parties to conform to the rules and requirements of the law by putting in properly and scientifically drafted pleadings and, in case of non-compliance reject them forthwith. [P 907 C 2]

(b) Court-fee—Fixation cannot be made of compromise.

A Court of justice cannot settle the question of court-fee by a compromise. Either a particular amount of court-fee is due or it is not, but there cannot be any question of compromise between the parties and the Court on the subject in the absence of anyone representing the fiscal authorities. [P 908 C 1]

(c) Mahomedan Law—Sajjadanashin—Succession to — Principles governing usage—Nomination and formal election is more probable than pure election.

In determing the usage regarding the succession to the office of Sajjadanashin, one should approach the subject from the point of Sufism, its doctrines and its teachings and should not allow himself to be influenced by practices of certain modern institutions the head of which is appointed by election and counting of votes. According to these doctrines nomination by the existing Sajjadanashin, of his successor and formal approval by election of the same person by the followers is more probable than pure election without previous nomination. [P 908 C 1]

(d) Mahomedan Law—Sajjadanashin—Mere conviction under Arms Act is not bar.

A conviction under Arms Act, standing by itself, is a mere technical matter which does not in any way involve moral turpitude, so as to dis-

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6. A I R 1924 All 40=77 I C 57=46 All 16.
7. (1885) 15 Q B D 239=54 L J Q B 529=52 L T 782=2 Morrell 179.

entitle a person from being appointed a Sajjadanashin. [P 909 C 2; P 910 C 1]

Mehar Chand Mahajan and *Mohammad Amin Syed*—for Appellant.

J. G. Sethi, *M. L. Sethi* and *Zahooruddin*—for Respondent.

Agha Haidar, J.—This appeal arises out of a suit brought by the plaintiff as mutwalli and Sajjadanashin for the possession of a certain shrine together with lands and buildings attached thereto situate at mauza Begampur in the tahsil and district of Lahore. The trial Court has decreed the plaintiff's suit and the defendant has come up to this Court in appeal. The words mutwalli and sajjadanashin seem to have been used throughout the case and in the arguments before us as interchangeable expressions.

In the village of Begampura which is close to village Beghbanpura, a suburb of Lahore, there is the mausoleum of a Mohammadan saint known as the shrine of Hazarat Khwaja Khawin Mahmud, popularly designated, out of respect as Hazarat Eshan (Their Presence). There is mention of this shrine in a book entitled "Lahore: Its history, architectural remains and antiquities," (1892 edition), by the late Khan Bahadur Syad Mohammad Latif, extra Judicial Assistant Commissioner, Gurdaspur, Fellow, Punjab University and member of the Bengal Asiatic Society. The following passage, which occurs at p. 139 of the book, may appropriately be quoted here:

"The high dome of this mausoleum is to the west of Begampura on the road to Shalimar. According to Kitab-i-Rizwani, Khwaja Mahmud alias Hazrat Eshan was a native of Bukhara. He received his education in the Royal College, and became an accomplished scholar. The fame of his piety and devotion reached far and wide, and he made thousands of disciples in Herat, Cabul and Candhar. He came to Kashmir in Akbar's time, and Jahangir, his successor, took him to Agra. In the time of Shah Jahan he lived at Lahore. That Emperor, on his accession to the throne, presented him with a lakh of gold takas, with which he laid out a fine garden. The present mausoleum was built by him in his own lifetime. Wazir Khan, the Minister of Shah Jahan, held him in great esteem, and it is said his prayer cured Nur Jahan of a dangerous illness. During the Viceroyalty of Nawab Khan Bahadur Khan, who lived at Begampura, the mausoleum was in the height of its popularity. The Ulemas assembled here every week, and bread was distributed to the poor and needy, each man getting a rupee in cash besides. There were Tasbi Khanas, or houses of worship, and the now forsaken mosques were resorted to by multitudes of people who performed prayers in them, but during the ascendancy of the Sikhs all these institutions were neglected. The pulpit from which Khwaja Mahmud used to preach in the mosque still exists. He was a contemporary of Mian Mir and used to hold religious discourses with him."

It appears that the shrine had been neglected for many years past and there was no one to look after it. One Syed Mir Jan, who, according to the evidence on the record, had been living in a mosque somewhere in Lahore, took charge of the shrine some time during the closing years of the last century. On the 22nd August 1899, the Punjab Government, with the sanction of the Government of India, granted to this shrine 93 kanals 1 marla of land entered at khata No. 27 situate at Mauza Begampura. Part of this land was subsequently acquired by the Government for the construction of the Mechanical College, Moghalpura. There are some other lands too which appertain to the shrine. Apart from these lands there is a mosque, a well, a tank, a zenankhana, (ladies' apartment) and a few cells attached to the shrine, all known under the comprehensive name of Khanqah Hazrat Eshan. Syed Mir Jan, who combined in his person the offices of both a mutwalli and Sajjadanashin, attracted by his piety and devotion a number of Mohammadans of the locality to himself and to the shrine which he served. He died on 13th November 1901. According to the evidence led by the plaintiff Syed Mir Jan had expressed a wish during his lifetime that, on his death, the holy office, which he had held, should devolve upon his disciple Sain Kamal Din. Consequently, on the death of Syed Mir Jan, Sain Kamal Din succeeded to him and began to discharge the functions of a mutwalli and sajjadanashin. The plaintiff and the defendant, who are both closely related to each other, are the disciples of Syed Mir Jan.

In the year 1909 one Hakim Ali appeared on the scene and contested the title of Sain Kamal Din to act as a mutwalli and for a time succeeded in ousting Sain Kamal Din from the shrine. Eventually however Kamal Din was reinstated and the trouble that had arisen came to an end. In the the year 1912, it appears, that some disputes arose between Sain Kamal Din and a lady called Bibi Jan, the sister of the late Syed Mir Jan, who had been living during all these years in the aforesaid Zenankhana attached to the shrine. A number of worshippers and persons interested in the shrine took her side and among her partisans were Abdul Rashid plaintiff and Ghulam Mohammad defendant. Several applications were addressed to the authorities and Abdul Rashid, plaintiff, signed three of these applications, stating that Sain Kamal Din was unfit to hold the office of the mutwalli and that Ghulam Mohammad may be appointed in his place. This crisis terminated with the order dated the 13th January 1913, when the Deputy Commissioner, Lahore, directed that Sain Kamal Din, should be maintained in the office of the mutwalli. For a nuber of years afterwards, Sain Kamal Din managed the affairs of the Khanqah and there cannot be any manner of doubt that Abdul Rashid made himself useful to Sain Kamal Din in the management of the institution and won his confidence. On 11th November 1919, Sain Kamal Din, who was becoming old and infirm, executed a registered power of attorney, Ex. P/2, in favour of the plaintiff. In this document Abdul Rashid is descirbed as a very honest, intelligent and able murid (disciple) of Hazrat Shah Sahib (meaning thereby the late Syed Mir Jan) who had been managing the shrine and rendering services to it for a long time. Finally, on 1st March 1923, Sain Kamal Din executed his last will and and testament, Ex. P/3, in favour of Abdul Rashid wherein he is described as "a very honest, service-rendering, obedient, prayerful and well-behaved" person who has been serving the shrine and managing the properties attached thereto.

The will provides that, after the death of the testator, Abdul Rashid shall be the mutwalli and take possession of the entire property including lands, houses, mosque, etc. It lays down that "if hereafter any one brings any sort of claim in respect of this will or against Abdul Rashid legatee for the office of mutwalli, it shall be false." The testator further affirms that he was very much pleased with the legatee on account of his services. There is a recital that the will appointing one Syed Wali Shah as mutwalli of the shrine is hereby cancelled. Sain Kamal Din, who, at the time of the execution of this will, was 65 years old lived on for some eighteen months and died at Multan on 7th September 1924. The plaintiff's case is that, on the occasion of the Chehlam (fortieth day ceremony) of Sain Kamal Din, which took place on 16th October 1924, and in deference to the wishes of the late Sain Kamal Din he was duly installed as the mutwalli and sajjadanshin of the Khanqah by a large concourse of people, consisting of Murids, devotees and worshippers who all testified to his appointment by signing the mahzarnama, Ex. P/4, recording his installation and that thereupon he assumed charge of the position of mutwalli and sajjadanashin and for some time managed the property and performed the duties of his office. Trouble, however, soon arose and a petition dated the 10th January 1925, was made to the Executive authorities by a number of persons including some of the Makhdums of Multan, stating that Ghulam Mohammad defendant had been duly appointed as successor to Sain Kamal Din by the followers and belivers who reside at Multan and that Abdul Rashid had no right to the office. The Deputy Commissioner called upon the Tahsildar to submit a report and, finally, on 14th April 1925, put Ghulam Mohammad in charge of the shrine and the lands appertaining thereto, directing Abdul Rashid to seek his remedy in a civil Court. Hence the present suit.

The written statement is a hopelessly incompetent and confused document. It is surprising that any lawyer who has received even the most elementary legal training should have drafted it. I sometimes wonder why Subordinate Judges do not pay any attention to the pleadings which are filed in their Courts and do not call upon counsel for the parties to conform to the rules and requirements of the law by putting in properly and scientifically drafted pleadings and, in case of non-compliance do not reject them forthwith. The case for the defendant, as I have been able to understand it, is that the plaintiff was not the murid (disciple) of Syed Mir Jan, that he used to act merely as the Mukhtar of Sain Kamal Din deceased, that the power of attorney Ex. P/2 in his favour had been revoked by Sain Kamal Din while he was in life, that the will, Ex. P-3, was a spurious document and, if executed at all by Sain Kamâl Din, the testator was not, at the time of its execution, of a sound and disposing mind, and that, in any case, Sain Kamal Din had no power to appoint his successor. The Mahzarnama Ex. P-4, mentioned above is described as a fictitious document and a merely got-up affair. The defendant claimed that he was the Khalifa of the late Syed Mir Jan and was in every way a fit and proper person to be appointed as the mutwalli of the shrine and that he was, in fact, so appointed by the general body of murids (disciples) and worshippers after the death of Sain Kamal Din at the Dastarbandi ceremony (investiture of turban in token of the succession). There are other reckless and baseless accusations made against the plaintiff which need not be noticed. A number of issues were framed by the trial Judge, whose findings on all of them are in favour of the plaintiff. In the beginning of the judgment, however, at p. 162 of the paper book, there is an amazing sentence as regards the question of Court fee. The trial Judge observes as follows:

> "His (defendant's) plea as to court-fee was eventually settled by me by a sort of compromise on 2nd August 1927."

I do not understand how a Court of Justice can settle the question of Court fee by a compromise. Either a particular amount of Court fee is due or it is not, but there cannot be any question of a compromise between the parties and the Court on the subject in the absence of any one representing the fiscal authorities. The question of succession to the office of sajjadanashin and mutwalli is usually determined by the direct evidence of an old document, if any such document exists, laying down the rule of succession which must be adhered to. In the absence of any such document the general rule is to ascertain what is the usage of a particular religious institution and the succession would be governed by such ascertained usage. There are provisions in the Mahomedan Law about the rule of succession to the office of a mutwalli, but the parties to this litigation are both agreed that the present case is governed by custom and not by Mahomedan Law. According to the plaintiff, the existing sajjadanashin nominates his successor in his lifetime and, on his death, the murids and worshippers of the shrine and other Mutaqids (believers) assemble and elect formally the new mutwalli and duly instal him into the office in accordance with the wishes of the last sajjadanashin. According to the defendant, the sajjadanashin has no right to nominate his successor, and the succession depends entirely upon the rule of election when the general body of murids, worshippers, devotees etc., assemble and elect a suitable person as sajjadanashin.

In determining the usage regarding the succession to the office of a sajjadanashin, one should approach the subject from the point of view of Sufism, its doctrines and its teachings and should not allow himself to be influenced by practices of certain modern institutions, the head of which is appointed by election and counting of votes. Sufism may be generally described as the process of purifying the human mind, by curing it of its baser passions, under the guidance of a spiritual preceptor. It is a process of self-discipline and self-control which leads a man to "the right path" (tarikat). And, while dealing with the office of sajjadanashin, one should remember that Sufism, as we see it to-day, is a relic of a bygone age, the age of faith when those who yearned for "higher things" betook themselves to a cloistered life of asceticism and meditation and sat at the feet a holy man who initiated them into the mysteries of "cleansing", i. e., self-purification and guided them along the "true path." At this point it would not be out of place to refer to the case of *Vidya Varuthi* v. *Balusami Ayyar* (1), in which at p. 850 (of 44 Mad.), the Right Honourable Mr. Ameer Ali, has quoted from his judgment in the case reported as *Piran* v. *Abdool Karim* (2), the following passages which may now be considered as classical and which succinctly deal with Sufism and with the question of the appointment of a sajjadanashin:

> "The Sajjadanashin has certain spiritual functions to perform. He is not only a Muttawali, but also a spiritual preceptor. He is the curator of the durgah where his ancestor is buried, and in him is supposed to continue the spiritual line (silsila). As is well-known, these durgahs are the tombs of celebrated dervishes, who in their lifetime were regarded as saints. Some of these men had established Khankahs where they lived and their disciples congregated. Many of them never rose to the importance of a Khankah, and when they died their mausolea became shrines or durgahs. These dervishes professed esoteric doctrines and distinct systems of initiation. The preceptor is called the pir, the disciple the murid. On the death of the pir his successor assumes the privilege of initiating the disciples into the mysteries of dervishism or sufism. This privilege of initiation, of making murids, of imparting to them spiritual knowledge, is one of the functions which the Sajjadanashin performs or is supposed to perform. The endowment is maintained by grants of land to the shrine by pious Moslems. The head of the institution, like that of a Khankah, is called a Sajjadanashin. The governance (towaliat) of the endowment is in his hands; he is a Muttawali, with the duty of imparting spiritual instruction to those who seek it. The property of the "shrine" is wakf 'tied up in the ownership of God'."
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> "Upon the death of the last incumbent, generally on the day of what is called the sium or teja ceremony (performed on the third day after his decease), the Fakirs and Murids of the Durgah, assisted by the heads of neighbouring Durgahs, instal a competent person on the Gaddi; *generally the person chosen is the son of the*

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1. A I R 1922 P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).
2. (1892) 19 Cal 203.

deceased or somebody nominated by him, for his nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to communicate to the disciples. In some instances the nomination takes the shape of a formal installation by the electoral body, so to speak, during the lifetime of the incumbent."

The portion which I have underlined, (italicized) is imporatnt because the opinion of the last sajjadanashin would naturally carry great weight and would be respected by all persons interested in the institution. The custom, therefore, relied upon by the plaintiff is a more probable custom bearing in mind the doctrines of Sufism. Apart from the evidence as to its existence, it is more likely that such a custom should be observed and followed by the believers in Sufism. There may be some institutions in which the last incumbent has no voice as regards the appointment of his successor or his wishes are ignored and the successor is appointed by the general body of murids and worshippers only. But, if I may be permitted to say so, I have not, in actual experience, come across any such custom. Such a custom, if it exists at all, would be contrary to the very spirit of Sufism and its teachings. In support of this view I may be allowed here to quote a couplet from the Diwan of Khwaja Hafiz who is par excellence the poet of Sufis and whose lyrics have been recited and sung at every Sufi shrine all over the world for centuries past. It runs as follows:

" *Be mai sajjada rangin kun garat pir-e-mugham goyad*
K salik be khabar na buwad z rah-o-rasm a manzilha."

Translated literally, the couplet means

" Paint thy prayermat with (red) wine if the old man of the tavern says so, for the wayfarer knows the ways and usages of the journey."

Translated again in plain language and dropping the Sufistic style of expression, it means

" If thy spiritual preceptor tells thee to do a thing which is abominable in the eye of the Mahomedan faith, even then obey him because he knows all about the road which leads to God."

Wine, as is well known, is an abomination according to the Mohammadan religion and besmearing the cloth on which prayers are said would be doubly abhorrent in the eye of the orthodox. This shows what value is attached to the word of the last spiritual head of the shrine in all matters connected with it. (The Judge after considering the evidence of usage concluded). The conclusion, therefore, as regards the prevailing custom is irresistible and, on the evidence of the plaintiff's witnesses supported as it is by at least six of the defendant's witnesses, I have no doubt in my mind that succession to the office of sajjadanashin in the present case is regulated by nomination by the last incumbent followed by the formal installation by the electoral body, after the death of the last sajjadanashin. The question now arises whether the plaintiff was, as a matter of fact, mentioned by the late Sein Kamal Din. (His Lordship after considering the evidence on the point held). The result therefore is that the plaintiff has been able to prove satisfactorily, the factum of his nomination according to the usage of the institution by the last sajjadanashin. (The judgment after finding that the ceremony of plaintiff's installation was proved proceeded). We are not called upon in the present case to decide upon the relative merits of two claimants, namely, the plaintiff and the defendant, because the parties were agreed that, if the plaintiff succeeded in proving his lawful succession, as set up by him in his plaint, his suit ought to be decreed. I may observe, however, that there is a large volume of evidence on the record to show that the plaintiff is a pious man and bears a good moral character and the choice of Sain Kamal Din nominating him as his successor and the action of the general body of murids and worshippers etc. on the fortieth day ceremony installing him into office were fully justified having regard to the plaintiff's previous record. I may also mention that the attacks made upon the character of the plaintiff by the witnesses, who appeared on behalf of the defendant, are scurrilous and without any foundation and I, therefore, completely ignore them.

It has been repeatedly urged against the plaintiff by the witnesses for the defendant with varying degree of acerbity, that the plaintiff was convicted many years ago under the Arms Act for being in unlawful possession of a gun and was sentenced to pay a fine of Rs. 50. I am surprised to find that at p. 171 of the printed paper book, the Subordinate Judge, while holding that such a conviction is not a disqualification, has prefaced his finding with a long apology raising questions of disloyalty, politics and so on which have no bearing whatsoever upon the point under consideration. In the first place the question did not arise because, as already stated, we are not here to pronounce judgment upon the qualifications of the two rival candidates, namely the plaintiff and the defendant. Besides, a conviction under the Arms Act, standing by itself, is a mere technical matter which does not in any way involve moral turpitude. There are many tracts in this very province to which the Indian Arms Act does not extend and where the inhabitants freely carry arms. (The judgment after considering the defendants evidence and holding it to be unbelievable concluded.) I would, therefore, affirm the decree of the Senior Subordinate Judge, Lahore, dated the 23rd January 1928, and dismiss with costs the appeal preferred by the defendant. In conclusion, I may add that Ghulam Mohammad, defendant is an old man and is admittedly a senior murid of the late Syed Mir Jan. He has, in all probability, been used as a pliable tool by the Makhdums of Multan who, for their own motives of self-aggrandizement, are anxious to extend their domination to this comparatively humble Khankah. I trust that the plaintiff shall treat Ghulam Mohammad for the rest of his life with that regard and consideration which is always shown to a senior murid in such like institutions and that the parties would try to live on friendly terms and work for the well-being and prosperity of the holy shrine.

Addison, J.—I agree to the order proposed.

M.N. *Appeal dismissed.*

A. I. R. 1933 Lahore 910

BHIDE AND CURRIE, JJ.

Anup Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 584 of 1933, Decided on 13th July 1933.

(a) Criminal P. C (1898), Ss. 309 and 537 —Omission to make reference in judgment to opinion of assessors can be cured by S. 537 unless it has occasioned failure of justice.

The omission of the Sessions Judge to make any reference in the judgment to the opinion of the assessors is certainly contrary to the usual practice. However it does not vitiate the trial but is merely an omission in the judgment which can be cured by the application of the provisions of S. 537, Criminal P. C., unless it has in fact occasioned a failure of justice.

Where conclusions arrived at by the Sessions Judge were in accordance with the opinion of the majority of the assessors :

Held : the failure to refer to the opinion of assessors in the judgment could not be said to have caused any failure of justice : 48 *P R* 1905 *Cr*, *Dist.* [P 911 C 1]

(b) Criminal P. C. (1898 as amended in 1923), S. 339-A—Magistrate recording plea as to whether approver had complied with condition of tender of pardon, but question discussed after considering whether he was guilty—Held there was no irregularity which would vitiate trial.

In his judgment, the Sessions Judge had duly recorded the plea of the accused that he had complied with the conditions on which pardon was tendered and had come to a definite finding that the approver has failed to comply with the conditions. But he inverted the order of issues and instead of recording and discussing the plea first, he remarked: the questions for consideration therefore, are : (1) Whether the accused is guilty of the offence charged ; and (2) If so, whether he has complied with the conditions on which the pardon was given to him, and is therefore entitled whether guilty or not, to an acquittal. The decision of the question whether the approver had complied with the conditions on which the tender of pardon was made depended on the decision of the question whether the statement made by him to the Magistrate or those made before the Committing Magistrate and the Sessions Court represented the true version of the facts. It was necessary therefore to examine the facts of the case and determine the complicity of the approver before it could be decided that he had forfeited his pardon :

Held : under the circumstances, the Sessions Judge had not committed any irregularity which would vitiate the trial : 26 *I C* 657 : 31 *P R* 1904 and 33 *Mad* 514, *Dist* ; *AIR* 1925 *Lah* 15 ; *AIR* 1928 *Lah* 320 and *AIR* 1929 *Oudh* 256, *Ref.* [P 912 C 1]

(c) Criminal P. C. (1898), S. 339 (2)—Statement made by inducement of pardon but not under pressure — Statement is admissible under S. 339 (2)—Evidence Act (1872), S. 24.

The accused himself originally stated that he confessed because he was afraid he might be beaten and got confused and thought that the murder was bound to come out. The actual statement he made was clearly induced by promise of pardon and it was not made under pressure :

Held : that the statement was admissible under S. 339 (2), Criminal P. C. [P 912 C 2]

Bhagat Ram Puri—for Appellant.

Des Raj Sawhney—for the Crown.

Currie, J.—Shiv Singh, and his wife Mt. Mohindar Kaur were murdered on the night of 6-7th May 1932. In the first information report suspicion was not thrown on any one, but subsequently the present Anup Singh, his father Ram Singh and one Ujagar Singh were suspected. Anup Singh was made an approver and disclosed everything when his statement was recorded by Rai Sahib Izzat Rai on 18th May 1932. Before the Committing Magistrate, however he denied knowing anything about the case and adhered to this statement in the Sessions Court, alleging that his previous statement had been obtained by torture. The trial of Ram Singh and Ujagar Singh, however proceeded and it appears that they were convicted. The Public Prosecutor gave a certificate under section 339 (1), Criminal P. C., that the approver had forfeited his pardon and Anup Singh was accordingly placed on his trial. As his guilt is to be determined on the evidence on this record, we have not referred to the proceedings of the trial of Ram Singh and Ujagar Singh.

Before considering the question of the guilt of the present appellant it will be convenient to dispose of two legal objections raised by his learned counsel. In the first place Mr. Puri points out that the learned Sessions Judge has omitted to make any reference in his judgment to the opinion of the assessors. He argues that this is a material irregularity and vitiates the whole trial. The learned Sessions Judge recorded the opinion of the assessors as required by S. 309, Criminal P. C. Admittedly there is no provision in the Code of Criminal Procedure which makes it obligatory on the Court to discuss the opinion of the assessors in the judgment or give reasons for disagreeing or agreeing with it. The only authority cited on the subject is *Guran Ditta* v. *Emperor* (1), in which certain principles regarding the treatment by the Sessions Court of the opinion of assessors were enunciated. The published report of that case is incomplete. We accordingly sent for the original record. We find that there was no discussion of the question whether the failure of the Sessions Judge to discuss the opinion of the assessors was an irregularity or no. In that case eventually the conviction was upheld. The decision therefore is of no assistance in the present case. The omission of the learned Sessions Judge to make any reference to the opinion of the assessors is certainly contrary to the usual practice and is to be regretted. It does not however in my opinion, vitiate the trial but is merely an omission in the judgment which can be cured by the application of the provisions of S. 537, Criminal P. C., unless it has in fact occasioned a failure of justice. In the present case two of the four assessors found against the appellant on all points. Another held that although made under pressure, his original statement was correct; while the fourth was of opinion that the statement was made under pressure and that the appellant had not abetted the murder. As the conclusions arrived at by the learned Sessions Judge are in accordance with the opinion of the majority of the assessors, his failure to refer to their opinion cannot be said to have caused any failure of justice.

Secondly, Mr. Puri argued that the learned Sessions Judge has not complied with the provisions of S. 339-A, Criminal P. C. Admittedly the learned Sessions Judge has complied with the provisions of Cl. (1) of that section which provides that the accused shall be asked whether he pleades that he has complied with the conditions on which the tender of pardon was made. Cl. (2) provides that

> " if the accused does so plead, the Court shall record the plea and proceed with the trial and . . . the Court with the aid of the assessors shall . . . find whether or not the accused has complied with the conditions of the pardon, and if it is found that he has so complied, the Court shall notwithstanding anything contained in this Code pass judgment of acquittal,"

Mr. Puri contends that the learned Sessions Judge has failed to comply with these provisions. According to him the question of whether the approver had forfeited the pardon had to be decided definitely before the question of his guilt could be discussed. In this connexion he cited various rulings. *Sashi Rajbunshi* v. *Emperor* (2), *Emperor* v. *Kadu* (3) and *In re Aligiriswami Naicken* (4), were based on the provisions of S. 339 as it stood before it was amended in 1923 when S. 339-A, Criminal P. C., was also added. These rulings therefore are not in point, as S. 339-A definitely provides that after recording the accused's plea that he has complied with the conditions on which the tender of pardon was made to him, the Court shall proceed with the trial. Three decisions subsequent to the amendment of 1923 have been cited *Ali* v. *Emperor* (5), *Ram Nath* v. *Emperor* (6) and *Itwari* v. *Emperor* (7). In the last case in the Sessions Court no plea was recorded as to whether the accused pleaded that he had complied with the conditions on which the tender of pardon was made. The trial was therefore held to be vitiated owing to the failure to record the plea, the learned Judge following *Ali* v. *Emperor* (5). As already noted however in the present case the plea was duly recorded. In his judgment the learned Sessions Judge has come to a definite finding that the approver has failed to comply with the condi-

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1. (1905) 48 P R 1905 Cr=3 Cr L J 132.
2. (1915) 16 Cr L J 65=26 I C 657.
3. (1904) 31 P R 1904=21 Cr L J 1082.
4. (1910) 33 Mad 514=11 Cr L J 254=5 I C 881.
5. A I R 1925 Lah 15=84 I C 61=5 Lah 379.
6. A I R 1928 Lah 320=108 I C 514=9 Lah 608.
7. A I R 1929 Oudh 256=116 I C 64.

tions on which the tender of pardon was made. He has to some extent caused confusion by inverting the order of issues. He remarks: 'The questions for consideration therefore are: (1) Whether the accused is guilty of the offence charged and (2) If so, whether he has complied with the conditions on which the pardon was given to him, and is therefore entitled, whether guilty or not, to an acquittal. Had he placed the second question first, there could have been no objection to the form of his judgment.

In the present case the decision of the question of whether the approver had complied with the conditions on which the tender of pardon was made depended on the decision of the question whether the statement made by him to the Magistrate or those made before the Committing Magistrate and the Sessions Court represented the true version of the facts. It was necessary therefore to examine the facts of the case and determine the complicity of the approver before it could be decided that he had forfeited his pardon. I am therefore of opinion that the learned Sessions Judge has not committed any irregularity which would vitiate the trial.

To turn now to the facts of the case. In his statement as recorded by Rai Sahib Izzat Rai (Ex. P. A.) (p. 4), he detailed the enmity between his father and himself on one side and his uncle and Shiv Singh on the other. He described how, while on a visit to his father-in-law in the Hoshiarpur District, he got into touch with Ujagar Singh who agreed to join in committing the murder. He accordingly returned with him. Shiv Singh, however, was then sleeping at the house of Sohan Singh, his brother. Accordingly Ujagar Singh was sent away to stop at Amritsar until a favourable opportunity occurred. When Shiv Singh took to sleeping at his own house again Ujagar Singh was sent for. The approver stated that while his father and Ujagar Singh went up to the chaubara on the roof of the haveli and murdered Shiv Singh and his wife, he was left below in the lane to keep watch. Hearing foot-steps he bolted and stood behind the wall and as he and the murderers emerged, they encountered Jhanda, (P. W. 6), who had called out to Shiv Singh. Ujagar Singh seized him by the throat and threatened to kill him, but Ram Singh intervened and Jhanda was allowed to go on promising to keep silence. In the course of his statement before Rai Sahib Izzat Rai he stated that he was very much confused and could not conceal the facts. He thought he would be beaten and was afraid of this and also had an idea that murder must be out. He accordingly revealed the facts to the Sub-Inspector. Subsequently the police talked to him about the tender of pardon and he accepted the offer. Mr. Puri has argued on the strength of this that the appellant's statement as an approver was obtained under pressure and therefore is inadmissible, citing in this connexion certain remarks that occurred in *Ram Nath* v. *Emperor* (6). In that case it was held that the statement was obtained under pressure. In the present case however there is no ground for holding that pressure was exerted. The appellant himself originally stated that he confessed because he was afraid he might be beaten and got confused and thought that the murder was bound to come out. The actual statement he made was clearly induced by promise of pardon. I am therefore of opinion that there is no ground for holding that the statement is inadmissible as against him. It is clearly admissible under the provisions of S. 339 (2), Criminal P. C.

To corroborate the statement made by the appellant as an approver, Jhanda (P. W. 6), Kasar Mal, (P. W. 7) and Ibrahim, (P. W. 10), have been produced. (After discussing the evidence, His Lordship held that the guilt of the accused was established and proceeded). By residing from his statement he has forfeited his pardon and his conviction under S. 302, Penal Code, must be maintained. As regards the question of sentence, Mr. Puri has argued that the circumstances are such that the extreme penalty should not be exacted. The age of the appellant is given in the judgment as 23 though counsel suggests that it is really only about 21. Apart from that he urges that he was really acting under the influence of his father and that it was only natural that he should resile from his statement owing to a disinclination to give evidence against his parent. Having regard to the circumstances of the case and the fact that the appellant's statement must be accepted that he took no part in the actual murder, but merely stood on guard as he has said, I think that there is no need to inflict the extreme penalty. I would therefore commute the sentence to one of transportation for life.

Bhide, J.—I agree.

K.S. *Sentence commuted.*

* A. I. R. 1933 Lahore 913

TEK CHAND, J.

Mt. Jiwan Bai and *others*—Appellants.

v.

Jalaluddin and *another*—Respondents.

Misc. First Appeal No. 1840 of 1932, Decided on 29th June 1933, from order of First Class Sub-Judge, Lyallpur, D/- 30th August 1932.

*** Civil P. C. (1908), S. 145—Warrant issued by one Court—Surety bond attested by another Court and forwarded to executing Court—S. 145 applies and bond can be enforced against surety.**

In pursuance of a warrant for arrest of judgment-debtor issued by the Senior Subordinate Judge, the judgment-debtor was arrested. A surety offered to execute a bond and the judgment-debtor and surety were taken to another Subordinate Judge who had been authorized by the former Judge to release judgment-debtors on taking surety bond and the latter Judge attested the bond executed by the surety and forwarded it to the executing Court:

Held: that S. 145 applied to such cases and that the bond could be enforced against the surety: *A I R* 1926 *Cal* 877 and *A I R* 1930 *Lah* 185, *Rel on*; *A I R* 1919 *Mad* 813, *Dist*; *A I R* 1919 *Mad* 527, *Ref*. [P 914 C 1]

Nanak Chand—for Appellants.

Mohammad Din Jan — for Respondents.

Judgment.—On 14th January 1927 Jamna Das obtained a decree for Rs. 7,000 against Mohammad Din judgment-debtor, from the Court of the Senior Subordinate Judge, Lyallpur. In execution of this decree he got a warrant for the arrest of the judgment-debtor issued from the Court of the Senior Subordinate Judge. The judgment-debtor, who lived in a village near Gojra, was arrested on 19th June 1927, but was released on one Jalal Din executing a surety bond for his attendance in the Court of the Senior Subordinate Judge on the date fixed and all subsequent dates to which the proceedings might be adjourned and agreeing that if the judgment-debtor failed to do so he would pay to the decree-holder Rs. 2,004, the amount of the instalments for the recovery of which the warrant of arrest had been issued against the judgment-debtor. This bond was written on a stamped paper of Rs. 15 and was addressed to the Court of the Senior Subordinate Judge. The judgment-debtor appears to have been arrested at 12 o'clock and if he had been taken to Lyallpur to appear before the Senior Subordinate Judge he would have had to be kept in custody for the night. He was accordingly produced before the Subordinate Judge, Fourth Class, at Gojra with the surety and that officer attested the bond, ordered the release of the judgment-debtor, and forwarded the bond to the Senior Subordinate Judge, Lyallpur. The bond was accordingly placed on the execution record and the case adjourned from time to time for other proceedings in the case. The judgment-debtor failed to appear on one of the dates fixed, and the decree-holder has now applied under S. 145, Civil P. C., for execution of the decree for Rupees 2,004 against the surety.

This application has been rejected by the lower Court on the ground that S. 145 is inapplicable to the case in view of the fact that the bond was attested not by the Senior Subordinate Judge in whose Court the execution proceedings were pending, but by the Subordinate Judge, Fourth Class, at Gojra who was not seized of the case. In this connection reference has been made to a robkar issued by Sheikh Abdul Aziz, Senior Subordinate Judge, Lyallpur, to the Subordinate Judge at Gojra on 29th March 1926, to the effect that in cases where judgment-debtors were brought before that officer under arrest in execution of decrees pending in any other Court he could release the judgment-debtor on attesting the security bond for appearance of the judgment-debtor in the proper Court on the date fixed. The present Senior Subordinate Judge, Sardar Kartar Singh, has held that this robkar had been issued without authority and was ultra vires. In support of this decision the learned Judge has referred to a ruling of the Madras High Court in *Subbaraya Pillai* v. *Sathanatha Pandaram* (1), where it was held that S. 145, Civil P. C., was confined to cases where the liability of the surety had been entered into in the face of the Court or had been recorded by the Court in accordance with the provisions of the Code, and that it did not extend to surety bonds taken from the judgment-debtor outside the Court. The facts of that case are not very clearly stated in the judgment, but it appears from the argument of counsel printed at p. 940 and certain observations made by the learned Judges, that the bond then in question, had not been filed in Court and the Court had not acted upon it. In my opinion, that ruling has no bearing on the present case, the facts being entirely different.

I am not aware of any provision in the Code which requires a bond taken

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1. A I R 1919 Mad 813=48 I C 940.

S. N. DAR, B. A., LL. B.,
Vakil High Court.

from a judgment-debtor in circumstances similar to those of this case to be attested by the Court which had issued the warrant. It seems to me that the fact that the bond had been attested before another Court is not material, so long as after attestation it is forwarded to the executing Court and is placed by it on the record and otherwise acted upon. The wording of S. 145 is very general and the Calcutta High Court has gone to the extent of holding that for the purposes of execution against a surety under the section, it is not necessary that the contract of suretyship should be in the form of a security bond, or in writing, or that the contract of suretyship should be in favour of the Court: *Joyma Bewa* v. *Easin Sarkar* (2).

In *Ram Nath* v. *Ram Nath* (3), it was held by a Single Bench of this Court that where a decree-holder and his debtor compromised the matter out of Court and a third person stood surety for the payment of the amount on default of the debtor, and the surety bond was filed in Court, though in the absence of the surety, and the Court passed an order certifying the compromise, and filing the case, the decree-holder was entitled to pursue his remedy against the surety in execution proceedings in spite of the fact that there was no specific statement in the bond that the decree could be executed against the surety. In this case *Subbaraya Pillai* v. *Sathanatha Pandaram* (1), on which the lower Court has relied, was not followed. In *Nanjunda Ram* v. *Dhammaji Sammiji* (4) the Madras Court distinguished *Subbaraya Pillai* v. *Sathanatha Pandaram* (1), and held that a security bond executed in favour of a decree-holder to obtain the release of a judgment-debtor from imprisonment in execution, and filed in Court, whereupon the release of the judgment-debtor was ordered, must be regarded as a matter of record in the Court as much as if it had been executed to the Court itself, and is consequently enforceable against the surety in proceedings in execution. In my opinion, the order of the lower Court holding that S. 145 was inapplicable to this case is erroneous and must be set aside.

Mr. Mohammad Din Jan for the surety has however argued that the application of the decree-holder for proceeding against the surety is barred by limitation. On the point the lower Court had framed an issue, but has not recorded any finding. The facts bearing on this question are not apparent on the present record, and it is not possible for me to come to a definite decision on the materials placed before me. The question therefore shall have to be decided by the lower Court itself. I accept the appeal, set aside the order of the lower Court and remand the case for disposal of the question of limitation and any other point that might arise on the pleadings. Court-fee on this appeal shall be refunded, other costs shall be costs in the cause.

K.S. *Appeal accepted.*

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2. A I R 1926 Cal 877=95 I C 483=53 Cal 515.
3. A I R 1930 Lah 185=124 I C 677.
4. A I R 1919 Mad 527=53 I C 673.

A. I. R. 1933 Lahore 914

MONROE, J.

Durga Das—Accused—Petitioner.

v.

Emperor— Opposite Party.

Criminal Misc. Petn. No. 101 of 1933, Decided on 18th July 1933.

Criminal P. C. (1898), S. 526 — Magistrate continuing hearing of case in spite of application for transfer and cancelling bail pending hearing of application—Accused applying for bail to Sessions Judge and bail granted —Held, there were reasons for thinking that Magistrate was prejudiced against accused.

After the application for transfer was made the Magistrate continued the hearing of the case and pending the hearing of the application, cancelled the bail of the accused involving them in a further application to the Sessions Judge for bail which was granted :

Held : that the accused had good reasons for thinking that the Magistrate was prejudiced against them and that the case should be transferred. [P 914 C 2]

Govind Ram Khanna—for Petitioner.

Anant Ram Khosla—for the Crown.

Order.—This is an application by the accused for transfer from the Magistrate of a case involving a serious charge against them. Many grounds for transfer have been put forward, but it is unnecessary to deal with them all. It is clear that there have been a good many irregularities in the trial, which are calculated to prejudice the accused. In my opinion, the accused have good reason for thinking that the Magistrate is prejudiced against them: it is unnecessary that I should find that he is in fact prejudiced and I have reached no conclusion on that point. I hold that the accused may have a reasonable apprehension of bias, because when the application for transfer was made the Magistrate continued the hearing of the case and pending the hearing of the application; he cancelled the bail of the accused, involving them in an application to the Sessions Judge in a further application for bail which was granted and the granting of which indicated that there was no good reason for the cancellation. The applicants in open Court and by their counsel have stated that they do not seek a rehearing from the commencement and ask that the proceedings already had stand good.

Accordingly, I order that this case be transferred to a Magistrate of the Karnal District to be selected by the District Magistrate of that district that counsel appear before such Magistrate on the 3rd August to arrange for the continuance of the trial and that the trial do proceed before such Magistrate from the point which it has now reached: and that any witness who gave evidence before the charge was framed and has not been recalled after the charge for further cross-examination shall, if the accused so desire, be recalled for further cross-examination: this last direction will include the witness, Shiv Charan Dass.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 915

MONROE, J.

Lachhman Singh—Petitioner.

v.

Iqbal Singh—Opposite Party.

Civil Misc. Petn. No. 417 of 1933, Decided on 25th July 1933, from order of Second Class Sub-Judge, Narowal.

Civil P. C. (1908), S. 24 — Execution proceedings ordered to be stayed by High Court —Order not actually reaching Subordinate Judge — Party putting in affidavit stating order had been passed by High Court—Judge ordering issue of warrant for arrest in spite of such affidavit—Party is justified in thinking that Judge was prejudiced against him.

Execution proceedings pending in a Subordinate Judge's Court were ordered to be stayed by the High Court, but the order did not actually reach the Judge on the day the case was posted. The party filed an affidavit to the effect that stay had been ordered by the High Court, but the Judge rejected it on the ground that he had no official notification, and ordered issue of warrant for arrest of the judgment-debtor. The same day as the above order was issued, the judgment-debtor got a certified copy of the order of stay, but the Judge stated that he had already passed the order:

Held: that under the above circumstances, the judgment-debtor was justified in thinking that the Subordinate Judge was prejudiced against him and that the case should be transferred to some other Judge. [P 915 C 2]

Shambu Lal Puri—for Petitioner.

Order.—This is an application for transfer under S. 24, Civil P. C., of the case now at hearing before the Subordinate Judge, Second Class, Narowal, on the ground that the Subordinate Judge has acted in such a way that the defendant-petitioner has reason for thinking that he will not get justice at the hands of this Subordinate Judge.

I consider it is unnecessary to go in detail into the charges alleged in the petition, because during the course of the hearing the following facts came to light: On 9th June 1933, Dalip Singh, J., directed that notice should be served in this case and made an order for the stay of proceedings. This order was communicated to the Senior Subordinate Judge, Sialkot, by letter dated the 12th June and the Senior Subordinate Judge states that he forwarded this letter to the Subordinate Judge under a registered cover on the 13th June. On the 19th June the case was down for arguments, and when it was called an affidavit of the petitioner was presented to the Judge, stating that the proceedings in the case had been stayed by the order of the 9th June referred to above. The Subordinate Judge refused to act on the affidavit, stating that he had had no official notification. The petitioner thereupon came to Lahore and obtained a certified copy of the order with which he appeared before the Subordinate Judge on 22nd June. The Subordinate Judge stated that the original order had not reached him, that he had already made his order that same morning and could do nothing. On 22nd June the Subordinate Judge issued a warrant for the arrest of the petitioner. In the circumstances I think that the petitioner is well justified in thinking that the Subordinate Judge is strongly prejudiced against him and that an order for transfer ought to be made.

I may add that I took so serious a view of the conduct of the Subordinate Judge that I summoned him to attend here and asked him for an explanation. After hearing fully the explanation of the Subordinate Judge I came to the conclusion that his neglect to obey the order of this Court was not deliberate and arose from a series of mischances which however he certainly should not have allowed to take place.

I therefore do not hold that there is any evidence to show that the Subordinate Judge would not give the case a fair trial, but as I have indicated above I am in sympathy with the petitioner's attitude: his fears may not be justified, but they are not unreasonable.

I order that this case be transferred for hearing of the evidence of both parties and the decision of the case by a Subordinate Judge in the district to be selected by the District Judge. I set aside the decree made on 22nd June 1933 and the warrant for the arrest of the petitioner issued on 22nd June.

K.S. *Application allowed.*

A. I. R. 1933 Lahore 916

ADDISON AND AGHA HAIDAR, JJ.

Sham Das—Defendant—Appellant.

v.

Mahabir Das and *others*—Respondents.

First Appeal No. 3028 of 1927, Decided on 27th June 1933, from decree of Senior Sub-Judge, Sheikhupura, D/- 22nd August 1927.

(a) Custom (Punjab)—Religious institution—Election of mahant is not invalidated merely because of omission to invite general body of gaddinashins.

Installation is a ceremony intended for giving publicity to the fact of the elevation of a candidate to the gaddi as mahant, and the mere omission to invite the general body of gaddinashins would not by itself vitiate an election otherwise valid. [P 917 C 1]

(b) Custom (Punjab)—Religious institution—Mahantship.

Each religious institution has its own usage as regards succession to mahantship. [P 917 C 2]

(c) Practice — Plaintiff has to succeed on strengh of his own case.

A plaintiff has to succeed on the strength of his own case and not on the weakness of the defendant's case. [P 920 C 1]

(d) Civil P. C. (1908), O 22, R. 9 (2)—Application to bring on record legal representative filed four days beyond limitation, applicant not knowing date of deceased's death—Time was extended.

An applicantion to bring on record the legal representative of a deceased respondent in an appeal was filed by the appellant four days beyond the period of 90 days prescribed for such application. The reason for the delay was alleged to be that the appellant was not in a position to know the exact date on which the deceased died:

Held: it was a fit case in which time should be extended under O. 22, R. 9: *A I R* 1926 *Lah* 234 and *A I R* 1920 *All* 284, *Ref.* [P 920 C 1, 2]

Mukund Lal Puri and *N. C. Mehra*—for Appellant.

Nand Lal—for Respondents.

Agha Haidar, J.—This is a defendant's appeal arising out of a suit brought by the plaintiff for a declaration that Sham Das, defendant 1, is not the grand disciple of the late Mahant Dharam Das of the Thakardwara Mauza Bhikhi and is therefore liable to be removed from it, and that the plaintiff is the lawful Mahant and, as such, entitled to possession of movable and immovable properties belonging to the said Thakardwara. The trial Court has decreed the plaintiff's claim. Sham Das, defendant 1, has preferred the present appeal to this Court.

There is a Thakarwara at Mauza Bhikhi whose last Mahant was Dharam Das. He became insane and died on 25th June 1923. On his death Sham Das, claming to be the chela of Dial Das who according to him was the chela of Dharam Das, applied for mutation and, on 2nd November 1924, the mutation was effected in his favour. Hence the present suit. The case for the plaintiff, as disclosed in the pleading is as follows:

One Bawa Lalji was a Bairagi Sadhu who lived some time during the reign of the Mughal Emperor Shah Jahan. He had 22 disciples each of whom founded a separate religious institution or gaddi. One of these disciples was Prehlad Bhagat who was the founder of the gaddi in dispute. The rule of succession to this gaddi is contained in para. 2 of the plaint according to which a Mahant for the time being cannot nominate any chela without the permission and consent of the Bhek (counsel) of Bairagis and the appointment of the Mahant takes place when he is elected by the Bhek. At the time of the installation of a successor to a gaddi the rest of the gaddinashins are invited and, in case of death of any gaddinashin without nominating his chela the remaining gaddinashins are entitled to appoint any gaddinashin as a Mahant of the vacant gaddi. The rule of celibacy is strictly enforceable in the case of a Mahant who occupies the gaddi at Bhikhi. On the death of Mahant Dharam Das, Sham Das, defendant 1, who fictitiously gave out that he was the chela of Dharam Das, obtained possession of the gaddi at Bhikhi and got mutation effected in his favour describing himself as the only heir of Dharam Das. The title of defendant 1 is assailed on the grounds that he was not the grand chela of Dharam Das, that he had never been nominated as a chela in accordance with the custom and rules prevailing in the Bhek of Virakt (celibate) Bairagis, that he was a married man and therefore incompetent to occupy the gaddi, and furthermore that he had never been duly elected as a Mahant by the Bhek nor did he invite any other gaddinashin or distinguished Sadhu of the Bhek at the time of his succession. The plaintiff described himself as the gaddinashin of the Dera Bawa Lalji situate in the city of Peshawar and also at Chiniot in the district of Jhang and, according to him, as Mahant Dharam Das, the last gaddinashin of Dera Bhikhi, died without leaving a chela the plaintiff on the ground of being a distinguished gaddinashin of Bhek has a right of succession on behalf of the Bhek. According to the plaintiff, the cause of action accrued to him in his capacity as a distinguished gaddinashin of the Bhek of Virakt Bairagis on the death of Mahant Dharam Das without leaving a chela when defendant 1 took possession of the entire property of the gaddi. In his statement before the Court on 2nd December 1926, prior to the framing of the issues, the plaintiff stated that he had been authorised by the four big gaddis to bring the suit. As to who these "big four" gaddis were and what authority they had is all left in the air.

It would thus be seen from a perusal of the pleadings that the rule of sccession, as adumbrated in the plaint and the statement of the plaint before issues are hopelessly confused and it is difficult to understand what is the exact position which the plaintiff had taken up in support of his case. As to para. 2 of the plaint, it is not clear whether the permission and consent of the Bhek was necessary for the nomination by a gaddinashin of a chela or whether it was intended that such permission and consent should be obtained before the chela can be nominated to the Mahantship. If the appointment of a Mahant was to take place by the rules of election, pure and simple, then it is difficult to understand what was the necessity for referring to the nomination by the gaddinashin of any chela, as in any case such nomination by itself would be infructuous. Installation, as I understand, is a ceremony intended for giving publicity to the fact of the election of a candidate to the gaddi as a Mahant and I do not see how the mere omission to invite the general body of gaddinashins would by itself vitiate an election otherwise valid. After laying down that the appointment of a Mahant takes place by virtue of his election by the Bhek, a further rule is laid down which seems to contradict the first rule as regards election. According to this rule, if a gaddinashin dies without nominating a chela, the remaining gaddinashins are entitled to appoint any gaddinashin as a Mahant. It would thus appear that there are two distinct electoral colleges both of which are supposed to function. One of these colleges consists of the Bhek or the general body of Bairagis who elect a new Mahant on the death of the old Mahant, whilst the other college consisting of the remaining gaddinashins on the death of a Mahant dying without leaving a chela are competent to appoint any one from amongst themselves as a Mahant to the gaddi which has thus fallen vacant. It is a well-known rule that each religious institution, like the Thakardwara of Bhikhi, has its own usage as regards succession to Mahantship, but, according to the allegations in para. 2 of the plaint, there are two different machineries for the appointment of a successor and it is impossible to understand how the question of succession would be decided if both these machineries are prepared to exercise their respective functions and each appoints a separate Mahant. In para. 6 of the plaint the plaintiff makes a new departure and, ignoring the rules of succession which he had himself formulated in para. 2 of the plaint he alleges that, as Mahant Dharam Das died without leaving a chela, the plaintiff was entitled to succeed on behalf of the Bhek on the ground of being one of the distinguished gaddinashins of the said Bhek. He again reiterates this plea in para. 9 where he says that the cause of action accrued to him in his capacity as a distinguished gaddinashin of the Bhek of Virakt Bairagis on the death of Mahant Dharam Das without leaving any chela. In his statement before the issues he says that he had been authorised by the four big gaddis to institute the present suit. On a consideration of the various and shifting positions which the plaintiff has taken up in his pleadings, it is difficult to determine as to what his real credentials are for bringing this suit. He does not say that he had been elected by the Bhek nor does he say that the remaining gaddinashins appointed him as the Mahant. In paras. 6 and 9 he relies for his title upon the fact of his being a distinguished gaddinashin of the Bhek and, as such, entitled to bring the suit while in the statement before issues, which must be read as part of the pleadings in the case, he says that he has brought the present suit because he has obtained the sanction of the four Mahants.

The array of the parties impleaded as defendants is also curious. Sham Das is rightly impleaded as defendant 1 and all the reliefs are claimed against him. But we find that as against defendants 2 to 5, who are described as gaddinashins of the various Thakardwaras in different parts of the country, no relief is claimed. Only in para. 7 there is the allegation that these parties are gaddinashins of different gaddis of Bawa Lalji and have been impleaded for the completion of the record and for the decision of the rights involved in the suit. I fail to understand how their impleadment was necessary for the completion of the record and how their presence before the Court as parties defendants would in any way help in the decision of the rights involved in the present suit. With the exception of Harnam Das, defendant 2, none of these defendants has put in appearance in the case. Defendants 6 to 26 are the tenants who are holding under defendant 1 and they have been impleaded, as is usual, as pro forma defendants in a suit for possession.

The pleas raised in defence by Sham Das, defendant 1, so far as they are necessary for the decision of this appeal, are that the gaddi of the Thakardwara at Bhikhi is absolutely independent of any other gaddi, that the plaintiff, as the gaddinashin of the Thakardwara at Peshawar, has no concern with it and that the Bhikhi Thakardwara is not an institution connected with Bawa Lalji. The allegations contained in para. 2 of the plaint are denied and it is further pleaded that there is no impediment to a married man being a Mahant of the gaddi, nor is it essential that at the time of the appointment of a Mahant any special ceremony should be performed or the other gaddinashins should be invited at the time when the new Mahant is nominated. It is further pointed out that every Thakardwara is self-governing and that the chela occupies the gaddi on the death of the Mahant. The deceased Mahant Dharam Das is admitted to have been the spiritual descendant of Bawa Prehlad Bhagat and when Mahant Dharam Das became insane, the management of the Thakardwara was made over to Mahant Dial Das who was the chela of Mahant Dharam Das. The defendant alleges that he was appointed a chela of Dial Das with the consent and in the presence of Mahant Dharam Das and was elevated to the gaddi in the presence of the fraternity of Bairagis on the death of Mahant Dharam Das as his legal heir and successor.

The written statement of Mahant Harnam Das, defendant 2, is in some respects important. He has also appeared as a witness for the plaintiff and professes to support his claim. He has admitted the allegations contained in paras. 2, 3 and 4 of the petition of plaint as correct. He supports the plaintiff by pleading that celibacy is the rule which governs the Mahants of every Thakardwara connected with Bawa Lalji in accordance with the custom prevailing among the Bairagis, that defendant 1 was never appointed a Mahant, in fact by the Bhek and is further ineligible on account of being a married man. In para. 5 of his written statement he says that the Thakardwara at Bhikhi is subordinate to the Dhianpur gaddi of which he was the Mahant and that the plaintiff who is a Mahant gaddinashin himself and has been accepted by the Bhek of the Bairagis, has brought the present suit with the permission of the Dhianpur gaddi. It would thus appear that he has put forward a case for the plaintiff which he himself never set up in that he has pleaded that the plaintiff has been accepted by the Bhek or the general council of the Bairagis and that he has brought the present suit with his permission.

On these pleadings the following issues, which are necessary for the disposal of the appeal, were amongst others framed by the trial Judge:

(3) Has the plaintiff locus standi to bring this suit ? (4) Is this gaddi subordinate to the Dhianpur gaddi and the appointment of the Mahant of Bhikhi is made according to the usage of that gaddi ? (5) If so, was the defendant appointed a mahant as such ? (6) Is the gaddi of Bhikhi quite independent of the fraternity of Bawa Lalji's followers in matters of succession and appointment.

The learned Judge has recorded a combined finding on issues Nos. 3 and 4. The reasons for the amalgamation of the findings on these two issues are not quite obvious. On the question of the plaintiff's locus standi he has obseved as follows:

> "The plaintiff is, as stated above, a Bairagi, descendant of Bawa Lalji. He is a Mahant of Peshawar and Chiniot gaddis. He says that he has been authorised by the Bhekh to bring this suit against the defendant who is a trespasser and who by transgressing the custom of Bairagi followers of Bawa Lalji has entered a married life."

This passage is open to criticism. In the first place, the learned Judge seems to have been under the impression that the allegations in the plaint amount to the proof of the plaintiff's case.

This, of course, is an erroneous view, for allegations in the plaint, unless they are admitted by the defendant or supported by proper evidence, are of no evidentiary value whatsoever. Secondly, even the allegations ascribed to the plaintiff by the trial Judge that he had been authorized by the Bhek to bring the suit against the defendant is based upon a misapprehension, because all that the plaintiff had alleged in his plaint was that his title rested upon his being a distinguished gaddinashin of the Bhek and therefore he had a right of succession on behalf of the Bhek. And in his statement before the issues the plaintiff had only stated that he had been authorised by the four big gaddis to bring the suit.

The learned Senior Subordinate Judge relying mainly upon the evidence of Mahant Harnam Das of Dhianpur, P. W. 12, and Mahant Narsingh Das of Hafizabad, P. W. 16, has held that the Bhikhi gaddi is subordinate to the Dhianpur gaddi and succession is regulated and confirmed by the Mahant of Dhianpur, and that, when a Mahant of any one of the 22 gaddis dies without a chela, his successor is appointed by the Mahant of Dhianpur. Obviously this was not the plaintiff's case as a perusal of the pleadings would show. The learned Judge has further referred to certain pedigree-tables and the shajra for the purpose of showing that the founder of the gaddi, Bawa Prahladji was a disciple of Bawa Lalji. He has further held that since the Mahant of Dhianpur was the proper person to appoint the Mahant of Bhikhi gaddi on the death of Dharam Das and since he himself had no time to do so, he had consequently authorised the plaintiff with the consent of Mahant Narsingh Das to bring the suit. Then follow the curious observations that the permission of the Mahant of Dhianpur implies the permission of the Bhek, that the four big gaddis are Dhianpur, Peshawar, Hafizabad and Chiniot, that the Mahantship of the two gaddis, namely, Peshawar and Chiniot, is combined in the person of the plaintiff himself, and that, as the plaintiff has brought the present suit with the permission of big Mahants and especially the head Mahant, he has a locus standi to bring the present suit. He has overruled the pleas in defence by observing that the defendant has not been able to rebut the evidence led on behalf of the plaintiff and has further failed to show that Bhikhi gaddi is an independent institution and its Mahants are quite independent of the Bhek of Bawa Lalji's followers. Finally, he has held that as the defendant was a married man he has held that he was not eligible to be the Mahant of Bhikhi gaddi. On these rulings he decreed the plaintiff's suit in full.

The plaintiff must have been taken by surprise at the reasoning of the Senior Subordinate Judge in support of his claim, because it is entirely new and original in its character and is certainly quite different from the case as put forward by him in his pleadings, and, to a very great extent, by the evidence led by him.

In appeal it was argued by the counsel for the defendant-appellant that the judgment of the trial Court was erroneous and must be set aside because the findings of the Subordinate Judge are inconsistent with the case set up by the plaintiff, that this case has not been proved by any reliable evidence whatsoever and that on this ground alone the plaintiff's suit should be dismissed, even if it be assumed for the sake of argument that the defendant has not been able to establish his case. There is considerable force in this argument. Bearing in mind correctly the case as put forward by the plaintiff, let us examine the evidence, both oral and documentary, which he has placed on the record. (After examining the evidence, the judgment proceeded). The defendant has produced a number of witnesses who depose that the defendant was the chela of Dial Das and that he had been duly installed as a Mahant about 3 or $3\frac{1}{4}$ years ago. Some of these witnesses are the sewaks of the temple while others are Bairagis and, as such, belong to the community of the parties. The Bairagi witnesses are quite clear in their evidence that the members of their community are not precluded from entering into the bond of matrimony: vide the evidence of Sundar Das, D. W. 3, Mahant Kishen Chand, D. W. 5, Lachhman Das, D. W. 6, and Bhagat Ram, D. W. 7: see also 1923 *Patna* 309. Altogether eleven witnesses have appeared on behalf of defendant 1 and they undoubtedly support his case. Some of them depose to their being personally present at the installation of defendant 1 and there is no suggestion why the evidence of these witnesses should be discarded and the defendant, who is in possession under valid mutation, should be turned out in order to make room for the plaintiff. In any event the plaintiff has to succeed on the strength of his own title and not on the weakness of the defendant's case and, applying this principle, the plaintiff's suit must fail. Some evidence has been led assailing the character of defendant 1. It is not necessary for this Court in deciding this appeal to express any opinion one way or the other. Even assuming for the sake of argument that, according to the rules of the institution, the practice of celibacy is strictly enjoined upon the incumbent of the Mahantship, that by itself is no ground for decreeing the plaintiff's claim. If the defendant is transgressing the rules which govern this institution, then the persons interested in it can seek such legal remedy as may be open to them. We express no opinion on the subject.

On a careful consideration of the material on the record and giving due weight to the lengthy arguments which were addressed to us by counsel for the parties, I am satisfied in my mind that the trial Judge has approached the case from an erroneous point of view and his decision is erroneous. I would therefore allow this appeal and, setting aside the judgment and decree of the Court below dismiss the plaintiff's suit with costs throughout.

An application was put in this Court on 14th October 1930, by the defennant-appellant saying that the plaintiff-respondent, Mahant Mahabir Das, had died about two months ago and that his legal representatives may be brought on the record. This application was granted subject to all just exceptions. No further steps seem to have been taken on behalf of the respondent. On the second day of the hearing of the present appeal, counsel for the plaintiff-respondent put in an application accompanied by an affidavit that Mahant Mahabir Das had died on 11th July 1930 and therefore the application was too late by four days and the appeal abated on 10th October 1930. This contention however is correct to this extent that the appeal abated automatically on the expiry of the 90 days from the date of the death of Mahant Mahabir Das. The appellant however has put in an application asking this Court to excuse the four days' delay in view of the fact that he was not in a position to know the exact date of the death of Mahant Mahabir Das. These applications have been considered by the Court and in my judgment it is a fit case for extending the concession permitted under O. 22, R. 9, Sub-R. (2), Civil P. C., to the defendant-appellant, and therefore the abatement is hereby set aside: vide inter alia *Qain* v. *Nura* (1) and *Lachmi Narain* v. *Muhammad Yusaf* (2).

Addison, J.—I concur.

K.S. *Appeal allowed.*

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1. A I R 1926 Lah 234=94 I C 422=7 Lah 73.
2. A I R 1920 All 284=59 I C 903=42 All 540.

A. I. R. 1933 Lahore 920

JAI LAL AND AGHA HAIDAR, JJ.

Ram Lal and *others*—Defendants—Appellants.

v.

Thakurji Mandir and *another*—Plaintiffs—Respondents.

Second Appeal No. 2605 of 1928, Decided on 19th April 1933, from decree of Dist. Judge, Hissar, D/- 6th August 1928.

(a) Civil P. C. (1908), S. 11—Suit to declare property as belonging to temple — To apply res judicata it must be shown that temple right was substantially in issue in previous suit.

In a suit praying for declaration that the land described in the plaint was the property of the temple, in order to apply the bar of res judicata it is necessary for the defendant to establish that the parties were litigating under the same title in the previous suit and also that the question of the right of the temple was substantially in issue in the provious suit : *A I R* 1927 *Cal* 606, *Dist.* [P 921 C 2]

(b) Specific Relief Act (1877), S. 42 — Property in possession of temple—Each denial is fresh invasion and affords fresh cause of action.

Where the property in dispute has throughout been in possession of the temple, each denial of title of the temple to the property in dispute is a fresh invasion of its right and affords a fresh cause of action to establish its title to the property in dispute : *A I R* 1927 *Lah* 119, *Foll.* [P 922 C 1]

Kishan Dayal—for Appellants.

Manohar Lal and *Chiranjiva Lal* — for Respondents.

Jai Lal, J.—This second appeal is by the defendants. On 25th May 1925, two persons Puran Singh and Ganga Singh instituted a suit praying for a declaration that the land described in the plaint was the property of the temple styled as Mandir Thakurji situated at Bundhor in the Tehsil of Rewari. The tenure, according to the plaint, was that of a dholidar which means the grant of land made to a temple. The defendants are the original proprietors of the land. It appears that the grant has been made by the defendants or their ancestors. The suit was defended on various grounds, but on this second appeal we are concerned with three of them. One is that the suit is barred by res judicata; the second is that the plaintiffs have no locus standi to institute this suit and the third is that the suit is barred by limitation. The suit was originally dismissed by the trial Court on the ground that the Mandir was not in possession of the land in suit and therefore the plaintiffs were not entitled to sue for a mere declaration and that the land in suit had not been dedicated in perpetuity to the temple. The District Judge, however differed from the conclusions of the trial Court and remanded the suit to it for decision of the remaining issues after reversing its finding on the two issues mentioned above. The trial Court after remand gave a finding in favour of the plaintiffs on all the issues and decreed the suit, and with this view the District Judge has agreed.

Now, with regard to the plea of res judicata it is necessary to mention that in the year 1916 a suit was instituted by the appellants, that is to say, the then owners of the land, against one Ishar Das who apparently was the pujari of the temple. It was alleged by the plaintiffs in that suit that Ishar Das was in possession of the land as bhondedar which implies a tenure by virtue of grant by the proprietors of land in lieu of services. It was alleged in the plaint that Ishar Das had ceased to render the services for which the land had been granted to him and was therefore liable to ejectment. The suit was therefore for the ejectment of Ishar Das. That suit was defended by Ishar Das on the ground that he was not a bhondedar, but that the temple was the dholidar in respect of the land in suit. The trial Court held that this plea of Ishar Das was wrong and decreed the suit. An appeal was preferred against this decree, but was apparently dismissed on a preliminary objection—so the counsel stated before us—and a further appeal to this Court also was dismissed on similar ground.

In execution of that decree an attempt was made to award possession of the land in suit to the owners, but the District Judge has found that as a matter of fact actual possession was not given to the proprietors and that the temple has remained in possession of the land through its tenants, as before, right up to the date of the institution of the suit out of which this second appeal has arisen. Subsequently one Anand Das, a minor, instituted a suit for a declaration that the land in suit was held by the temple as dholidar. He claimed to be a chela of Ishar Das. His suit was dismissed on two grounds: (1) that the land had not been proved to be held by the temple, and (2) that Anand Das had not been proved to be the chela of Ishar Das. Anand Das filed an appeal against this decree, but it was dismissed on the ground that he had failed to prove his locus standi, that is to say, his status as a chela of Ishar Das. I have merely mentioned this suit as the learned counsel of the appellants mentioned it at the commencement of his arguments, but nothing turns on the findings in this suit, indeed there were no final findings with regard to the rights of the temple.

It is contended on behalf of the appellants that the decision in the suit in 1916 operates as res judicata against the plaintiffs in this suit, in other words, that the plaintiffs are not entitled to claim that the land is held by the temple as dholidar. Now, in order to apply the bar of res judicata it is necessary for the defendants to establish that the parties were litigating under the same title in the previous suit and also that the question of the right of the temple was substantially in issue in the previous suit. In my opinion on both these points the decision must be against the defendants. In the first instance, Ishar Das had been impleaded in that suit as a defendant in his personal capacity and not as a pujari of the temple therefore he was merely contesting the right of the plaintiffs to eject him by denying the status that they ascribed to him and a decision on that question alone was sufficient to dispose of the plaintiffs' case. It was not necessary for the purpose of the previous suit to decide whether the temple was interested in the land or what was the nature of that interest. I would therefore hold that there is no force in this contention of the appellants' counsel. *Bohari Lal* v. *Gour Chandra* (1), a judgment of a Division Bench of the Calcutta High Court, was cited by the learned counsel, but the facts of that case were clearly distinguishable from the facts of this case. In that case the Shebait had been impleaded in the previous litigation as such and was not defending his own title, but the title of the temple. In the present suit Ishar Das had been impleaded not as a representative of the temple, but in his personal capacity. He was not therefore competent, and he did not pur-

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1. A I R 1927 Cal 606=101 I C 758.

port, to represent the temple in the previous litigation of 1916.

With regard to the second objection the learned counsel conceded that the worshippers of a temple are entitled to sue for a declaration that the property in suit belongs to the temple, but he raised the objection that the suit had been instituted in the name of the temple and not in the name of the worshippers personally. This objection however was not raised at the trial and appears to have been raised for the first time before us. A perusal of the issues framed in this case shows that the only objection taken by the defendants in the trial Court was that the worshippers of a temple were not competent to sue for a declaration, but this proposition has now been conceded by the learned counsel and the second objection that has now been raised is not open on the ground that it was not previously raised. In any case, in my opinion, the objection is of an entirely technical nature and could easily be met by an amendment of the plaint as to the nomenclature of the plaintiffs, but it is not necessary to do so now because both the parties understood that the plaintiffs in the suit were really the worshippers who were claiming a declaration on behalf of the temple. As to limitation it having been found by the District Judge that the property in dispute has throughout been in possession of the temple in my opinion each denial of title of the temple to the property in dispute is a fresh invasion of its right and affords a fresh cause of action to establish its title to the próperty in dispute. *Tara Chand* v. *Kashi Ram* (2), *Jaimal Singh* v. *Chand Singh* (3) and *Hira* v. *Ram Sing* (4), were cited by the appellant's counsel in support of this contention, but *Smail* v. *Bahab* (5), is a case which fully covers the present case and the decision in that case has been followed in other cases in this Court. In my opinion, if I may say so with respect, the view taken in *Smail* v. *Bahab* (5), is the correct one and I follow it. The cases cited by the appellants' counsel are capable of being distinguished on their own peculiar facts. There is therefore no force in the plea of limitation either. I would therefore dismiss this appeal with costs.

Agha Haidar, J.—The question of limitation is further covered by a decision of the Allahabad High Court reported as *Kali Prasad Misir* v. *Harbans Misir* (6). which seems to be exactly similar to the case reported as *Smail* v. *Bahab* (5). I agree with the order proposed by my learned brother.

R.K. *Appeal dismissed.*

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2. (1917) 17 P R 1917=39 I C 121.
3. (1925) 91 I C 605.
4. (1926) 99 I C 988.
5. A I R 1927 Lah 119=100 I C 732=8 Lah 22.
6. A I R 1919 All 383=50 I C 767=41 All 509.

A. I. R. 1933 Lahore 922

ADDISON AND AGHA HAIDAR, JJ.

Sodhi Sadhu Singh & Sons and *others* —Defendants—Appellants.

v.

Dal Chand Tulsi Ram and *another*—Plaintiffs—Respondents.

First Appeal No. 1008 of 1932, Decided on 27th June 1933, from decree of Senior Sub-Judge, Ferozepore, D/- 30th March 1932.

(a) Civil P. C. (1908), O. 10, R. 4—Several adjournments given for appearance—Warning pleader and agent that action would be taken under O. 10, R. 4 (2)—Non-appearance by party and neither pleader nor agent undertaking to answer questions—Disposal of suit under O. 10, R. 4 (2), is proper though no questions were put to pleader or agent.

Several adjournments were given for the appearance of a party, on the motion of pleader and agent of the party; and each time they were warned that in case the party failed to appear, action will be taken under O. 10, R. 4. In spite of all this, neither the party appeared nor did the pleader or agent undertake to answer all the questions. Thereupon the Court disposed of the suit under O. 10, R. 4 (2), without putting any question to the pleader or the agent:

Held: that even though it was incumbent on the Judge to put such questions before taking action under O. 10, R. 4 (2), still under the circumstances the Judge's action was quite proper. [P 924 C 2]

(b) Interest—Suit on hundis in which no interest was mentioned—Award of 12 per cent interest from date of hundi to date of institution is excessive.

In a suit on hundis in which no interest was mentioned, the trial Court awarded 12 per cent from date of hundi to date of suit and 9 per cent from date of suit till realization:

Held: that there was no justification for allowing such high rate but that 6 per cent from date of hundi to date of realization was sufficient. [P 925 C 1]

Fakir Chand and *Chandar Gupta*—for Appellants.

Badri Das and *Shamair Chand*—for Respondents.

Agha Haidar, J.—This appeal arises out of a suit brought by the plaintiffs against the defendants on the basis of two hundis. The trial Judge decreed the plaintiffs' suit and the defendants have come up to this Court in appeal. The facts of the case may be briefly stated as follows: On 14th May 1930, Sodhi Harnam Singh, defendant 1, as the managing proprietor of the firm known as "Sardar Bahadur Sodhi Sadu Singh and Sons" executed a hundi in favour of the plaintiff-firm for a sum of Rs. 10,000. The hundi was payable after 180 days. On 4th June 1930, Sodhi Harnam Singh executed another hundi in favour of the plaintiff-firm for a sum of Rs. 10,000. This hundi was also payable after 180 days. No interest was mentioned in any one of these hundis. The plaintiffs alleged that, as the defendants did not pay anything at all towards the amount due on the hundis, although these were presented to them at the proper time, they have brought the present suit for the recovery of Rs. 21,545-1-3, calculating interest on the total sum of Rs. 20,000 at the rate of one per cent per mensem and adding a minor item of expense which need not be detailed here.

The defendants filed a document purporting to be their written statement. In this document, which bears the names of the four defendants and was filed through one Arjan Singh, their general attorney, the execution of the two hundis is admitted, but the defendants denied that there was any stipulation as regards interest and therefore they pleaded that the plaintiffs were not entitled to anything under that head. They further pleaded that during the specified period (namely 180 days) a sum of Rs. 16,000, had been paid by the defendants to Tulsi Ram, representing the firm of the plaintiffs, that Sodhi Harnam Singh went to the shop of the plaintiffs on the date fixed in order to pay up the balance of the amount due and that this could not be done on account of the evasive attitude adopted by the plaintiffs. They prayed that the plaintiffs' suit should be dismissed. The formal verification of this document is not signed by any one of the defendants, nor did Arjan Singh sign it in his capacity as the general agent of the defendants. It is important to note that no specific date is given in this document on which the payment of Rs. 16,000, under the two hundis is alleged to have been made on behalf of the defendants. The written statement bears the date 13th November 1931. On this date the Court in the presence of the counsel for the defendants made an order that

> "the parties should appear personally on 5th December 1931 for their statements being recorded."

On 4th December 1931, an application was made by Sodhi Harnam Singh through Arjan Singh, general agent, and was presented to the Court through Mr. Shadi Lal, pleader for the defendants stating that Sodhi Harnam Singh would be unable to put in his appearance on 5th December 1931, for certain private reasons of his own and that any date other than the 5th December might be fixed for recording the statement of Sodhi Harnam Singh. This application was placed before the Court in the presence of the pleaders for the plaintiffs as well as for the defendants and their mukhtar was also present. The plaintiffs' advocate did not raise any objection as to the adjournment and the mukhtar of the defendants stated that Sodhi Harnam Singh would be present in Court on 17th December 1931. The case was accordingly adjourned to that date and it was ordered that the statements of the parties shall be recorded on that date. On 14th December 1931, an application was made on behalf of Sodhi Harnam Singh, defendant, through Arjan Singh and was presented to the Court by his pleader Mr. Shadi Lal.

In this application it was stated that the applicant's counsel had some urgent business, on account of which he shall not be able to appear in the case and that the hearing may be fixed for a date other than 17th December 1931. The pleader for the plaintiffs stated that his clients thought that Sodhi Harnam Singh would not put in appearance on the next date of the hearing and that if counsel for the defendants guaranteed that Sodhi Harnam Singh would be produced before the Court the plaintiffs would have no objection. Counsel for the defendants stated in Court that he had some business on the 17th December and therefore would not be able to conduct the case on behalf of his clients on that date, but he undertook to produce his client in Court on 5th January 1932, without fail. The Court ordered that the case should be fixed for 11th January 1932, and that the counsel for the defendants should produce his client on that date without fail so that his statement might be recorded on 11th January 1932. An application was put in on behalf of Sodhi Harnam Singh stating that the case was fixed for 11th January 1932, for recording the statement of Sodhi Harnam Singh, but that he was unable to attend the Court on account of the marriage of his brother. No date of the marriage was given in the application, but the Court took a lenient view and ordered the adjournment of the case fixing 21st

January 1932, for recording the statements of the parties. On the 21st January, Sodhi Harnam Singh did not appear and his agent filed an application and a telegram. The Court ordered that, as several opportunities had already been allowed to the defendant and he has not appeared, proceedings shall be taken against him under O. 10, R. 4, Civil P. C., if he failed to appear on 15th February 1932.

This date was subsequently altered to 16th February 1932, as the earlier date was declared a public holiday. On 16th February 1932, when the case was called for hearing the Court adjourned the hearing to 7th March 1932, as a result of the letter dated 14th February 1932, which Sodhi Harnam Singh addressed to the Court. In making this order the Court once again made it clear that, in case the defendant did not attend the Court on the date fixed, action shall be taken against him under the provisions of O. 10, R. 4, Civil P. C. The case was not taken upon the 7th March because there was a talk of a settlement being arrived at between the parties and therefore 16th March 1932, was fixed as the date of the next hearing. No settlement was arrived at and the pleaders for the parties and the agent for the defendant appeared before the Court. On the 16th March the Court made an order that the counsel for the defendant and his general agent should be directed to produce all the four defendants on 30th March 1932, for their statements being recorded, otherwise proceedings under O. 10, R. 4, Civil P. C., shall be taken against them. On 30th March 1932, Sardar Autar Singh, defendant 3, and Sardar Mahindar Singh, defendant 4, appeared in Court and stated that they had no knowledge about the dealings relating to the hundis in suit and that their brother Sodhi Harnam Singh had been conducting these affairs and they themselves were not in a position to say whether the sum of Rs. 16,000 had been paid to the plaintiffs or not.

It would thus appear that the Senior Subordinate Judge had been very accommodating in adjourning the case repeatedly to suit the convenience of the defendants. In my judgment this leniency was not quite justified because it was apparent from the series of the applications, to which I have made reference, that the defendants had been doing their best to avoid being present in Court, as repeatedly ordered. In three of the orders at least, namely, those dated 21st January 1932, 16th February 1932, and 16th March 1932, the Court clearly pointed out that, unless the defendants put in an appearance before the Court and gave their statements as required by law, action would be taken against them under O. 10, R. 4, Civil P. C.

In appeal it is argued on behalf of the defendants-appellants, that in order to justify the action which the Court has taken under O. 10, R. 4, Civil P. C., it was incumbent upon the learned Senior Subordinate Judge to put any question to the pleader of the party or such other person as accompanied the pleader (in this case Arjan Singh, general attorney) and that it was only when the pleader for the defendants was unable to answer the question that the procedure contemplated by O. 10, R. 4, sub-R. (2), Civil P. C., could be adopted. This argument is perfectly correct so far as it goes, but, having regard to the proceedings detailed above and to the repeated orders of the Court, to which reference has been made, there cannot be any doubt that the pleader for the defendants and Arjan Singh, mukhtar, were not prepared to make any statement as regards the case set up on behalf of the defendants. As already stated, reference to O. 10, R. 4 is contained in the orders bearing the dates 21st January 1932, 16th February 1932 and 16th March 1932, and Mr. Shadi Lal who represented the defendants in the lower Court knew exactly what the implications of these references were. The inference is obvious that the pleader did not undertake and in all probability was not in a position to undertake, to answer the questions which the Court might have put as regards the plea of payment vaguely raised in the written statement. In my judgment, having regard to the circumstances of the case the trial Judge had no alternative left except to pronounce judgment against the recalcitrant defendants 1 and 2.

A point was taken by Mr. Fakir Chand, counsel for the appellants, that the Court was not justified in decreeing the suit against Autar Singh, defendant 3, and Mahinder Singh, defendant 4, as they, at any rate, had appeared before the Court on 30th March 1932. This contention is correct, but Mr. Badri Das, the learned counsel for the respondents, made a statement in Court that his clients were not at all anxious to proceed against defendants 3 and 4. This being so, Autar Singh and Mahindar Singh may be taken to be no longer parties to the suit against whom any relief could be claimed. The order of the Senior Subordinate Judge therefore against defendants 1 and 2 would be maintained to this extent: that the suit for the amount due under the two hundis would stand decreed. As regards interest, as already mentioned, no interest is stipulated in the hundis and the trial Judge had no justification for allowing interest at the rate of 12 per cent per annum from the date of the hundis up to the date of the institution of the suit. The trial Judge also allowed interest from the date of the institution of the suit till realization at the rate of 9 per cent per annum. In my judgment this rate of interest having regard to the nature of the suit, is excessive. The plaintiffs shall be entitled to interest on Rupees 20,000, the amount due under the two hundis, at the rate of 6 per cent per annum from the date of the hundis up to the date of realization. To this extent only I would allow this appeal. Defendants 3 and 4 would bear their own costs throughout, but the plaintiffs-respondents would get their costs from defendants 1 and 2 both in this Court as well as in the trial Court.

Addison, J.—I concur.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 925

BHIDE, J.

Emperor

v.

Krishan Gopal—Accused—Respondent.

Criminal Revn. No. 459 of 1933, Decided on 29th June 1933.

Criminal P. C. (1898), Ss. 497 and 498—S. 498 is not controlled by limitations of S. 497 and High Court or Sessions Court has wider powers to grant bail.

Section 498 gives a much wider discretion to grant bail to the Court of Session and the High Court than that given to Subordinate Courts by S. 497, and S. 498 is not controlled by limitations of S. 497.

The Commissioners appointed under the Punjab Act 4 of 1930, to try the Punjab conspiracy case, while framing charges against the respondent under S. 302/109, I. P. C., and S. 307/109, I. P. C., ordered his release on bail for Rs. 10,000. The reason given for allowing bail was that although a serious charge had been framed against the respondent his case was apparently considered to be on the border line:

Held: that the Commissioners had jurisdiction to grant bail under S. 498 and that there were no adequate grounds for interference in revision with the discretion exercised: *A I R* 1931 *All* 504, *Ref.* [P 926 C 1, 2]

Carden Noad, *G. A. Jowala Parshad* and *Gopal Lal*—for the Crown.

A. R. Kapur and *Pran Nath Mehta*—for Respondent.

Judgment.—The Commissioners appointed under Punjab Act 4 of 1930, who are trying what is known as the Punjab Conspiracy Case, while framing charges against the respondent, Kishan Gopal, under S. 302/109, I. P. C., and S. 302/109, Penal Code, etc., ordered his release on bail for Rs. 10,000 for reasons set forth in their order dated 6th March 1933. A petition for revision has been filed on behalf of the Crown and it has been urged by the learned Government Advocate that the order passed by the learned Commissioners was illegal and without jurisdiction. In support of this contention the learned Government Advocate relied on the provisions of S. 497, Criminal P. C., according to which an accused person shall not be released on bail if there appear to be reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life. It was urged that as the learned Commissioners framed charges against the respondent, they evidently considered that there was "ground for presuming" that he had committed the offences with which he was charged (vide S. 254, Criminal P. C.) and hence the order granting bail was without jurisdiction and illegal. Attention having been drawn to the provisions of S. 498, Criminal P. C., the learned Government Advocate contended that although the restrictions set forth in S. 497, do not appear in S. 498, it had been held that the grant of bail under the latter section also is governed by the restrictions in the preceding section.

It may be conceded at once that in view of the fact that the learned Commissioners had framed charges against the respondent under S. 302/109, Penal Code, etc., the order granting bail does not appear to be justifiable under S. 497, Criminal P. C., but the order does not purport to be passed under that section but was passed on an application under S. 498, Criminal P. C. The learned Commissioners have admittedly powers of a Court of Session and the sole point which needs consideration is whether the order passed by them under S. 498 is or is not legally justifiable. Most of the authorities cited by the learned Government Advocate relate to S. 497, Criminal P. C., and are of no assistance so far as this point is concerned. The only authority referred to by him which is relevant so far as S. 498, Criminal P. C., is concerned is *Sourendra* v. *Emperor* (1), in which the learned Judges observed that though the powers of the High Court under S. 498, Criminal P. C., as regards granting bail were unfettered they ought to "take into consideration" the limitations on the power of other authorities to grant bail imposed by S. 497, Criminal P. C. But this observation cannot be taken to mean that the powers of the Court of Session and the High Court under S. 498, Criminal P. C., are not wider or that they cannot grant bail on grounds other than those falling within the purview of S. 497, Criminal P. C. Any such interpretation would be, I think, clearly opposed to the plain language of the section itself. The contention of the learned counsel for the respondent that S. 498, Criminal P. C., gives a much wider discretion to the Court of Session and the High Court than that given to Subordinate Courts by S. 497, Criminal P. C., is, on the other hand, supported by ample authority. The question was recently considered at length by a special Bench of three Judges of the Allahabad High Court in *A. I. R.* 1931 *All.* 504, and it will be sufficient to quote the following observations of their Lordships on the point:

> " Section 493, Criminal P. C., gives an unfettered discretion to the High Court or the Court of Session to admit an accused person to bail. It is a mistake to imagine that S. 498 is controlled by the limitations of S. 497, except when there are not reasonable grounds for believing that the accused committed the offence or there are reasonable grounds for believing that he is not guilty, in which case it becomes a duty to release him. Magistrates can proceed under S. 497 only and their discretion is regulated by the provisions of that section, but S. 498 confers upon a Sessions Judge or the High Court wide powers to grant bail which are not handicapped by the restriction in the preceding section. That discretion is unfettered, but of course it cannot be exercised arbitrarily but must be exercised judicially. There is no hard and fast rule and no inflexible principle governing such discretion. The only principle that is established is that there should be a judicial exercise of that discretion. It is not any one single circumstance which necessarily concludes the decision; but it is the cumulative effect of all the combined circumstances that must weigh with the Court. The considerations are too numerous to be classified or catalogued exhaustively."

The learned Judges then proceeded to mention various matters which may be properly taken into consideration in deciding the question of bail. The learned Commissioners have given their reason for allowing bail although serious charges had been framed against the respondent. The case of the respondent was apparently considered to be on the border line and hence in the exceptional circumstances bail was granted but at the same time the amount of the security was fixed at a very high figure. I feel no doubt that the learned Commissioners had jurisdiction to grant bail under S. 498 and in view of the reasons given by them in their order, I see no adequate ground for interference in revision with the discretion exercised by them in the matter.

The learned Government Advocate mentioned in the course of his arguments that the respondent was attempting to tamper with the prosecution witnesses. There is no affidavit before me in this connexion and the matter would require enquiry. If there is any reliable evidence to show that the respondent is abusing his liberty it will be, of course, open to the learned Government Advocate to approach the learned Commissioners with an application for cancellation of the bail. With these remarks I dismiss the petition.

K.S. *Petition dismissed.*

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* A. I. R. 1933 Lahore 926

JAI LAL, J.

Emperor

v.

Lal Singh and *others*—Accused—Respondents.

Criminal Revn. No. 915 of 1933, Decided on 23rd June 1933, reported by Addl. Sess. Judge, Lahore, D/- 12th June 1933.

*** Criminal P. C. (1898), S. 561-A—Assessor determined to help accused in course of trial is not proper person to act as assessor—High Court has power to order new trial with help of new assessors—Criminal trial.**

Where one of the assessors expressed during the course of the trial that he was determined to help the accused:

Held: that he was not a proper person to act as an assessor and in such a case the High Court has power under S. 561-A to order a new trial with the help of new assessors: 15 *I C* 313, *Ref.* [P 927 C 1]

Carden Noad and *Hazara Singh*—for the Crown.

Bihari Lal and *Sagar Chand*—for Respondents.

Order.—This is a reference by the Additional Sessions Judge of Lahore, made under rather peculiar circumstances. The accused, Lal Singh and others were being tried before the

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1. (1910) 37 Cal 412=11 Cr L J 217=6 I C 8.

learned Additional Sessions Judge on a charge of dacoity accompanied by murder under S. 396, Penal Code, and one S. Kirpal Singh was one of the three assessors who was assisting the learned Judge in the trial. In the course of the trial the Additional Sessions Judge discovered that S. Kirpal Singh had stated that he was determined to help the accused; in fact he had expressed an opinion that he was not going to allow the accused to be convicted. This fact is proved by reliable evidence which the learned Judge has accepted as true and which I have no reason to disbelieve. That being so, it is obvious that S. Kirpal Singh is not a proper person to act as an assessor in this case.

The next and the more difficult question is what is the proper action to be taken in such circumstances. The only authority mentioned by the learned Additional Sessions Judge is *Sessions Judge of Tanjore* v. *Thiagaraja Thevan* (1), a judgment of the Madras High Court. In that case in the course of the trial the Sessions Judge discovered that one of the assessors was interested in the deceased. He would not have appointed him as an assessor if he had known this fact when he commenced the trial, but it came to his notice during the course of the trial. He consequently referred the case for orders of the High Court recommending that a new trial be ordered with the help of other assessors and the High Court accepted this recommendation as the proper course in the circumstances. I consider that the High Court has power to pass such an order inter alia under S. 561-A, Criminal P. C.

The counsel for the accused have very properly not opposed the recommendation of the Additional Sessions Judge and have left the matter in the hands of this Court. I am aware that a number of witnesses have already been examined and a new trial will necessitate their being recalled, but this course cannot be avoided because I do not think it would be fair to all concerned that the evidence already recorded should be read as evidence in the case considering that new assessors will have to be chosen by the trial Judge, who will have to give their opinion on the whole of the evidence led by the parties. I must not of course be understood to observe that the present assessors, except S. Kirpal Singh, are not elligible for being re-appointed. That is a matter entirely for the Sessions Judge to consider. I consequently accept the recommendation of the learned Additional Sessions Judge and set aside the proceedings so far taken in the trial before him and direct him to hold a de novo trial of the accused with the help of other assessors. I think it is necessary in the interests of justice that the attention of the learned Sessions Judge of Lahore be invited to this case in order to enable him to consider the question of the removal of the name of S. Kirpal Singh from the list of assessors.

K.S. *Reference answered.*

A. I. R. 1933 Lahore 927

BROADWAY, J.

Zulfikar and *another*—Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn Petn. No. 1566 of 1932, Decided on 3rd March 1933, from order of Sess. Judge, Mianwali, D/. 24th October 1932.

Penal Code (1860), S. 34—Applicability.

When two or more persons set on to another armed with hatchets and dangs it may safely be assumed that their common intention is to give him a thorough hiding, and it may also safely be assumed that all are cognizant of the fact that the hatchets will be used and that very serious injuries are likely to be inflicted. In these circumstances S. 34 rightly applies. [P 928 C 1]

Mohammad Amin—for Petitioners.

Ganesh Datta for *the Government*—for the Crown.

Judgment. — One Abdul Haq was either carrying on a liaison with Mt. Mirai, as he stated in the first information report, or, as he stated in Court, was suspected of doing so. Mt. Mirai is the sister of Abbas Khan and the cousin of Zulfikar. On 9th June 1932, Abdul Haq was beaten. He received an injury on the head which was skin deep and an incised wound on his right arm, and a bone of his leg was fractured. He also received 14 other simple hurts. Five persons in all were charged with having assaulted him, including Abbas the Zulfikar; and in the first information report, he named three persons as his eye-witnesses. At the trial however he did not produce these eye-witnesses, alleging that they had been won over by the opposite party and instead produced a man named Ghulam Mohammad. Of the five persons tried, Abbas and Zulfikar alone were found guilty of having taken part in the assault and were convicted under section

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1. (1912) 15 I C 313=13 Cr L J 473.

324/325, Penal Code, and sentenced to two years' rigorous imprisonment each. They appealed and the learned Sessions Judge dismissed their appeal basing his findings entirely on the story told by Abdul Haq supported by the medical evidence which showed that he had received seventeen injuries.

It has been found that Abbas only struck one blow which caused the head injury. An axe was said to have been used, but apparently it was the blunt end of it. Zulifikar was said to have been armed with a dang only and therefore could scarcely be held responsible for the incised injury on the arm; he may have caused the fracture of the leg. The case is not a satisfactory one, but notice has only been issued with regard to sentence and the applicability of S. 34, Penal Code. When two or more persons set on to another armed with hatchets and dangs it may safely be assumed that their common intention is to give him a thorough hiding, and it may also safely be assumed that all are cognizant of the fact that the hatchets will be used and that very serious injuries are likely to be inflicted. In these circumstances I think that S. 34, Penal Code, has rightly been applied, but, in the circumstances of the case itself, I consider that the sentences are excessive. I therefore reduce the sentence in each case to nine months' rigorous imprisonment.

V.S. *Sentence reduced.*

A. I. R. 1933 Lahore 928

BROADWAY AND ABDUL QADIR, JJ.

Machhia and *others* — Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1459 of 1932, Decided on 24th March 1933, from order of Addl. Sess. Judge, Jhang, D/- 17th November 1932.

(a) Penal Code (1860), S. 302—Person instigating others to beat deceased and in whose presence injuries are inflicted by such others causing death is guilty under S. 302.

One of the accused was instigating others to beat the deceased and, while so instigating and in his presence, the other accused inflicted several injuries on the person of the deceased with a toka which caused his death :

Held : that the accused could not escape responsibility for abetment of murder committed by others and that he should be convicted under S. 302. [P 929 C 2; P 930 C 1]

(b) Penal Code (1860), S. 149 — Unpremeditated fight between two parties as result of abuse on both sides—Parties do not form unlawful assemblies but are guilty only of rioting.

Where a fight occurring between two parties was unpremeditated, and was the result of the abuse on both sides and the sudden quarrel resulting therefrom and members of each party began to assault one another and both sides were injured in the affray :

Held : there was no unlawful assembly with any common object, that the accused were guilty of only rioting under S. 147 but not under S. 302 read with S. 149 even though some of them were guilty under S. 302 for acts done by them. [P 929 C 2; P 930 C 1]

Din Mohammad—for Appellants.

D. R. Sawhney—for the Crown.

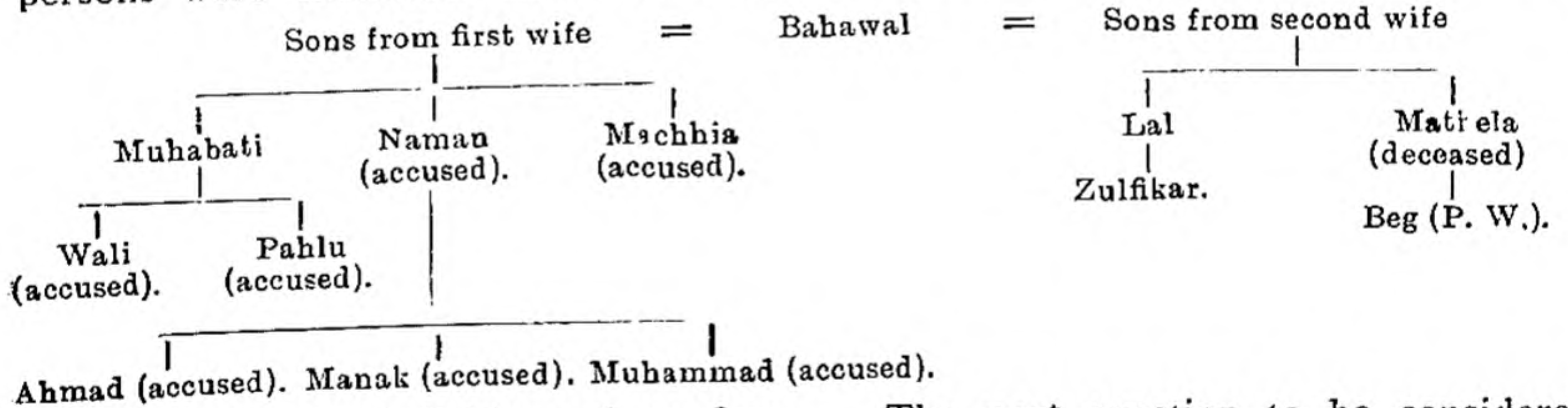
(*For pedigree Table, See p.* 929)

Abdul Qadir, J.—The pedigree-table given above will illustrate the relationship between the parties to this case. Bahawal had two wives and the party accused in this case represents the sons and grandsons of Bahawal from the first wife, while the party of the complainants represents the sons of the second wife. There had admittedly been bad blood between the parties, which started owing to the breaking of a betrothal, followed by complaints to the canal authorities and other officers by one party against the other, on various occasions. A few days before the occurrence with which we are concerned in this case, a complaint had been made to the canal authorities by Muhammad and Wali against Mathela and Nawab charging them with having taken water in excess of their due. On 2nd March 1932 trouble between the parties arose over the cutting of some trees on the banks of the canal. Mathela and Nawab complained to Sardar Budh Singh, overseer, that Machhia had cut a tree belonging to Government. Budh Singh told them to send formal complaint to the Sub-Divisional Officer at Gojra before he could take any action. They promised to do so and thereupon Budh Singh gave them a letter to Khushal lambardar asking him to go to the spot and to watch the tree alleged to have been cut by Machhia and that he would himself come to the spot. Machela and Nawab got a letter written at the Post-Office addressed to the Sub-Divisional Officer and sent it under a registered cover and then proceeded to the spot where the tree said to have been cut by Machhia was. They took with them Umar Hayat, son of Khushal lambardar as the latter was absent from the village. Budh Singh joined them and Machhia and some members of his party also came. The tree that had been cut was pointed out and the overseer expressed the opinion that it was a tree belonging to Government. Machhia thereupon said that he could also point out trees cut by the other side and he took Budh Singh to the spot where the tree said to have been cut by Mathela's party was. That was near Lal's field. Lal is the real brother of Mathela and step-brother of Machhia. On inspecting the spot in the presence of the parties, Budh Singh declared that the tree appeared to belong to Lal. This annoyed Machhia, who said he could point out another tree. While he was taking Budh Singh and the other persons present, to show another tree the parties of Machhia and Mathela began to abuse one another and Machhia got so angry that he shouted to his companions to beat Mathela and to teach him a lesson. Thereupon, Pahlu and some other members of the party of Machhia began to beat Mathela. It was noticed at that stage that Pahlu was hitting Mathela with a toka and some of the others were beating him with sticks. Mathela got five injuries caused by sharp-edged weapons on his person and four other injuries, including abrasions, caused by some blunt weapons. Several persons were injured on both sides. The matter was reported to the police. Mathela was taken to the hospital where he died on 5th March 1932. Seven persons were challaned under S. 302, Penal Code, for having caused the death of Mathela. They were Machhia, Pahlu, Naman, Muhammad, Manak and Wali. They were committed to the Sessions and have been convicted by the Additional Sessions Judge of Jhang under S. 302/149, Penal Code, and Machhia and Pahlu have been sentenced to death, while the other five accused have been sentenced to transportation for life. They have appealed through Mr. Din Muhammad, who has addressed us at length on their behalf, and we have also heard the Public Prosecutor for the Crown.

His Lordship, after discussing the evidence of the eye-witnesses, held it to be in the main true and consequently relying upon it observed:

> "I have no doubt that all the seven appellants were present at the time of this occurrence, nor have I any reason to doubt that Pahlu caused injuries to the deceased with a toka."

Whether he had the toka with him at the time of the occurrence or he picked it up from somewhere, appears to me to be immaterial so far as the guilt of Pahlu is concerned. His offence, considering the number of injuries caused and the part of the body hit and the nature of the weapon used, amounts to nothing short of murder. I would therefore dismiss the appeal of Pahlu and confirm the sentence of death passed against him.



As regards Machhia, though I am satisfied that he did not catch hold of Mathela when the latter was being injured by Pahlu, yet I am convinced that he was instigating others to beat Mathela, and if, in his presence and while he was instigating, the toka was used repeatedly for causing injuries to the deceased, I cannot see how he can escape responsibility for the abetment of the murder committed by Pahlu. I think his conviction under S. 302, Penal Code, is justified by the evidence on the record, though I think under the circumstances disclosed above, his sentence may be commuted to one of transportation for life.

The next question to be considered is the responsibility of the other appellants with regard to the offence committed by Pahlu. It has been argued by the counsel for the appellants, that S. 149 does not apply to the facts of this case and that the circumstances clearly show that the fight that occurred between the two parties was unpremeditated and was the result of the abuse of both sides and the sudden quarrel resulting therefrom. I think there is force in this argument and it seems to me that when Pahlu and others attacked Mathela, members of each party began to assault one another and both sides were injured in the affray, but there was no unlawful assembly of the accused at that stage with any common object. The fact that the party of the accused received a large number of injuries, including grievous hurts caused to Muhammad, which have not at all been explained by the evidence of the prosecution, lends colour to this belief. In these circumstances I do not see that the members of the accused party, other than Phulu and Machhia, were guilty of any offence beyond rioting. I would therefore accept their appeals and set aside the sentences passed against them of transportation for life under S. 302/149, Penal Code, and convicting them of offence under S. 147, Penal Code, I would sentence them to two years' rigorous imprisonment each.

I would dismiss the appeal of Pahlu and accept that of Machhia to the extent of modifying the sentence and reducing it to one of transportation for life.

Broadway, J.—I agree in holding that Pahlu has been correctly found guilty of an offence under S. 302, Penal Code, and that there being no extenuating circumstances the sentence of death passed on him should be confirmed. I also agree in the view expressed by my learned brother in the case of Machhia. No doubt his instigation consisted in the main of verbal encouragement and he has not been shown to have taken any active part in the assault on the deceased, nevertheless I consider that, on the facts found in this case, he must be held responsible for the act committed by Pahlu whom he instigated in his attack on the deceased. I also agree that in his case the death penalty is not necessary and that the sentence should be reduced to one of transportation for life. So far as the remaining appellants are concerned, I agree that their conviction should be altered in the case of each one of them to one under S. 147, Penal Code, and that the sentence in each case should be reduced to one of two years' rigorous imprisonment.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 930

BROADWAY AND ABDUL QADIR, JJ.

Langar Gehna and *others*—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1568 of 1932, Decided on 21st March 1933, from order of Sess. Judge, Lyallpur, D/- 7th December 1932.

(a) Penal Code (1860), S. 302 — Striking with formidable lathi on head thereby fracturing skull—Intention to cause such injury as is likely to cause death can be assumed.

When a man strikes another on the head with a formidable lathi and fractures the skull, it may safely be assumed that he intended to cause such an injury as would be likely to cause death. [P 932 C 1]

(b) Penal Code (1860), Ss. 302 and 304, Part. 2—One of accused giving blow on head fracturing skull while other accused giving one blow each—Held, former should be convicted under S. 302, but latter should be convicted under S. 304, Part. 2.

Accused went armed with heavy lathis to give a beating to the deceased in return for what he had done to the sister of one of them. One of them gave a blow on the head fracturing the skull, while the other two gave one blow each :

Held : that the former must be convicted under S. 302 but that the latter two should be convicted only under S. 304, Part 2. [P 932 C 1]

Abdul Aziz—for Appellants.

D. R. Sawhney—for the Crown.

Broadway, J.—Langar, son of Gehna, and his two sons, Sheru and Ali have been convicted of having caused the death of one Mutalli and under S. 302, Penal Code, have been sentenced to death. They have appealed and the case is also before us under S. 374, Criminal P. C. The case is a fairly simple one and the allegation for the prosecution is that Karam Ali, (P. W. 3), the brother of Mutalli, a man of about 50 years of age, had lost his wife Mt. Fajjan some 15 years or so ago. He had a daughter named, Mt. Satto, and some three or four years prior to this occurrence Karam Ali had entered into an arrangement with Sheru appellant by which he gave Sheru his daughter Mt. Satto as wife and in exchange took from Sheru his sister Mt. Fateh Bibi as wife. Sheru and Mt. Satto lived together and Mt. Fateh Bibi came to Karam Ali's house. Apparently owing to the disparity in their ages Mt. Fateh Bibi was not very happy with her elderly husband and after staying with him for a short time returned to her father's house and has been living with her father ever since. Mt. Satto gave birth to a daughter who is now some 2¼ years of age, and Karam Ali has prevented Mt. Satto from returning to her husband Sheru for the last two years or so on the ground that as she had been given to Sheru in exchange, he would not let her go to Sheru unless Mt. Fateh Bibi came and lived with him as his wife. Matters were in this state on 17th August 1932, when it appears that at "peshiwela" somewhere between 2 and 3 p. m. Mt. Satto happened to go down to Chaura Pattan of the Deg Nala to wash clothes. This Chaura Pattan is about 150 karams from the village of Salehpur where the parties reside. Sheru arrived at this pattan and asked Mt. Satto to return to him. She told him that she would not go to his house until and unless his sister Mt. Fateh Bibi came to her father's house. While they were quarrelling over this question, Mutalli, Mt. Satto's uncle, appeared on the scene and he and Sheru exchanged abuse. Mt. Fateh Bibi then appeared and proceeded to abuse Mt. Satto and Mutalli. Thereupon Mutalli, who apparently had a stick in his hand, struck Mt. Fateh Bibi a couple of blows which act on his part was resented by Sheru. Yaru, (P. W. 12), who happened to arrive at the ferry about that time intervened and the matter apparently ended there. Mutalli returned to his house and Sheru apparently returned to his own home.

According to the eye-witnesses to the actual occurrence some six in number, Mutalli was in his house preparing to have his beard trimmed by P. W. 7, Fajja. Karam Din, (P. W. 6) and Sawar Shah, (P. W. 8), were at that time present in Mutalli's haveli. Suddently the three appellants are said to have made their appearance armed with sabstantial lathis and to have proceeded to set on Mutalli, inflicting three blows on his head, the first one being struck by Sheru. This blow felled Mutalli to the ground and Langer and Ali are said to have struck him one blow each on the head while he was lying prone. Karam Ali, (P. W. 3) and Fateh Muhammad, (P. W. 4) and Saleh Muhammad, (P. W. 5) are said to have been present at the dera of Karam Ali and Mutalli which is close by, but separate from Mutalli's residential hosu. They claimed to have heard the "raula" and to have hastened across to Mutalli's house where they arrived in time to see the whole attack on Mutalli, the first blow being struck by Sheru. It has been urged by Mr. Abdul Aziz, on behalf of the appellants, that these eye-witnesses are unworthy of evidence and that at least three of them have been dragged in from other villages. He has urged that the report was made at 9 p. m., whereas the occurrence is said to have taken place somewhere about 3 p. m., and the distance to be traversed from the village to the police station was only six miles. It has however to be borne in mind that Mutalli, had to be carried on a cot the whole of that distance and that inasmuch as he was not dead, his bearers would very naturally carry him with a certain amount of care. After due consideration of the learned Counsel's contention I do not think that there has been any undue delay in the making of the report.

Mutalli was unconscious and continued unconscious till the morning of the 20th August when he died. The postmortem was held by Dr. D'Arcy, Civil Surgeon at Sheikhupura, whose evidence shows that he found three contused wounds on the head, There were no other marks of injury on the deceased's body. The skull was extensively fractured, there being a compound comminuted fracture of the right parietal and left parietal bones. A large piece of the right parietal bone was driven into the substance of the brain causing compression of the right hemisphere, while eight pieces of bones from both parietal bones were lying loose. There can be no doubt that the blow given by Sheru was a very substantial one. It was apparently delivered with very considerable force and the lathi used was a very formidable weapon. In addition to this there is the evidence of P. W. 9, Qaim Din lambardar who says that Langar and Ali had come to him at 9 p. m., at Kala Gujar on the evening of 17th August 1932, and had told him that they had fought with Mutalli and hit him with dangs and asked him to intervene so as to bring about a compromise. He said he was unable to interfere and so they left him. Taking all this evidence into consideration and after giving all possible weight to the arguments of the learned counsel, it seems to me that there can be no doubt that the story told by the prosecution is substantially correct and that Mutalli met with his death at the hands of the three appellants more or less in the manner stated by the eye-witnesses. It is worthy of note that the appellants merely denied having caused any injuries to Mutalli, but offered no explanation of any kind whatsoever of the occurrence itself.

Next, it was argued that the offence disclosed by this evidence did not fall within the ambit of S. 302, Penal Code, and in this connexion reference was made to the evidence of P. W. 10, Sadad. This witness says that he happened to be passing through Salehpur on the 17th August and went into the house of the appellants where he found Langar and Ali. He sat down and had a smoke with them and while he was there Mt. Fateh Bibi came crying and said that she had been beaten by Mutalli. Upon this Langar and Ali both said, "we will beat him." Sadad advised them not to do so, but soon afterwards Sheru arrived, caught hold of a dang and said that Mutalli must be killed before sunset. The witness told them not to be foolish and went home, apparently leaving all three in the house. Now, if this story is correct, it would seem that whatever intention Sheru may have had in his mind, Langar and Ali had not expressed any desire to do more than beat Mutalli in return for the blow he had inflicted on Mt. Fateh Bibi. There can be no doubt that when a man strikes another on the head with a formidable lathi and fractures the skull, it may safely be assumed that he intended to cause such an injury as would be likely to cause death. That Sheru had this intention may, I think, be safely assumed, but I do not think the same assumption can fairly be raised in the case of his father and brother. I therefore consider that the offence committed by them falls more strictly within the purview of the second part of S. 304, Penal Code, and I would therefore accept this appeal so far as they are concerned and alter their conviction to one under S. 304, part. 2, and sentence each of them to rigorous imprisonment for a period of ten years.

In the case of Sheru I consider that his offence falls within the four corners of S. 302, Penal Code. There is no doubt however he was smarting under grave provocation; that he and his wife Mt. Satto had been living on friendly terms appears to be undisputed and, but for the attitude taken up by Mt. Fateh Bibi it seems certain that Mt. Satto and Sheru would have been living a happy married life. He had met his wife at the ferry and had endeavoured to persuade her to return to him. Mutalli had interfered and had abused him, and, on the appearance of Mt. Fateh Bibi and her interference in the matter, Mutalli struck Mt. Fateh Bibi, Sheru's sister. Owing to the intervention of P. W. 12, Yaru, nothing further occurred then, but there can be no doubt that Sheru was influenced by what had occurred and that what had happened amounted to provocation. Although therefore his offence falls under S. 302, Penal Code, I do not think it necessary to inflict the extreme penalty. In his case therefore I would maintain the conviction under S. 302, Penal Code, but reduce the sentence to one of transportation for life.

Abdul Qadir, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 932

SHADI LAL, C. J.

Ghulam Mohammad—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 698 of 1933, Decided on 13th July 1933, from order of Sess. Judge, Jhelum, D/- 10th April 1933.

Penal Code (1860), S. 498 — Imprisonment for one month and 12 days is not adequate punishment for aggravated form of offence under S. 498—Nor is sentence of six months' rigorous imprisonment excessive.

Accused who was found guilty of an offence under S. 498 was sentenced to six months rigorous imprisonment Further it was found that though he had promised to return the complainant's wife, he did not do so but concealed her :

Held : that a sentence of six months rigorous imprisonment was not excessive and that the imprisonment of one month and 12 days which he had already undergone was not an adequate punishment for the aggravated offence which he had committed. [P 932 C 2]

Bishan Narain Pandit — for Petitioner.

Anant Ram Khosla—for the Crown.

Judgment.—The learned Sessions Judge, agreeing with the trial Magistrate, has found the petitioner guilty of enticing away the wife of the complainant, and has sentenced him under S. 498, Penal Code, to rigorous imprisonment, for six months. This application for revision has been admitted only on the question of sentence and after hearing arguments on both sides, I am not prepared to hold that the sentence imposed upon the accused is excessive. As pointed out by the learned counsel for the Crown, though the accused promised to return the woman to the husband, he has not fulfilled that promise, and the judgments of the Courts below show that he has concealed her. He has thereby aggravated the offence committed by him.

It is to be observed that the maximum sentence prescribed by law for the offence is two years, and it is obvious that imprisonment for a period of one month and twelve days, which the convict has undergone cannot be regarded as an adequate punishment for an aggravated offence of this nature. The application for revision is accordingly dismissed.

K.S. *Application dismissed.*

A. I. R. 1933 Lahore 933 (1)

TEK CHAND, J.

Kehr Singh—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 630 of 1933, Decided on 13th July 1933, reported by Sess. Judge, Karnal, D/- 18th April 1933.

Criminal P. C. (1898), S. 423 — Appeal against conviction under Ss. 147 and 323, Penal Code—Quashing by District Magistrate of conviction under S. 147 and altering conviction under S. 323 to one under S. 325 retaining whole sentence amount to exhancement.

Accused who was convicted under Ss. 147 and 323, Penal Code, was sentenced to six months' rigorous imprisonment for the first offence and Rs. 100 fine for the second. On appeal the District Magistrate quashed the conviction under S. 147 and altered the conviction under S. 323 to one under S. 325, but retained the whole sentence:

Held: his action amounted to an enhancement of sentence for which he had no power and that the order could not be maintained. [P 933 C 1, 2]

Anant Ram Khosla for *Government Advocate*—for the Crown.

Order.—The facts of the case are given in the order of reference made by the learned Sessions Judge and it is not necessary to recapitulate them here. The petitioner was tried along with a number of other persons and was convicted by the trial Magistrate under Ss. 147 and 323, Penal Code, and sentenced to undergo rigorous imprisonment for six months for the first offence and to pay a fine of Rs. 100 for the second. On appeal the learned Additional District Magistrate held that the offence of rioting had not been established and quashed the conviction of all the convicts under S. 147. He was further of opinion that the petitioner Kehr Singh ought to have been punished under S. 325 and not under S. 323, and therefore he altered the conviction to one under S. 325, and for that offence sentenced the petitioner to undergo rigorous imprisonment for six months and pay a fine of Rs. 100. Kehr Singh filed a petition for revision before the Sessions Judge and urged that the Additional District Magistrate should not have altered the conviction to one under S. 325, and, in any case, his order was tantamount to enhancement of the sentence, which he was not competent to do. The learned Sessions Judge accepted the second contention and has recommended that the sentence be reduced.

Mr. Anant Ram for the Crown admits that in view of the finding of the learned Additional District Magistrate quashing the conviction under S. 147, his action in retaining the whole of the sentence, which had been imposed by the trial Magistrate for offences under Ss. 147 and 323, had virtually the effect of enhancing the sentence and was therefore beyond his powers. I have no doubt that this is the correct view and the order of the Additional District Magistrate cannot be maintained. I am further of opinion that it has not been satisfactorily established on the record that Kehr Singh had inflicted grievous hurt on the complainant, and on this point the trail Magistrate had taken the correct view. I therefore alter the conviction to one under S. 323 and sentence Kehr Singh to pay a fine of Rs. 50, or in default to undergo rigorous imprisonment for one month.

K S. *Conviction altered.*

A. I. R. 1933 Lahore 933 (2)

SHADI LAL, C. J. AND ABDUL QADIR, J.

Ram Kishan and *others* — Plaintiffs—Appellants.

v.

Bhim Singh and *others*—Defendants—Respondents.

Second Appeal No. 1308 of 1929, Decided on 29th May 1933, from decree of Dist. Judge, Delhi, D/- 22nd February 1929.

Civil P. C. (1908), O. 41, R. 4—Decree appealed from proceeding on ground common to all plaintiffs—All plaintiffs need not join in making appeal and decree may be reversed or carried in favour of all plaintiffs—Civil P. C. (1908), O. 22, R. 3.

Where a decree appealed from proceeds on ground common to all the plaintiffs it is not necessary that all the plaintiffs should join in making the appeal and the appellate Court has power under O. 41, R. 4, to reverse or vary the decree appealed from in favour of all the plaintiffs. [P 934 C 2]

Plaintiffs' suit for declaration that particular land in dispute situate in village Naya Bans, in the Delhi Province, was partible in proportion to holdings and not according to ancestral shares was dismissed and the plaintiffs appealed. The lower appellate Court without going into the merits of of the appeal dismissed it on the ground that some of the plaintiffs who were necessary parties had not authorised the appeal and were not parties to it owing to certain defects in the wakalatnama. Plaintiffs thereupon preferred a second appeal. During the pendency of the second appeal one of the plaintiffs died and the application by his widow to bring, the representative on record was not made within the period of limitation but was admitted subject to just exceptions to be considered at the hearing of the appeal:

Held: that the decree appealed from proceeded on ground common to all the plaintiffs and the appeal did not abate even though the representa-

tive of the deceased appellant was not brought on record in time : *A I R* 1914 *Lah* 382 ; *A I R* 1918 *Lah* 227 and *A I R* 1926 *Lah* 502, *Foll* : *A I R* 1919 *Cal* 410 and *A I R* 1928 *Cal* 184, *not Foll.*
[P 934 C 2; P 935 C 1]

Kishan Dayal and *Amar Nath Chona*—for Appellants.

Achhru Ram—for Respondents.

Abdul Qadir, J.—The suit that has given rise to this second appeal was for a declaration that 534 bighas, 19 biswas Kham of land in village Naya Bans, in the Delhi Province were partible in proportion to holdings and not according to ancestral shares. The suit of the plaintiffs was dismissed with costs by the trial Court and the plaintiffs appealed. At the hearing of the appeal a preliminary objection was raised, on behalf of the respondents, that the wakalat-nama of the counsel for the appellants was defective, and that it should be held that certain plaintiffs were not duly joined as appellants and it could not be that they had authorised the appeal. The learned District Judge accepted the contention that the defects pointed out in the wakalat-nama were correct and held that the appeal could not proceed as some of the appellants who were necessary parties, were not represented before him. He therefore dismissed the appeal with costs.

The plaintiffs thereupon preferred a second appeal to this Court, which was admitted on 20th June 1929. During the pendency of the appeal, Puran, one of the plaintiffs died on 19th November 1930. An application to bring the widow, Mt. Godawari, and his minor sons Kanwar Lal and Baljit Singh on the record as his representatives was made on 20th April 1931. Mt. Godawari alleged that she was in mourning and had lost a third son named Hira Lal, on 19th December 1930, and did not know that she had to put in such an application. Though belated, this application was admitted, subject to all just exceptions, and this matter was left to be considered by the Bench hearing the appeal.

When the appeal came up for hearing before us, Mr. Achhru Ram, on behalf of the respondents, raised a preliminary objection that the appeal had abated qua Puran and under the circumstances was incompetent so far as the other appellants were concerned. He relied on a decision of the Calcutta High Court, *Balaram Pal* v. *Kanysha Majhi* (1), in which it has been held that where one of several plaintiffs prefers an appeal, in which the other plaintiffs are also interested, R. 4, O. 41, Civil P. C., does not authorise him to proceed with the appeal without making the other plaintiffs parties thereto. He also referred to *Naimuddin Biswas* v. *Maniruddin Laskhar, A. I. R.* 1928 *Cal.* 184, where the legal representatives of a dead party were not brought on the record and it was held that the order of abatement by virtue of the death of the party was practically a decree. It was also held, in the said case, that the appeal as it stood was incompetent, because one of necessary parties was not on the record and in his absence the appeal could not proceed.

Mr. Kishan Dayal contends however that as the decree appealed from in the case before us, proceeded on a ground common to all the plaintiffs, it was not necessary that all the plaintiffs should join in making the appeal and the Court had the power under O. 41, R. 4, Civil P. C., to reverse or vary the decree appealed from in favour of all the plaintiffs. He points out that this view has been followed consistently by this Court in a long series of decisions. Reference is specially made to two rulings of the Punjab Chief Court, which have been followed in several decisions since by the High Court. They are: *Med Singh* v. *Kabirunnisa* (2); *Piyare Lal* v. *Chura Mani Ralla Ram* (3). The same view has been expressed by the High Court in *Maqbul Singh* v. *Sadhu Ram* (4). It is pointed out that there are decisions of the Calcutta, Bombay, Madras and Allahabad High Courts accepting this view. He adds that this was a fit case in which the delay in making the application for the representatives of Puran Singh brought on the record should have been excused and the abatement, if any, should have been set aside.

I think there is no reason why the authorities of this Court cited by Mr. Kishan Dayal should not be followed. The preliminary objection is therefore overruled, and I would hold that the appeal did not abate, even though the representatives of Puran were not brought on the record in time. It has been mentioned already that in the lower appellate Court the merits of the appeal before it were not gone into and appeal of the plaintiffs was dismiss-

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1. A I R 1919 Cal 410=53 I C 548.
2. A I R 1914 Lah 382=26 I C 486=88 P R 1914,
3. A I R 1918 Lah 227=46 I C 50=84 P R 1918.
4. A I R 1926 Lah 502=95 I C 247=7 Lah 451.

ed on the ground that some of the plaintiffs had not authorised the appeal and were not parties to it, owing to certain defects in the wakalat-nama. Mr. Kishan Dayal argues that there were no real defects in the wakalat-nama and undue weight was attached to certain technical objections raised by the counsel for the respondents. I think there is no force in this contention, but the question of defects in the wakalat-nama need not be discussed, because of the view taken above as to the competence of an appeal by one of the persons entitled to prefer it, in a case which proceeds on a ground common to all the appellants. Following this principle, in my opinion, the appeal before the learned District Judge should be decided on the merits and was wrongly dismissed on a preliminary objection.

I would therefore accept this appeal and send back the case to the Court of the District Judge for a re-hearing on the appeal that was lodged in that Court on the merits, and for its disposal according to law. The appellants will be allowed their costs in this Court.

Shadi Lal, C. J.—I concur.

V.B./R.K. *Appeal allowed.*

A. I. R. 1933 Lahore 935.

TEK CHAND, J.

Gulzari Lal—Plaintiff—Appellant.

v.

Municipal Committee, Ludhiana—Defendant—Respondent.

Appeal No. 1714 of 1932, Decided on 2nd March 1933, from decree of Dist. Judge, Ludhiana, D/- 10th August 1932.

Punjab Municipal Act (3 of 1911), Ss. 172 and 220 — Notice containing two directions, one of which is good and other bad — Notice is bad in entirety.

A notice which contains two directions, one of which is good and the other bad, is bad in its entirety; and hence failure to comply with it, does not make the owner liable for penalty laid down in S. 220: 1 *Weir* 749, *Rel on.* [P 935 C 2]

Shamair Chand—for Appellant.

Mohammad Monir—for Respondent.

Judgment.—It has been concurrently found by the Courts below that, in front of a room in the upper storey of his house, the plaintiff had an old unroofed projection overhanging the street which had existed for over 30 years, that recently he has repaired his projection and, in doing so he has reduced the width by six inches and has constructed a roof of tin-sheets on the projection. The Municipal Committee first served on the plaintiff a notice under S. 172, Punjab Municipal Act, calling upon him to demolish the entire projection including the old structure, within thirty days. Plaintiff failed to comply with this notice, and the Committee issued another notice under S. 220 requiring him to remove the entire projection within six hours, failing which the Committee would demolish it at its own expense.

On receipt of this notice the plaintiff brought a suit against the Municipal Committee for an injunction restraining the Committee from demolishing the projection. The suit was decreed by the trial Court, but on appeal the learned District Judge has maintained the decree prohibiting the Committee from demolishing the lower part of the projection only but has dismissed the suit so far as the newly constructed tinroof is concerned. The case of the Municipal Committee in the trial Court was that the entire projection was new. The plaintiff however contended that the unroofed projection had existed for more than 30 years, that its width was 4 feet 3 inches, that in repairing it the width has been reduced to 3 feet 9 inches only, and that this portion has been recently roofed with tin-sheets. As stated already the Courts below have found that the facts are as stated by the plaintiff and that the lower portion of the projection has existed for more than thirty years. The notice under S. 172 issued by the Committee however required the plaintiff to demolish the entire projection, including the portion which had existed for 30 years. The question for determination therefore is whether failure to comply with a notice which contains two directions, one of of which is good and the other bad, makes the owner of the structure liable to the penalty laid down in S. 220. In my opinion, the answer to this question is in the negative. As held by Arnold White, C. J., in *re Madras Railway Company* (1):

> "Where the notice is in part within the powers conferred on the Municipality and in part beyond its powers, it must be treated as bad in its entirety. To hold otherwise would impose upon the defendants the obligation of picking out from the notice the requirement which it was within the power of the Municipality to call upon them to carry out."

Following this authority I hold that the notice issued under S. 172 by the Municipal Committee in this case was invalid, and the trial Judge had rightly decreed the suit. I express no opinion as to whether in the circumstances of the case the Municipal Committee can

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1. 1 Weir 749.

now issue a fresh notice to demolish the newly constructed roof. I accept the appeal, set aside the judgment of the learned District Judge and restore that of the trial Court with costs throughout.

K.S. *Appeal accepted.*

* A. I. R. 1933 Lahore 936 (1)

DALIP SINGH, J.

Karam Chand Sood—Creditor—Appellant.

v.

Official Receiver, Simla and *another*—Insolvents—Respondents.

Misc. Second Appeal No. 1844 of 1932, Decided on 23rd June 1933, from order of Dist. Judge, Ambala, D/- 28th September 1932.

*** Civil P. C (1908), S. 60—"Artizan"—Instruments of professional man like surgeon or doctor do not fall within S. 60.**

There is no definition in the Civil Procedure Code of the word "artizan", but it appears from the dictionary that the word "artizan" implies a handicraftsman, that is to say, one who makes certain things as part of his trade or calling. The instruments of a professional man like a surgeon or a doctor do not fall within S. 60, Civil P. C. [P 936 C 1, 2]

Tek Chand—for Appellant.

Judgment.—This appeal raises a novel point. It appears that one Dr. Miss Rosario applied for adjudication as an insolvent and the petition was admitted. She also applied for a protection order before adjudication. The complaint was that one creditor No. 4 in the list, viz. Karam Chand, had attached certain clothing and professional instruments and that these or some of them were exempt from attachment under S. 60, Civil P. C. The applicant is a doctor with a medical degree and she practises as a specialist in midwifery and gynaecology.

The trial Court rejected the plea that the instruments of a medical practitioner came within S. 60, Civil P. C. The learned District Judge on appeal held that the instruments used by a practising doctor in midwifery cases came within S. 60, Civil P. C., as they were tools of an artizan. He also held that, in any case, he would have exercised his discretion and granted a protection order, but did not do so as he held that the instruments in question came within S. 60, Civil P. C. The creditor Karam Chand has come in appeal and I have heard Mr. Tek Chand for the appellant and Dr. Rosario respondent, in person. After considering the arguments urged, I find that there is no definition in the Civil P. C., of the word "artizan" but it appears from the dictionary that the word "artizan" implies a handicraftsman, that is to say, one who makes certain things as part of his trade or calling, and I do not think that the term includes the instruments of professional man, like a Surgeon or a doctor.

I therefore accept the appeal and hold that the articles do not fall within S. 60, Civil P. C. At the same time, as the learned District Judge has indicated that he would have in any case exercised his discretion in the matter but did not do so, I send the case to him to dispose of this point. It is not clear to what section of Insolvency Act the District Judge was referring when he mentioned the question of discretion, it may possibly have been S. 66 but if that is so then, of course, the learned District Judge would have to fix such terms and conditions as he thinks just in the matter. I therefore offer no opinion on the point but simply remand the case to the District Judge for disposal as he may deem fit according to law.

K.S, *Appeal accepted.*

A. I. R. 1933 Lahore 936 (2)

CURRIE, J.

R. N. Clark In the Goods of

Probate Case No. 3 of 1931, Decided on 25th May 1932, from decision of Collector, Amritsar.

Court-fees Act (1870 as amended in 1899), S. 19-I—Date for valuation of estate is date of application for probate—Court-fee paid by applicant may be revised subsequently.

The date to be taken for the valuation of the estate for the purpose of assessment of probate duty is the date on which the application for grant of probate is made. Court-fees ought to be levied as a preliminary on the valuation put forward by the applicant for probate, but the duty chargeable may subsequently be revised as a result of a reference made by the Collector under S. 19-H, Court-fees Act: 14 *I C* 804, *Ref*; 21 *Bom.* 139 and 51 *P R* 1902, *Dist.* [P 938 C 1]

Carden Noad—for the Crown.

Edmunds—for Respondents.

Order.—This is a reference made by the Collector of Amritsar, under S. 19-H (4), Court-fees Act, regarding the valuation for probate of the estate of Mr. R. N. Clark, deceased. Mr. Clark died on 3rd August 1929. His executors valued the estate as at 18th December 1929. An application for the probate was presented apparently on 29th January 1930, in this Court. This was returned and the applicant was directed to deposit probate duty. Eventually probate duty amounting to

Rs. 6,240 was deposited and the application was refiled on 10th April 1931. In the meantime the value of certain stocks and shares had depreciated, but certain dividends had accrued. The contention of the Collector is that probate duty should be assessed on the valuation as at 10th April 1931. He accordingly claims an additional sum of Rs. 508-8-5. In addition to this a further sum is due on account of dividends on twenty-five preference shares and ten ordinary shares of the Bomay Steam Navigation Co. Ltd. A letter from the agents, Messrs. Killick-Nixon & Co., has been produced by the learned Government Advocate which shows that three dividends have come to hand since the testator's death. Probate duty is claimed on account of two of them which were paid in the interval between the death of the testator and 10th April 1931. The amount is: 25 preference shares:

Rs.	A.	P.	
340	13	0	collected on 9th December 1929.
339	0	1	collected on 15th October 1930 on account of 10 ordinary shares :
125	0	0	collected on 9th October 1929, and
125	0	0	collected on 15th October 1930.
929	13	1	

The accuracy of the Collector's calculation is not contested and the figures given by Messrs. Killick-Nixon & Co., are accepted by Mr. Edmunds who appears on behalf of the executors. The point in issue between the parties is the date which should be taken for the purposes of the valuation. The Government Advocate contends that the date when the application for probate was refiled, viz., 10th April 1931, is the date that should be taken for the valuation of the estate. Mr. Edmunds for the executors contends that the date for the valuation should be the date of the testator's death or, in the alternative, the date when the application was first presented, i. e., 29th January 1930.

As regards the first contention that the date for valuation should be the date of the testator's death, Mr. Edmunds contends that the probate of a will dates back to the death of the testator. He argues that the duty should be levied on the valuation of the estate as at the time it came into the executor's hands. In this connexion he refers to, *In the goods of Major-General Millet* (1) and *In the goods of Ezekiel Joshua Abraham* (2). The first of these rulings merely dealt with the question of whether assets in England were liable to probate duty in India, and is not in point. The Bombay case dealt with a similar question concerning certain moneys belonging to the testator's estate which at the time of his death were in Shanghai though some of the funds were subsequently transferred, before the application for probate was made, to Bombay. That ruling, to some extent, supports the contention put forward by Mr. Edmunds, but that ruling was given in 1896. The Court-fees Act was however amended by Act 11 of 1899, which added S. 19-I and Sch. 3, on which the learned Government Advocate relies. S. 19-I provides that no order entitling the petitioner to the grant of probate shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in Sch. 3, and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation. Sch. 3 prescribes the from of valuation. Cl. 1 provides that all the property and credits in which the deceased possessed a right or was entitled to at the time of his death, and which have come or are likely to come, to the hands of the executor shall be duly set forth. Cl. 3 provides for the valuation of the said assets exclusive only of the items which may by law be deducted, but inclusive of all rents, interest, dividends and increased values since the date of the death of the said deceased. In the instructions under Annexure A for valuation of the movable and immovable property under head Property in Government Securities transferable at the Public Debt Office it is expressly provided that interest shall be shown separately calculated up to the time of making the application.

From this it is clear that the probate duty is to be levied on the value of the estate as at the time of making the application. This was the view taken by the Financial Commissioner of Burma in a case reported as, *In the estate of A. C. Macmillan* (3). In Henderson's work on the Law of Succession, Edn. 5, by Alex Kinney in commenting on S. 289, Succession Act, at p. 502, the learned commentator remarks:

> "Schedule 3, Court-fees Act, gives the form of affidavit to be sworn to by the applicant and it will be noted that this includes rents and dividends accrued due since the date of death. This differs from the procedure in England and the

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1. (1902) 51 P R 1902.
2. (1897) 21 Bom 139.
3. (1912) 14 I C 804.

matter would appear to require reconsideration by the legislature, as to my mind it is not accurate to say that income accrued due since the date of death are assets of the estate as at time of death."

It is clear therefore that the date to be taken for the valuation of the estate for the purpose of assessment of probate duty is the date on which the application for grant of probate is made. To come now to the question in the present case, whether the date of valuation should be 10th April 1931, as contended by the Collector, or 29th January 1930, as contended for the executors. It is clear that the practice of this Court has been to insist on the payment of the probate duty calculated on the valuation presented by the applicant before the application is entertained. This is in accordance with R. 30 (iv) at p. 20 of Office Rules of the Chief Court of the Punjab, Part D, Judicial Department, which apparently has not been superseded. It is clearly in conformity with the provisions of S. 19-I, Court-fees Act. That section provides for payment, in the first instance, of the fee on the valuation put forward by the applicant and in Cl. 2 provides that the grant of probate shall not be delayed by reason of any reference made by the Collector. Reading this section as a whole it is clear that court-fees ought to be levied as a preliminary on the valuation put forward by the applicant for probate, but the duty chargeable may subsequently be revised as a result of a reference made by the Collector under S. 19-H, Court-fees Act. In my opinion, therefore the date to be taken of the valuation of the estate of the deceased for the purpose of the probate in the present case is 10th April 1931. The valuation of the estate must therefore be increased by the sum of Rupees 16,950-11-2, as calculated by the Collector, plus Rs. 929-13-1, the dividends received from the Bombay Steam Navigation Co., a total of Rupees 17,880-8-3. The executors will pay the costs of this reference.

K.S. *Reference accepted.*

A. I. R. 1933 Lahore 938

AGHA HAIDAR AND BHIDE, JJ.

Wazira and *another*—Appellants.

v.

Mt. Nandan and *others*—Respondents.

First Appeal No. 771 of 1930, Decided on 14th March 1933, from decree of Senior Sub-Judge, Gujranwala, D/- 21st January 1930.

(a) Civil P. C. (1908), O. 41, R. 1 — Decree not properly drawn up—Appeal accompanied by judgment and such decree—Proper decree filed later—Appeal is not barred.

The trial Court intended to draw up the decree in the prescribed form, but it did not strictly comply with the requirements of the law, as laid down in O. 21, R. 6, and drew up a document which could not be called a proper and correct decree. The memorandum of appeal was accompanied by the judgment and the document and the proper decree was filed after limitation when it was prepared on application by appellant :

Held : that the appeal was properly presented and was not barred. [P 939 C 1]

(b) Civil P. C. (1908), O. 22, R. 3—Suit for possession—One of plaintiffs dying — Legal representative not brought on record—No abatement of whole suit if shares ascertainable or separate suits could be brought.

A body of reversioners had obtained a declaration during a widow's lifetime that certain alienations were not binding on them. After her death some of them brought a suit for possession of their share and the remaining reversioners were made defendants. One of the plaintiffs died and his legal representative was not brought on record in time :

Held : that the suit did not abate as a whole as the remaining plaintiffs' shares were ascertainable and also because any of the previous plaintiffs could have brought a suit in respect of his share only : *A I R* 1928 *Lah* 572, *Ref.* [P 940 C 1]

Mukand Lal Puri and *Mehr Chand Sud*—for Appellants.

Jai Gopal Sethi—for Respondents.

Agha Haidar, J.—A preliminary objection was taken to the hearing of this appeal by Mr. Jai Gopal Sethi, counsel for the respondents, that the appeal was barred by time. The objection is based upon the following statement of facts. The judgment of the trial Court was delivered on 21st January 1930, and is printed at p. 23 of the paper-book. On the page immediately following the judgment there is a memorandum of costs. The appellants applied in good time for the copies of the judgment and the decree within the period of limitation and the copy of the judgment and of the document printed at p. 24 of the paper-book was supplied to him on 15th February 1930. After paying proper court-fee on the memorandum of appeal as well as on the copy of the judgment and the memorandum of costs, the appellants filed the present appeal in this Court on 23rd April 1930. "The memorandum of costs" undoubtedly purports to be a decree, but it is drawn up in a crude form. It does not give the number of the suit, the name and description of the parties and particulars of the claim nor does it specify the relief granted or other determination of the suit. It simply gives the costs incurred by the plaintiffs as well as by the defendants and then at the foot of this document the signatures of the presiding officer of the Court are to be found. On 24th April 1930, the office made a note that, as the copy of the decree had not been filed by the appellants, the appeal was not competent. To this the counsel on 28th April 1930, replied that the copy of the document, which has been supplied to his clients on their application for a copy of the decree sheet, had been filed. On 7th May 1930, the appeal was admitted by the learned Chief Justice in the ordinary course. On 5th May 1930, the appellants applied to the trial Court to prepare a proper decree in the prescribed form. This document was prepared and is printed at pp. 25 and 26 of the paper-book. It gives the number of the suit, the names and description of the parties and the nature of the claim, but is silent as to the actual adjudication by the Court upon the rights of the parties. The learned counsel however to be on the safe side, filed the document also in Court on 16th May 1930, and, on 19th May 1930, the office put up a note to the following effect:

> "Place with the case and bring to the notice of the Bench hearing the appeal the fact that a copy of the decree was filed after limitation."

The objection of Mr. Sethi is that this copy of the decree was filed after the period of limitation and therefore the appeal was barred by time. The office of the Senior Subordinate Judge, Gujranwala, intended to draw up the decree in the prescribed form, but it did not strictly comply with the requirements of the law, as laid down in O. 21, R. 6, Civil P. C., and drew up a document which cannot be called a proper and correct decree: But that was not the fault of the appellants who duly made their application within the period of limitation to obtain copies of the judgment and the decree and the documents, which they filed along with the memorandum of appeal, were those which were supplied to them by the copying department. They cannot therefore be held to be in any way responsible because the decree was not properly prepared. In my opinion, there is no force in the preliminary objection and it consequently fails.

Coming to the merits of the case, the facts leading up to the present appeal may be stated as follows: The property originally belonged to one Khazan Singh who died leaving him surviving his widow Mt. Rajan, a son Gulab Singh and a daughter Mt. Nandan. Gulab Singh, the last male owner, died and mutation was effected in the name of his mother Mt. Rajan. The latter made a gift of the property in favour of Mt. Nandan in February 1912. On 20th May 1921, a suit was brought by the reversioners of Gulab Singh for a declaration that the gift made by Mt. Rajan in favour of Mt. Nandan would not affect their reversionary rights on the demise of Mt. Rajan. This suit was decreed on 15th May 1922. There was an appeal to the High Court and, on 20th November 1926, the decree of the lower Court was affirmed and the appeal was dismissed. This decision of the High Court is reported as *Mt. Nandan* v. *Wazir* (1).

On 30th August 1925, Mt. Rajan died, and on 9th March 1928, the present suit was instituted by the reversioners, (excepting one) who had already obtained a declaratory decree in their favour on 15th May 1922. It appears that plaintiffs 8, 10, 13 and 14 in the original plaint refused to prosecute the claim and admitted the defence of Mt. Nandan. The Court ordered that the plaint should be amended. The result was that these four plaintiffs were transported to the array of the defendants and the shares of the remaining plaintiffs were consequently proportionately reduced. The order of the Court was carried out and we have the amended plaint at p. 13 of the printed record. It appears that between the date of the original institution of the suit, i. e., 9th March 1928, and the date on which the amended plaint was filed, i. e., 29th January 1929, one Indar, a plaintiff, died and Mt. Viro, his widow and legal representative, was not brought on the record until after the expiration of the period of limitation. This being the situation, an objection was raised on behalf of the respondents that the suit had abated as a whole, inasmuch as the legal representative of Indar had been brought on the record beyond the prescribed time. Counsel for the plaintiffs admitted this fact. Issues were struck, and issue 2 was:

> "If Mt. Viro was impleaded after the period of limitation, did the suit abate wholly or partially?"

The learned Judge of the trial Court held that the decree in favour of the plaintiffs was a joint decree and the present suit was brought for the enforcement of joint rights to obtain pos-

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1. A I R 1927 Lah 198=100 I C 84=8 Lah 215.

session and that, as the plaintiffs had not specified their shares, nor are those shares definitely known, the suit had abated as a whole. A number of cases were cited and ultimately the suit was held to have abated in its entirety and was accordingly dismissed. It is unfortunate that the Senior Subordinate Judge was not aware of, and his attention was not invited to the Full Bench decision reported as *Sant Singh* v. *Gulab Singh* (2), where the whole law of abatement is fully discussed. In the present case the plaintiffs had already obtained a declaratory decree in their favour. When succession opened on the death of the widow, they wanted to give effect to the decree by bringing a suit for possession. There is an allegation in para. 2 of the amended plaint that a fard of khasra numbers, pedigree table, and copy of the judgment of the High Court are attached. In para. 3 of the written statement filed by Mt. Nandan, the real and contesting defendant, it is stated that, in view of the fact that certain of the plaintiffs had admitted her claim, the plaintiffs could not sue for more than their own shares. This clearly shows that, having regard to the allegations in the plaint and also in view of the copy of the judgment of the High Court, Mt. Nandan fully realized the legal position that the shares of the plaintiffs were capable of being ascertained, and that there was no legal bar to their maintaining the present suit after some of the plaintiffs had abandoned the suit and gone over to her side. It was not necessary in view of the objection taken by the defendant as regards abatement that the plaintiffs should have satisfied the Court there and then as to how the shares were to be ascertained and what would be the fractional share of each plaintiff. But there cannot be any doubt that the shares are capable of ascertainment on the materials on the record.

There is another way of testing the correctness of the plaintiffs' contention before this Court. It was open to each and every one of the present plaintiffs to bring a separate suit for possession of his own share, the cause of action, namely, the death of Mt. Rajan being common to all. And it does not stand to reason why, if the plaintiffs combine together and bring a single suit for the enforcement of their rights, there should be any legal difficulty in their way. Having regard to the principles laid down in *Sant Singh* v. *Gulab Singh* (2), the finding of the Court below that the suit abated as a whole cannot stand. So far as the interest of Indar is concerned, there cannot be any doubt that the suit must be deemed to have abated.

I would therefore accept the appeal to this extent that the judgment of the trial Judge would be set aside so far as the interests of the plaintiffs other than Indar are concerned. The order of abatement as regards the share of Indar only would stand. As the trial Court disposed of the suit on a preliminary point, I would remand the case, under O. 41, R. 23, Civil P. C., to that Court for determining the remaining issues and disposing of the case according to law. Costs here and hereinafter would abide the result. The court-fee paid on the memorandum of appeal shall be refunded to the appellants, since they have substantially succeeded in their appeal, and the remand is under O. 41, R. 23, Civil P. C.

Bhide, J.—I agree.

K.S. *Order remanded.*

A. I. R. 1933 Lahore 940

BHIDE, J.

Dilbagh Rai— Defendant—Petitioner.

v.

Walu Ram and *another*—Plaintiff and Defendant—Opposite Parties.

Civil Revn. Petn. No. 403 of 1932, Decided on 29th November 1932, from order of Dist. Judge, Multan.

(a) Civil P. C. (1908), S. 115—Trial Court returning plaint for want of jurisdiction—Appellate Court remanding case finding that trial Court has jurisdiction — Revision does not lie from appellate order.

Where a trial Court returns a plaint for presentation to proper Court on ground that it has no jurisdiction, but the appellate Court finds that it has got jurisdiction and remands the case, the appellate Court's order is not open to revision : *A I R* 1928 *Lah* 140, *Ref.* [P 941 C 1]

(b) Civil P. C. (1908), S. 20 — Promissory-note payable in District *M* assigned in District *N* — Court at *N* has jurisdiction to try suit.

Where a promissory note payable in District *M* is assigned in District *N*, as part of the cause of action arises in *N*, the suit is triable in that district : 57 *P R* 1900, *Dist.* [P 941 C 1]

Ram Chand Manchanda — for Petitioner.

Gobind Ram Khanna — for Opposite Parties.

Judgment.—This was a suit for recovery of Rs. 2,300 on the basis of a promissory note. The promissory note was payable in the Montgomery District but was assigned to the plaintiff, the assignment having taken place in the Multan District. The suit was in-

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2. AIR 1928 Lah 572=114 I C 417=10 Lah 7(FB).

stituted in the Multan District. An objection to jurisdiction was raised by the defendants on the ground that this promissory note was payable in the Montgomery District and therefore the suit should have been instituted in that district. This objection was upheld in the trial Court and the plaint was returned for presentation to the proper Court. From this decision an appeal was preferred to the District Judge who held that the assignment having taken place in the Multan District, the cause of action arose in part at least in that district and therefore the suit was triable in the Multan District. The appeal was accordingly accepted and the suit remanded for decision on merits. The defendant Dilbagh Rai has now preferred a petition to this Court for revision of the order of the learned District Judge.

A preliminary objection is raised that no petition for revision is competent inasmuch as no question affecting the jurisdiction of the lower appellate Court is involved in the case, and the decision of the learned District Judge whether right or wrong, cannot be interfered with in revision. The learned counsel for the appellant urges that a question of jurisdiction is involved inasmuch as his contention is that the trial Court had no jurisdiction to entertain the suit. This contention however does not appear to me to be sound. The learned District Judge had undoubtedly jurisdiction to decide in appeal whether the trial Court had or had not jurisdiction to entertain the suit. His decision, even if it is erroneous, cannot therefore be challenged in revision on the ground of want of jurisdiction: vide *Sant Singh* v. *Mubarak Singh* (1). The petition must fail on this ground alone.

I may further add that the decision of the learned District Judge on the point seems to me to be correct. The plaintiff in the present case could not succeed without proving the assignment of the promissory note in his favour. The assignment had admittedly taken place in the Multan District and consequently, it must, I think, be held that the cause of action arose in part in the Multan District and the suit was therefore triable in that district. The learned counsel for the petitioner has relied upon *Shivji Ram* v. *Hem Raj* (2). But as pointed out by the learned District Judge, that ruling cannot help the petitioner, as it was given under the old Code of Civil Procedure and the amendment of the old S. 17, now makes it clear that even if the cause of action arises in part in the locality in question, it is sufficient to give jurisdiction to the Court. I dismiss the petition with costs.

K.S. *Petition dismissed.*

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* A. I R. 1933 Lahore 941

SHADI LAL, C. J. AND ABDUL QADIR, J.

Bhag Shah—Plaintiff—Appellant.

v.

Labha Mal and *others* — Defendants—Respondents.

First Appeal No. 3061 of 1927, Decided on 10th June 1933, from preliminary decree of Senior Sub-Judge, Gujranwala, D/- 18th August 1927.

(a) Mortgage—Contract between parties to make interest charge on property — Decree should be prepared on that basis—Civil P. C. (1908), O. 20, R. 6.

Where in a mortgage-deed, it is provided that the interest is to be made a charge on the property, the decree should be prepared on that basis, as the mortgagee is entitled to follow the mortgaged property for the full satisfaction of his claims under the mortgage. [P 942 C 2]

***(b) Court-fees Act (1870), Sch. 2, Art. 17 (6)—Claim for interest from date of suit to date of realization raised in appeal—Court-fee is necessary—Interest.**

Court-fee is necessary on the claim for interest from date of suit to date of realization made in appeal, either ad valorem the sum up to the date of the appeal or at least a court-fee of Rs. 10 as provided by Art. 17 (6) : *A I R* 1931 *All* 351 and 27 *All* 559, *Rel on.* [P 943 C I]

Mehr Chand Mahajan and *H. C. Kammar*—for Appellant.

D. Mehr Chand, *S. L. Puri*, *Kanshi Nath Aggarwal* and *Fakir Chand* for *Badri Das*—for Respondents.

Abdul Qadir, J.—Lala Labha Mal of Hafizabad, district Gujranwala, mortgaged nine shops and some land measuring 176 kanals, 15 marlas to Bhag Shah, alias Bhag Mal, on 28th August 1923, for Rs. 15,000. The conditions of the mortgage were that the possession shall be with the mortgagee, that the mortgagors shall pay interest at the rate of 1 per cent per mensem after every three months otherwise they shall pay compound interest, that the income of the mortgaged property shall be credited towards interest; and that the mortgagors shall have power to redeem the mortgaged property after two years. On the same date a rent deed for the nine shops (Ex. P. 3) was executed by Labha Mal in favour of Bhag Shah, promising to pay Rs. 137-8-0 per mensem as the rent of the shops. The kabuliyat,

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1 A I R 1923 Lah 140=106 I C 901=9 Lah 208.
2. (1900) 57 P R 1900.

Ex. P-2, was also executed by Labha Mal on account of the agricultural land, promising to pay a net profit of Rupees 150 for the year.

After the above transactions, Labha Mal sold all the mortgaged shops, to his father-in-law Nand Lal, by a sale-deed,dated 13th October 1923. On 20th October 1924, another sale-deed was executed by Labha Mal in favour of Lala Mehr Chand and Lala Ram Chand, by which the land mortgaged to Bhag Shah was sold to the said two persons. On 26th October 1926, Bhag Shah brought a suit against Labha Mal and his vendees, claiming Rs. 15,000 as principal and Rs. 6957-12-0 as interest and allowing Rs. 452-4-0 as the sum received by him out of the above amount and adding annas 8 on account of the expenses of a notice, his claim was for Rs. 21,506. He prayed for a decree with costs and claimed interest at the rate of 1 per cent per mensem from the date of the suit to the date of realization of the decretal amount. He also prayed that, in case the decree for the prayed claimed and costs cannot be satisfied out of the proceeds of the auction sale of the mortgaged property, a decree for the balance may be passed against the remaining property and the person of Labha Mal, defendant 1.

The learned Senior Subordinate Judge gave the plaintiff a preliminary decree for the principal sum against the mortgaged property, but held that the said property was not responsible for the amount of interest and for that he made Labha Mal personally responsible. The plaintiff preferred an appeal to this Court and urged that the whole of the decree, including costs, should have been made a charge on the mortgaged property and interest ought to have been allowed to him from the date of the suit up to the realization of the decree. We have been addressed on behalf of the appellant by Mr. Mehr Chand Mahajan, and Mr. Fakir Chand, who appears on behalf of Mr. Badri Das, has argued the case for Labha Mal respondent 1. Mr. Mehr Chand Diwan appears for respondents 2 and 3, sons of Nand Lal, Mr. Shambhu Lal Puri appears for respondents 4 and 5.

Mr. Fakir Chand states that the decree has really been satisfied and that the appellant has in fact realised more than his due. He has filed an affidavit from his client stating that the decree-holder has realised Rs. 16,087-14-0 out of the sale proceeds of the shops in the course of the execution of his decree and has got Rs. 6,408 from Labha Mal by getting a decree in favour of Labha Mal against Inayat Ullah and others attached. Mr. Mehr Chand Mahajan states that, according to his information, Rs. 15,000 have been realized from the sale of the shops and Rs. 6,408 from Labha Mal, i. e., Rs. 21,408 in all and that Rupees 1,952-7-0 are still due. In view of the affidavit filed by the other party however he says that he has no objection to credit being given to the other side for any amount shown to have been actually paid to the decree-holder, but he contends that the Court below erred in not allowing interest to be a charge on the mortgaged property and in not making costs also a charge on the same, and urges that this mistake should be rectified. He also urges that interest from the date of the suit to the date of the realization of the decree should be allowed. With regard to this latter prayer, an objection is raised by Mr. Fakir Chand, that any claim for interest for the period above mentioned should not be entertained in appeal, as no court-fee has been paid on account of this relief. He adds that, even if it is argued that the nature of this relief was uncertain, the plaintiff should at least have paid ad valorem court-fee on the amount of interest due up to the date of the appeal, as this could be easily calculated. It is added that he should, in any case, have paid a court-fee of Rs. 10 and as he failed to do so, it is urged that he should not be allowed to make up this deficiency at this late stage and his prayer in this behalf should be rejected.

So far as the contention of Mr. Mahajan that the interest allowed should have been made a charge on the mortgaged property is concerned, I think it must prevail. A reference to the terms of the mortgage deed clearly shows that the contract between the parties was that interest would be a charge on the property. The decree in favour of the plaintiff should have been prepared on that basis, and though I am not sure whether the correction of this mistake would materially affect the case of the plaintiff, I think a correct decree on that basis should be prepared and costs should also be made a charge on the property.

The counsel for the two sets of vendees argued that their clients were bona fide purchasers for value and their interests should not suffer by the property being charged with interest and costs. Mr. Mehr Chand Mahajan points out rightly, in my opinion, that though he questions the bona fides of the sales in favour of the vendees, he is not concerned with the rights of Labha Mal and his vendees inter se, and is entitled to follow the mortgaged property for the full satisfaction of his claims under the mortgage.

As regards the question of interest after the date of suit, I am afraid the prayer in para. 2 of the grounds of appeal must fail because no court-fee for his relief has been paid. Though it has been laid down in some cases cited by Mr. Mahajan that no court-fee is necessary on the claim for interest from the date of suit to the realization of the decree, yet he admits that the trend of the decisions in the various High Courts on this point is in favour of court-fee being necessary, either on the sum due up to the date of the appeal or at least a court-fee of Rs. 10 as provided by Art. 17 (6) of the Sch. 2 to the Court-fees Act, 1870. The case of *Damodar Parshad* v. *Hardeo Parshad* (1) is an authority for the view that ad valorem court-fee should be paid on interest pendente lite not allowed by the lower Court on the amount that can be ascertained at the time of the appeal. The case of *Bhawani Parshad* v. *Qutabunnisa* (2) lays down that a proper court-fee payable on the memorandum of appeal in the suit up to the date of realization of the decree as prayed for is Rs. 10. In this case neither an ad-valorem court-fee on the amount claimed up to the date on which the appeal was instituted has been paid, nor a court-fee of Rs. 10. Mr. Mehr Chand Mahajan offers, on behalf of his client, to make good the deficiency now, but I think it is too late to allow him to do so, and under the circumstances no interest from the date of the institution of the suit to the realization of the decree can be allowed.

As this appeal succeeds only in one respect and fails in another, I think it would be fair to allow the parties to bear their own costs.

Shadi Lal, C. J.—I concur.

K.S. *Appeal partly allowed.*

✻ A. I. R. 1933 Lahore 943

SHADI LAL, C. J. AND ABDUL QADIR, J.

Ali Muhammad—Plaintiff—Appellant.

v.

Karim Bakhsh and *others* — Defendants —Respondents.

Second Appeal No. 250 of 1932, Decided on 31st May 1933, from decree of Senior Sub-Judge, Lahore, D/- 17th November 1931.

(a) Civil P. C. (1908), O. 23, R. 1 (3)—"Subject-matter" means right in property sought to be enforced.

The phrase "subject-matter" is not defined in Code, but it is clear that it does not mean property but has reference to the right in property which a person seeks to enforce. [P 914 C 1]

✻ **(b) Civil P. C. (1908), O. 23, R. 1 (3)—Bar created by O. 23, R. 1 (3) has no application where cause of action in first suit is different from that in second suit : 97 *P R* 1916=37 *I C* 128, Impliedly Overruled.**

The bar created by O. 23, R. 1 (3), has no application, where the cause of action in the first suit is different from that in the second suit.

The reversioners brought an action for a declaration that the alienation made by a widow was not binding upon them and should not affect their right to succeed to the estate after the death of the widow. She died during the pendency of the suit, and the plaintiffs thereupon made an application to the Court stating that they did not wish to continue the suit for a mere declaration and intended to bring an action for possession. The suit for a declaration was accordingly withdrawn, but no permission for the withdrawal thereof with liberty to bring a fresh suit was either asked for or granted. Subsequently the plaintiffs brought a suit for recovery of possession of the estate left by the widow praying at the same time that the alienation mentioned above be declared to be invalid. The lower Courts dismissed the claim on the ground that it was barred under O. 23, R. 1, Sub-R. 3 :

Held : that the causes of action in the two suits were quite different, that consequently the subject-matters in the two suits could not be identical and that the withdrawal of the former suit without permission to bring a fresh suit did not operate as a bar to the institution of the latter suit.

Held further : that the prayer regarding the alienation in the subsequent suit could be treated as a surplusage and that the plaintiff could without mentioning it in the plaint, impeach it when it was set up as a defence by the alienee : 97 *P R* 1916=37 *I C* 128, **Impliedly overruled** : 89 *Mad* 987, *Rel on* ; 8 *I C* 1066 and 28 *I C* 91, **Held Overruled.** [P 944 C 1, 2]

Bodh Raj—for Appellant.

Daulat Ram—for Respondents.

Shidi Lal, C. J.—The circumstances, which have given rise to this second appeal, may be shortly stated. Mt. Rakhi, the widow of one Pir Bakhsh, granted in 1918 and 1920, to the defendant Karim Bakhsh, two mortgages in respect of two

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1. A I R 1931 All 851=131 I C 253=52 All 1029.
2. (1905) 27 All 559=2 A L J 268=1905 A W N 84.

plots of land inherited by her from her deceased husband. Both the mortgages were with possession, and their validity is not disputed.

It appears that on 3rd February 1930, she borrowed from the mortgagee a sum of Rs. 400 on the security of the two plots already in his possession; and it was in respect of this third mortgage that the plaintiffs, who are the reversioners of Pir Bakhsh, brought an action for a declaration that the alienation was not binding upon them and should not affect their right to succeed to the estate after the death of the widow. She died during the pendency of the suit, and the plaintiffs thereupon made an application to the Court stating that they did not wish to continue the suit for a mere declaration and intended to bring an action for possession. The suit for a declaration was accordingly withdrawn on 3rd January 1931; but no permission for the withdrawal thereof with liberty to bring a fresh suit was either asked for or granted.

On 3rd February 1931, the plaintiffs brought the present action for the recovery of the possession of the estate left by Mt. Rakhi, praying at the same time that the third mortgage mentioned above be declared to be invalid. The Courts below have dismissed the claim on the ground that it was barred under O. 23, R. 1, Sub-R. 3, Civil P. C. The sub-rule provides that where the plaintiff withdraws from a suit, without permission to institute, a fresh suit in respect of the subject-matter of that suit, he shall be precluded from instituting any fresh suit in respect of such subject-matter. The question is whether the subject-matter of the present suit is identical with that of the declaratory suit which was withdrawn on 3rd January 1931. The phrase "subject-matter" is not defined in the Code, but it is clear that it does not mean property but has reference to the right in property which a person seeks to enforce.

Now, the former suit to declare the widow's alienation invalid as against the reversioners was brought by the plaintiffs on behalf of all the reversioners, but the present suit is instituted only by those persons in whom the estate has vested after the death of the widow and who claim possession on their own behalf. The causes of action in the two suits are quite different, and there is ample authority for the proposition that the subject matters in two suits cannot be identical, if the causes of action are different. The case of *Singa Reddi* v. *Subba Reddi* (1) is on all fours with the present case. It is true that the plaintiffs in the present case have asked the Court to declare the third mortgage to be invalid, but it was hardly necessary for them to ask for that relief because as was done in the case of *Singa Reddi* v. *Subba Reddi* (1) they could, without mentioning the alienation in the plaint, impeach it when it was set up as a defence by the alienee. The reference in the plaint to the third mortgage may therefore be treated as a surplusage.

Mr. Daulat Ram, who has ably argued the case for the respondents, places his reliance upon the single Bench ruling in *Jita Singh* v. *Hari Singh* (2) which is undoubtedly in his favour. The learned advocate however admits that the decision in that case was based mainly upon the judgments of the Madras High Court in *Machana Uajhala Dikshatulu* v. *Gorugantulu Vaggamma* (3) and *Sennava Reddiar* v. *Venkatachala Reddiar* (4), both of which have been overruled by the Full Bench of that Court in the case of *Singa Reddi* (1).

The rule that the bar created by O. 23, R. 1 (3), Civil P. C., has no application where the cause of action in the first suit is different from that in the second suit, has been affirmed by the Calcutta High Court in *Kamini Kant Roy* v. *Ram Nath* (5) and *Gopal Chandra Bannerjee* v. *Purna Chandra Bannerjee* (6). I accordingly hold that the subject-matter in respect of which the declaratory suit was brought is not identical with the subject-matter in the present suit for possession; and that the withdrawal of the former suit without permission to bring a fresh suit, does not operate as bar to the institution of the latter suit.

I would therefore allow the appeal and setting aside the decrees of the Courts below remit the case to the trial Court for decision. on the merits. The court-fees levied on the memoranda of appeal in this Court and in the lower appellate Court shall be refunded, and other costs shall abide the event.

Abdul Qadir, J.—I agree.

K.S. *Appeal allowed.*

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1. (1916) 39 Mad 987=35 I C 185 (F B).
2. (1916) 97 P R 1916=37 I C 128.
3. (1910) 8 I C 1066.
4. (1915) 28 I C 91.
5. (1894) 21 Cal 265.
6. (1900) 4 C W N 110.

A. I. R. 1933 Lahore 945

TEK CHAND, J.

Sant Singh and *another*—Defendants—Appellants.

v.

Hardit Singh and *another*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 602 of 1928, Decided on 23rd June 1932, against decree of Addl. Dist. Judge, Ferozepore, D/-17th November 1927.

(a) Custom (Punjab)—Alienation—Widow—Declaratory suit by reversioners challenging alienation by widow—Question whether property was ancestral or self-acquired in hands of husband is important—If ancestral Punjab Act 1 of 1920 applies—If non-ancestral suit is governed by Limitation Act, Art. 125—Punjab Limitation (Custom) Act 1 of 1920.

Although, for the purpose of determining whether a widow possessed unrestricted power of alienation in the property which had descended to her from her husband, it is immaterial whether the property was ancestral or self-acquired, in his hands, but the question is of great importance for ascertaining the period of limitation governing a declaratory suit by a reversioner to challenge the widow's alienation. If the property was ancestral of the husband and the contesting reversioner, there can be no doubt that (Punjab) Act 1 of 1920 is applicable and the period of limitation is six years. If however the property was non-ancestral, *qua* the plaintiff, the suit would be governed by Art. 125, Limitation Act: *A I R* 1927 *Lah* 198, *Foll.* [P 945 C 2]

(b) Evidence Act (1872), S. 65—Alienation by widow challenged by reversioner—Vendee unable to prove legal necessity on account of bahi of creditor being in possession of reversioner—Vendee should be allowed to lead secondary evidence as to existence of previous debt.

Where in a suit by a reversioner challenging an alienation by a widow the vendee is unable to produce a bahi belonging to a previous creditor to prove legal necessity due to its being in possession of the plaintiff who happens to be the heir of the creditor, the vendee cannot be blamed for the non-production of the bahi and the proper course is to allow the vendee to lead secondary evidence as to the existence of the alleged previous debt. [P 946 C 1]

Fakir Chand—for Appellants.

Order.—On 1st February 1915 defendant 1, Mt. Har Kaur, sold a portion of her husband's estate to the father of defendants 2 and 3 for Rs. 4,000. On 19th October 1926 Hardit Singh, who is a collateral of Ishar Singh in the third degree, brought the present suit for a declaration that the alienation had been effected without consideration and necessity and was ineffectual as against the plaintiffs' reversionary rights.

In the plaint it was stated that the suit was within time as the plaintiff was less than 21 years of age on the date of the institution of the suit. The learned Additional District Judge has found as a fact that the plaintiff had failed to prove that he was less than 21 years of age on the date when the plaint was filed in Court, but he has held the suit to be within time on the ground that it was governed by Art. 125, Limitation Act. Before him it appears to have been contended on behalf of the appellant that the alienor being a Jat the suit was governed by (Punjab) Act 1 of 1920 which provided a period of six years for a suit for declaration to contest an alienation by a widow of the ancestral immovable property of her husband. The learned Additional District Judge rejected this contention on the ground that the land had not been shown to be ancestral. It appears however from the record that an issue was framed as to the ancestral nature of the land but the trial Judge, by his intermediate order of 6th April 1927, ruled that the decision of this point was not necessary for the decision of the suit. He accordingly shut out all enquiry on the point.

It is no doubt true that for the purpose of determining whether a widow possessed unrestricted power of alienation in the property which had descended to her from her husband, it is immaterial whether the property was ancestral or self-acquired in his hands, but the question is of great importance for ascertaining the period of limitation governing a declaratory suit by a reversioner to challenge the widow's alienation. If the property was ancestral of the husband and the contesting reversioner, there can be no doubt that (Punjab) Act 1 of 1920 is applicable and the period of limitation is six years. If however the property was non-ancestral qua the plaintiff, the suit would be governed by Art. 125, Limitation Act: *Mt. Nandan* v. *Wazira* (1). I hold therefore that an enquiry in this matter was necessary.

On the question of necessity also, the judgment of the learned Additional District Judge is not very satisfactory. The principal item disallowed is the sum of Rs. 2,500 which is alleged to have been paid to Kala Singh, previous creditor. This Kala Singh was a collateral of Ishar Singh and was nearly related to him as the plaintiff. A receipt for Rs. 2,500, purported to have been assigned by Kala Singh, was produced. The learned

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1. A I R 1927 Lah 198=100 I C 84=8 Lah 215.

Judge has however refused to allow this item on the ground that Kala Singh's bahi had not been produced. But Kala Singh had admittedly died when the suit was brought, and it appears that his sole heir is Hardit Singh, plaintiff. If this is so, it is idle to blame the vendee for the non-production of the bahi and the proper course was to allow the vendee to lead secondary evidence as to the existence of the debt alleged to be due by Mt. Har Kaur's father-in-law to Kala Singh.

Further enquiry on both the points, is therefore necessary, and I remand the case under O. 41, R. 25, Civil P. C., to the trial Court for determining the following issues: (1) Whether the land in dispute was ancestral of the plaintiff and of Ishar Singh, the husband of Mt. Har Kaur? and (2) Whether necessity for Rs. 2,500 alleged to have been paid to Kala Singh, previous creditor, has been established?

The remand report, containing the findings of both the Courts below, must be submitted to this Court within three months.

R.M./R.K. *Case remanded.*

A. I. R. 1933 Lahore 946

DALIP SINGH, J.

Parbhu—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1549 of 1932, Decided on 27th May 1933, from order of Asst. Sess. Judge, Rohtak, D/- 23rd November 1932.

(a) Criminal Trial — Approvers having ample opportunity to consult each other before becoming approvers—They should not be considered as corroborating each other.

Where approvers had ample time to consult each other before they became approvers and also had opportunities of consultation after they had surrendered themselves to the police :

Held : that they could not, as a matter of judicial prudence, be held to corroborate each other. [P 946 C 2]

(b) Criminal Trial — Identification parade —Magistrate conducting parade should take intelligent interest in proceeding.

A Magistrate who is conducting an identification parade should take an intelligent interest in the proceedings, bearing in mind that the life and liberty of an accused person may depend upon his vigilance and caution, and at the same time, bearing in mind that justice should be done in an identification ; proceedings should not be made impossible for the identifiers who have, after all, as a rule, only got fleeting glimpses of persons they are supposed to identify. [P 947 C 1]

(c) Criminal Trial—Guilt.

The fact that a man makes a false defence does not prove that he is guilty. [P 947 C 2]

Shamair Chand and *Moti Ram* — for Appellant.

Des Raj Sawhney—for the Crown.

Judgment.—Eight of the appellants before me have been convicted by the learned Assistant Sessions Judge, for having taken part in a dacoity in the house of a Mahajan named Jai Dayal, complainant, and one Parbhu, appellant, has been convicted under S. 412, Penal Code, for having received stolen goods. The factum of the dacoity is amply proved by the evidence on the record and has not been disputed before me.

There are two approvers in the case, namely, Dipa and Shera. I consider that it is sufficiently proved on the record that these persons took part in the dacoity, and this fact has also not been seriously contested before me. At the same time it is clear on the record that these approvers cannot as a matter of judicial prudence be held to corroborate each other, as it is evident that they had ample time to consult each other before they became approvers and also had opportunities of consultation after they had surrendered themselves to the police. Bearing these facts in mind, I have to consider whether the evidence of the approvers is sufficiently corroborated against each of the persons who have been held to be the dacoits. I will therefore take each case seperately.

(1) *Mastan.*—There is no corroboration against him of the evidence of the two approvers and giving him the benefit of the doubt I accept his appeal and acquit him.

(2) *Jai Ram.*—The evidence of the approvers against him is corroborated by the fact that on information given by Jai Ram the shop of one Bhiku was discovered and from his shop was recovered a borla which has been duly identified to belong to the complainant. I consider that this is sufficient corroboration of the approvers and I dismiss the appeal of Jai Ram except as to sentence.

(3) *Raja.*—There is no corroboration of the evidence of the approvers against this man. Ram Nath, who is alleged to have identified him in an identification parade, failed to do so in Court. I therefore give him the benefit of doubt and accepting his appeal acquit him.

(4) *Sundla.*—The only corroboration of the approvers against this man is the evidence of identification by Ram Nath. I am not at all satisfied with this evidence, for it is on the record that a parade was held at which Ram Nath failed to identify anybody. Objection was taken to this parade by the police and a second parade was held. The Magistrate who conducted the first parade however denies that there was anything objectionable in the first parade. I should like to point out that a Magistrate, who is conducting an identification parade, should take an intelligent interest in the proceedings, bearing in mind that the life and liberty of an accused person may depend upon his vigilance and caution and at the same time bearing in mind that justice should be done in an identification; proceedings should not be made impossible for the identifiers who have, after all, as a rule, only got fleeting glimpses of persons they are supposed to identify. But this is perhaps a counsel of perfection. It is sufficient in this case to hold that I do not consider the evidence of Ram Nath about the identification of Sundla entirely reliable and giving him the benefit of doubt I accept his appeal and acquit him. I may point out that curiously enough Ram Nath, who was injured in the dacoity, is unable to say which of the dacoits hit him, though he identified four persons as having been concerned in the dacoity.

(5) *Ismail.*—He is identified by one Pir Dan lambardar of the village where the dacoity took place. I do not consider his evidence at all reliable. Giving Ismail benefit of the doubt I accept his appeal and acquit him.

(6) *Chaman.*—He is identified by Ram Nath as well as by Sundar Lal and Jug Lal (P. Ws. 13 and 14). These last two witnesses depose to having seen him shortly before the commission of the dacoity. As the distance of the village of Chaman from the village of the dacoity is 25 miles, I think there is fair reason to believe that Chaman took part in this dacoity. I therefore dismiss his appeal.

(7) *Har Kishan.*—There is no corroboration of the approvers' evidence against him and giving him the benefit of the doubt I accept his appeal and acquit him.

(8) *Bhagwana.*—This man was identified by one Kundan at the first identification parade where all the other witnesses failed to identify any one at all. It is stated that Bhagwana is a bearded man and it was easy to identify him because he was the only man with a beard at the identification parade. The learned Assistant Sessions Judge has missed the point of the argument. In this province it may be regretted, but it is a fact, that overzealous persons concerned in the investigation sometimes drop hints to persons about to identify people in an identification parade. Nothing is easier than to say that the bearded man is the person to be identified and if he is the only man with a beard, the identification obviously becomes a farce. However in the present case, had anything like this happened, Kundan would not have been the only man to identify Bhagwana. I therefore consider that the identification of this man is a good corroboration of the evidence of the approvers and I dismiss his appeal.

(9) *Parbhu.*—The learned Assistant Sessions Judge has himself remarked that if the prosecution evidence stood by itself against Parbhu, it would not be possible to convict him, but he has convicted him on the ground that his own conduct affords a further proof against him. The first proof of evidence in this connection is the production of a bahi by Parbhu which, according to the learned Assistant Sessions Judge is a forgery. I have seen the bahi in question. There is nothing suspicious about the entry in itself and the learned Judge has omitted to note that the money alleged to be paid for purchase of gold has been shown as credited to the son's khata, thus proving that the gold was supplied by Parbhu himself. There is then another bahi which shows that Parbhu purchased some gold on 7th June 1931, i. e., one day after the dacoity from a certain Ram Bilas. Ram Bilas denies that he ever sold any gold and Parbhu says he does not know which Ram Bilas is this. Considering that Ram Bilas is Parbhu's brother-in-law, the explanation of Parbhu is certainly disingenous. But at the same time I do not consider that the fact that a man makes a false defence proves that he is guilty. Other hypothesis can account for the entries and the statements made by Parbhu. I therefore give him the benefit of doubt. I accept his appeal and acquit him. I also set aside the order as regards bahis which should be returned to Parbhu.

As regards sentences, I maintain the sentences of imprisonment passed against all the persons whose appeals have not been accepted, but I set aside the sentence of fine imposed on Jai Ram for which I see no necessity.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 948

ADDISON AND AGHA HAIDAR, JJ.

Secy. of State—Defendant—Appellant.

v.

Mehraj Din and *another*—Objectors—Respondents.

First Appeal No. 1968 of 1925, Decided on 26th June 1933, from order of Dist. Judge, Lyallpur, D/- 27th May 1925.

(a) Land Acquisition Act (1894), S. 18—Case referred to District Judge on objection to award of land acquisition officer—Case remanded to District Court on appeal by some of objectors to High Court—Objectors not taking part in proceedings before District Judge not appealing to High Court are not entitled to intervene on remand—Civil P. C., O. 41, R. 23.

Where a case is referred to the District Judge on objections being raised to the award of the land acquisition officer, and the case on appeal to the High Court by some of objectors is again remanded to the District Court, an objector who has not taken part in the proceedings before the District Judge and those who have not appealed from order of District Judge, are not entitled to intervene as objectors on remand. [P 949 C 2]

(b) Land Acquisition Act (1894), S. 23—Compensation.

A land which has been assessed as a garden cannot also be assessed as an agricultural land. [P 950 C 2]

(c) Land Acquisition Act (1894), S. 23—Building with walls of architectural beauty.

Where a land is acquired which contains walls of architectural beauty, the value of the walls cannot be assessed from that standpoint but only with regard to the materials used. [P 950 C 2]

Carden Noad and *Anant Ram Khosla*—for Appellant.

N. C. Mehra and *Khurshaid Zaman*—for Respondents.

Agha Haidar, J.—There is a mausoleum of Asaf Khan, the brother of the Empress Nur Jahan, at Shahdara,. one of the suburbs of Lahore. It is a typical Mughal building. In the centre is the tomb of Asaf Khan with which we are not concerned. Round about the tomb there is land measuring 13.25 acres 105 kanals, 15 marlas, on which now grow various kinds of trees and the whole is surrounded by four walls, each having an entrance gate.

Under Punjab Government Notification No. 737 dated the 20th November 1915, this area was to be acquired for the purpose of protecting Asaf Khan's tomb. For various reasons, into which it is not necessary to enter, no further steps were taken after the Notification till in 1919 the Collector of Lahore took possession of the land under the provisions of the Land Acquisition Act 1 of 1894. On 18th March 1919, the Land Acquisition Officer made his award in the following terms: (1) The land was valued at the rate of Rs. 40 per kanal; (2) the price of the trees growing on the land was fixed at Rs. 3,500, and (3) the materials of the surrounding wall were valued at Rs. 3,434.

Against this award objections were filed and the case was referred to the District Judge, Lahore for decision. It may be mentioned here that there were three sets of objectors whose names together with their respective interests in the property in question are noted below. (1) Hardial Singh and Gian Singh ½, (2) Bhagwant Singh and Partab Singh—Originally the owners of ½. (3) Sazawar and his brother Muhammad Din. They were originally occupancy tenants of the land. During the course of the land acquisition proceedings, they acquired one-half of the land belonging to the second set and one-fourth share in half of the building, the understanding being that one-eighth of the compensation would go to Sazawar and 3 eighths to Bhagwat Singh and Partab Singh.

It appears that the objections filed by Sazawar and Muhammad Din were not signed by the latter, nor did he put in appearance before the District Judge. On 27th August 1919, the learned District Judge, Mr. Martineau, ordered that the objections would be regarded as those of Sazawar only. While the matter was pending before the District Judge, Muhammad Din never took part in the proceedings. The objections of the three sets of objectors were numbered and registered as three separate suits and were disposed of by the District Judge of Lahore (Lt. Col. Roe) by his judgment dated 7th May 1920, into the details of which it is not necessary to enter.

Against this decision two appeals were preferred to the High Court: one by Hardial Singh and Gian Singh (Civil Appeal No. 2,536 of 1920) and the other by Sazawar (Civil Appeal No. 810 of 1922). It may be noted here that neither Muhammad Din nor Bhagwant Singh and Partab Singh went up in appeal to the High Court. On 9th April 1924 a Division Bench of this Court allowed both the appeals and, setting aside the decision of the Court below, remanded the case for disposal in accordance with law, the parties being allowed to produce evidence in support of all the issues arising in the case.

The cases accordingly came up for disposal before the District Judge, Lahore, Mr. Sewaram Singh). It appears that some time before the decision of the High Court, Partab Singh had died. Applications were made by Bhagwant Singh and the sons of Partab Singh to the District Judge that they may be treated as objectors and their objections may be decided on the merits. An application to the same effect was also made by Muhammad Din. The District Judge held on these applications that Muhammad Din had no locus standi to intervene in the trial of the case after the remand, because he had not taken any part whatsoever in the previous proceedings before the District Judge and had kept himself away from the very outset. He however, allowed the application of Bhagwant Singh and the sons of Partab Singh on the somewhat curious ground that they could have appealed from the decision of the District Judge dated 7th May 1920, and therefore they could be given the benefit of the decision of the High Court.

There was a dispute as to the nature and extent of the title of the various objectors. The land in suit together with the surrounding wall had been granted by Maharaja Ranjit Singh to the predecessors-in-title of the two sets of the objectors, namely, Hardial Singh and his brother Gian Singh and Bhagwant Singh and Partab Singh. After the annexation of the Punjab by the British Government, the question of this grant came up before the proper authorities. Documentary evidence consisting of old sanads was brought to the notice of the District Judge and he held that it was the proprietary rights in the land and the building which has been granted to the grantess, now objectors before the Court, and that wall was also part of the same grant. Later on it was distinctly stipulated that the grantees would be under an obligation to maintain the wall in proper condition and to do the periodical repairs.

The learned District Judge allowed compensation at the rate of Rupees 127-8-0 per kanal for the land, treating it as agricultural land. As regards the trees the District Judge did not accept Rs. 3,500, the assessment of the Land Acquisition Officer who treated the trees as timber, but allowed a sum of Rs. 6,000, his calculations being on the basis of ten years lease money of the fruit crop. As regards the wall and other buildings he rejected the Collector's award of Rupees 3,434 which had been arrived at on the basis of treating the wall as mere rubble and allowed a sum of Rupees 22,000.' It may be mentioned here that in their statement dated 6th March 1919, Hardial Singh and Bhagwant Singh had accepted the sum of Rupees 22,064 only as the valuation of the buildings. On this basis the District Judge made an order awarding various sums to the different sets of objectors before him. Five appeals were preferred to the High Court against the District Judge's award, namely, (1) Civil Appeal No. 1968 of 1925 by the Secretary of State against Mehraj Din and Siraj Din, sons of Sazawar. (2) Civil Appeal No. 1969 by the Secretary of State against Bhagwant Singh and the sons of Partab Singh; (3) Civil Appeal No. 1970 of 1925 by the Secretary of State against Hardial Singh and Gian Singh; (4) Civil Appeal No. 1971 of 1925 by Muhammad Din against the Secretary of State; and (5) Civil Appeal No. 2509 of 1925, by Mehraj Din and Siraj Din, sons of Sazawar, against the Secretary of State.

All these appeals were heard together and would be disposed of by the same judgment. I would first take up the appeal of Muhammad Din (Civil Appeal No. 1971 of 1925). Counsel appearing on his behalf challenged the correctness of the order of the District Judge disallowing his application dated 26th January 1925. In my opinion, the order of the learned Judge was correct in view of the fact that when the reference came before the District Judge and objections were taken by the various parties to the Collector's award Muhammad Din did not take any part in the proceedings. The whole case was disposed of by Lieutenant-Colonel Roe and there were appeals to the High Court, but throughout these proceedings Muhammad Din remained absent. Under these circumstances he was not entitled to intervene as an objector when the case came up for fresh decision before the District Judge. It may also be observed that this appeal fails on another ground which is absolutely fatal. Muhammad Din did not pay the proper court-fee on the memorandum of appeal presented in this Court and when the attention of the counsel appearing on his behalf was drawn to this aspect of the case, he merely stated that the appeal may

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be treated as a petition for revision. This, of course, could not be allowed. The result is that Muhammad Din's appeal fails and I would dismiss it with costs.

I would next take up Civil Appeal No. 1969 of 1925. In my opinion, the first ground of appeal is unanswerable. Bhagwant Singh and Partab Singh did not file an appeal from the decision of Lieutenant-Colonel Roe and as against them it became final. That decision was set aside on appeal as a result of the two appeals filed, one by Sazawar and the other by Hardial Singh and Gian Singh. Bhagwant Singh and the sons of Partab Singh therefore cannot derive any benefit from the order of remand, in the two appeals when they were not before the Court as parties in any one of the two appeals. In my opinion, the case of Bhagwant Singh and the sons of Partab Singh stands, in principle, on the same footing as that of Muhammad Din. They had no locus standi to take part in the proceedings before the District Judge after the order of remand by the High Court. This appeal therefore prevails and I would accept it with costs throughout. This means that the Collector's award stands.

The remaining three appeals (Nos. 1968, 2509 and 1970 of 1925) have some common features and may be dealt with together. There is no dispute now as regards the nature of the interest in the land and the buildings standing thereon. The learned Government Advocate made a statement before the Court during the course of Mr. Anant Ram's argument that the Government did not wish to contest the finding of the District Judge which was to the effect that the Government had really granted proprietary rights in the land in suit to the grantees. As regards the buildings they go with the land on which they are standing with this exception that a condition was imposed upon the grantees to keep the walls in good condition by executing periodical repairs and that they were not to be pulled down. So the matter as regards the title to the land and the walls need not be pursued any further. As regards the assessment of the three items, namely (1) Land, (2) Trees and (3) Walls, I record the following findings:

(1) *Land*.—The District Judge has awarded a sum of Rs. 13,260 as the price of the land. Both parties in this Court have accepted this figure. Therefore this sum would stand as it is.

(2) *Trees*.—The District Judge assessed the value of the trees on an entirely wrong footing. He accepted the annual value of the fruit trees at Rupees 600 per annum and assessed the price of the trees at ten times this figure. This method of calculation is open to the obvious objection that the land has been assessed by the District Judge on the basis of being agricultural. Therefore if the land is treated as agricultural land then it cannot be of much use as a garden. In the same manner if the land is treated as garden it would not be useful as agricultural land because the crops do not thrive in the shadow of the trees. In fact Mr. Mehr Chand Mahajan, who represented the objectors, Hardial Singh and Gian Singh, very properly did not attempt to support the basis on which the District Judge has made the assessment. I have gone through the relevant evidence on the record and, in my judgment, a sum of Rs. 3,500, as the price of trees awarded by the Collector, is reasonable. Therefore the appeals of the Secretary of State as regards the price of the trees would prevail to this extent that a sum of Rupees 2,500 would be cut down from the sum awarded by the District Judge.

(3) *Walls*.—The question of fixing the price of the walls is not free from difficulty. The District Judge has awarded a sum of Rs. 22,000 which was claimed by the objectors. He has made the assessment on the basis of standing buildings which he has described as:

> "substantial ones that have already stood for nearly four centuries and might be depended upon to stand for a similar period further on."

He has further quoted Colnel Roe's remark that:

> "indeed to put such walls as they are would cost a lac at least at Public Works Department rates."

There is no doubt that these walls from an architectural point of view represent best work of the Mughal Emperors of India who were famous all over the world as great builders. The value of these walls from the point of view of the archaeologist and the historian is very great, but this cannot be calculated in money. For our purposes it is only necessary to consider them as thoroughly good walls which serve the object of surrounding the garden and the mausoleum and for the purpose of assessment they should be treated as such. We have made calculations from the materials before us and, in my judgment, the walls and gates shall be treated as first class boundary walls and their value on a generous estimate can be anything between Rs. 5,000 and Rs. 7,500. I would award the outside figure, namely, Rs. 7,500 as the price of the walls and the buildings. Therefore the appeals of the Secretary of State relating to the price of the walls and the buildings would also prevail.

As regards Civil Appeal No. 2509 of 1925 filed by the sons of Sazawar I may observe at the outset that the first three grounds of appeal were not pressed before us for the obvious reason that Muhammad Din was not impleaded as a party to this appeal. There was a slight mistake in the calculations. The share of the sons of Sazawar out of the price of the land comes to Rs. 3,646-8-0 being the 55 per cent of the proprietary rights in the land and not Rs. 2,648-4-0 as awarded by the District Judge. They shall also get a sum of Rs. 497-4-0 being the price of the one-sixth share in the occupancy rights which are 45 per cent of the total amount. Similarly, out of the price of the trees, they shall get 55 per cent on account of proprietary rights, i. e., Rs. 962-8-0, and one-sixth of the 45 per cent on account of occupancy rights, i. e., Rupees 131-4-0. They would further be entitled to Rs. 468-12-0 being the one-fourth share out of the one-half of the price of the walls. This appeal is therefore allowed to this extent that the sum of Rs. 4,745-8-0 awarded to the sons of Sazawar by the District Judge would be augmented to Rupees 5,706-4-0.

Hardial Singh and Gian Singh would be entitled to half of the price of the land, trees and the walls. The decree of the Court below for a sum of Rupees 20,630 in their favour would now be reduced to Rs. 12,130. The respondents in Civil Appeals Nos. 1968 and 1970 of 1925, would get the usual 15 per cent over and above the price awarded to them by this Court. for the compulsory acquisition plus six per cent per annum interest on the total amount calculated from the date of the acquisition up to the date of payment. If any one of the objectors has realised any amount of compensation or interest exceeding the sum awarded by this Court he would be liable to make a refund of it to the Secretary of State. The parties to these appeals (Nos. 1968, 2509 and 1970) shall bear their costs throughout.

Addison, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 951

SHADI LAL, C. J. AND ABDUL QADIR, J.

Kidar Nath — Defendant—Appellant.

v.

Shiv Dayal and *others* — Plaintiffs—Respondents.

Second Appeal No. 2598 of 1927, Decided on 11th May 1933, from decree of Dist. Judge, Ambala, D/- 5th July 1927.

(a) Civil P. C. (1908), S. 100—Finding of fact—New plea in second appeal that it is based on inadmissible evidence cannot be entertained when defect was curable.

A finding of fact was challenged in second appeal on the ground that it was based on inadmissible evidence. If that plea had been taken in the lower Courts the defect was easily curable:

Held: that there was no ground to disturb the finding. [P 951 C 2]

(b) Limitation Act (1908), Art. 120—Suit by cosharer for his share of rents against cosharer in exclusive possession is governed by Art. 120 and not by Limitation Act (1908), Art. 109.

A suit by one cosharer against another cosharer (who is in exclusive possession of the joint property) for his share of the rents of the joint property is governed not by Art. 109, but by Art. 120: *A I R* 1922 *Mad* 150 (*F B*), *Foll.* [P 952 C 1]

Mehr Chand Mahajan, D. C. Ralli and *Mohammad Amin Malik*—for Appellant.

Faqir Chand—for Respondents.

Shadi Lal, C. J.—The Courts below have concurred in holding that the shop, of which the plaintiffs claimed to be co-sharers with the defendant, was the property of one Prabhu Mal, a collateral of the parties; and that the defendant, who was in possession of the property as a co-sharer, is liable to pay to the plaintiffs their share of the rent realised by him. The learned District Judge has examined the entire evidence having a bearing upon the question whether the shop was the exclusive property of Prabhu Mal or belonged jointly to him and Baisakhi Mal, the grandfather of the defendant, and reached the conclusion that Prabhu Mal was the sole owner thereof. The learned counsel for the defendant-appellant seeks to impeach that finding, which is obviously one of fact, on the ground that the learned Judge has relied, inter alia, upon the evidence which being inadmissible should have been excluded from consideration. It is however clear that no such objection was raised in either of the Courts below; and that if it had been raised, the defect could have been easily cured. There is therefore no adequate ground for disturbing in second appeal the finding of fact recorded by the lower appellate Court.

The only question argued on behalf of the appellant is that the suit was barred by time. Now, it is conceded that, if the claim is governed by Art. 89 or Art. 120, Sch. 1, Limitation Act, it is within limitation. The learned advocate however contends that the suit is governed by Art. 109, which prescribed a period of three years for a suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant. Now, there is abundant authority for the proposition that a suit by one co-sharer against another co-sharer (who is in exclusive possession of the joint property) for his share of the rents of the joint property is governed not by Art. 109, but by Art. 120, vide inter alia, *Yerukola* v. *Yerukola* (1), in which the whole of the case law on the subject is exhaustively discussed. The suit has therefore been rightly held to be within limitation.

The appellant having failed on both the points raised before us, his appeal must be dismissed with costs.

Abdul Qadir, J.—I agree.

M.N. *Appeal dismissed.*

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1. A I R 1922 Mad 150=71 I C 177=45 Mad 648 (F B).

* A. I. R. 1933 Lahore 952

JAI LAL AND MONROE, JJ.

Sher Singh Nathu Ram — Assessees—Petitioners.

v.

Income-tax Commissioner, Punjab, Delhi and *North-West Frontier*—Opposite Party.

Civil Misc. Petn. No. 641 of 1932, Decided on 13th July 1933.

*** Income-tax Act (1922), Ss. 25-A and 66 (3) —Whether S. 25-A requires partition by metes and bounds, and whether certain finding of income-tax officer is supported by evidence, are questions of law.**

The questions whether S. 25-A requires actual partition of the family property by metes and bounds as a condition precedent to the recognition of a partition under S. 25-A, and whether a finding of the income-tax officer is supported by any evidence, are questions of law. [P 952 C 2]

H. C. Kumar—for Petitioners.

J. N. Aggarwal and *J. L. Kapur*—for Opposite Party.

Order.—Under S. 66 (3), Income-tax Act, the assessees, Messrs. Sher Singh and Nathu Ram, have made an application that the Commissioner of Income-tax be required to state two questions of law for the opinion of this Court.

Before stating the questions of law propounded by the petitioners it is necessary to state in brief certain facts which appear from the order of the Commissioner. It seems that the petitioners were originally assessed as a joint Hindu family. During the year of assessment they made an application, under S. 25-A, Income-tax Act, to the assessing authority that they had effected a partition of the joint family property. The Income-tax Officer held that there had been no partition of the joint family property and proceeded to assess the petitioners as before.

In the course of the assessment a claim was made that the interest paid by the assessees to certain ladies of their family, who apparently are married to some of the members of the family, on the deposits made by them in the firm should be deducted from the assessment. The Income-tax Officer declined to admit this claim. He was of the opinion that the transactions were bogus ones and that the assessees had not proved by any evidence that the amounts deposited belonged to the ladies, and not to their respective husbands. Two questions therefore arise and they both appear to be questions of law. One is as to the meaning of the word partition as used in S. 25-A, Income-tax Act. The question is whether the word is used in the sense in which it is understood in the Hindu law or whether in order to bring into operation the provisions of S. 25-A a partition of the joint family property by metes and bounds is essential. The second question is whether the Income-tax authority acted on any evidence in this case in reaching the conclusion that the transactions of the deposits of the amounts in the assesses' shop were bogus transactions.

We consequently direct the Commissioner to refer the following two questions for the opinion of this Court: (1) Whether S. 25-A of the Act, requires actual partition of the family property by metes and bounds as a condition precedent to the recognition of a partition under S. 25-A, Income-tax Act? (2) Whether the finding of the Income-tax Officer, that the money deposited with the assessees did not belong to the ladies in whose names it is deposited is supported by any evidence?

The first question is, in our opinion, an important one and it is desirable therefore that on the receipt of the reference the case be heard by a Full Bench if the Chief Justice agrees to this course. We direct that on the receipt of the reference the papers be laid before him for the constitution of a Full Bench. The costs of this petition shall be paid by the Commissioner.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 953

TEK CHAND AND MONROE, JJ.

Amar Singh—Defendant — Appellant.

v.

Imperial Bank of India, Jullunder—Plaintiff—Respondent.

First Appeal No. 1251 of 1931, Decided on 21st December 1932, from decree of First Class Sub-Judge, Jullunder, D/ 30th March 1931.

Provincial Insolvency Act (1920), S. 78 (2)—Debtor adjudicated insolvent—Order set aside on appeal and case remanded — On remand application for adjudication dismissed — Period between order of adjudication and annulment should be excluded in computing limitation in the suit against the debtor—Annulment is not limited to "annulment" under S. 35.

On an application for adjudication by a debtor, an order of adjudication was passed; but the order was set aside on appeal and the case was remitted to lower Court. The application was then dismissed and this order was confirmed on appeal. In a suit against the debtor:

Held: that the period between the order of adjudication and the order setting it aside should be excluded in computing the period of limitation.

Held further: that the word "annulment" should not be restricted to annulment under S. 35 and that the order setting aside the order of adjudication on appeal was an annulment even though the words "set aside" and not "annulled" were used: *A I R* 1931 *Nag* 109, *Dist*: *Bailey* v. *Johnson*, (1872) 7 *Ex* 263, *Ref*. [P 954 C 1, 2]

Badri Das and *Shiv Charan Das*—for Appellant.

A. Majid and *N. S. Gauba* — for Respondent.

Monroe, J.—The first of these appeals No. 1251 of 1931, arises out of a suit to recover the sum of rupees 37,411-4-11 due to the Imperial Bank of India, on a cash credit account. The only issue with which we are now concerned is whether the suit was brought within time, the Subordinate Judge holding it to be within time has given a decree for the amount claimed. The Second Appeal No. 1334 of 1931, arises out of a like claim against the appellant by the Punjab National Bank, Limited, for a sum of Rs. 1,683-4-4. In the first instance the Subordinate Judge decreed this claim also, but on appeal to the District Judge this decision was reversed on the ground that the suit was not within time. From the decision in the first case the defendant, and from the decision in the second the Punjab National Bank, Limited, have appealed to this Court. The defendant debtor was adjudicated insolvent on 17th December 1926, and the debts were proved before the Official Receiver on 28th January 1927. The adjudication order was set aside on 29th October 1928, on appeal to this Court, when Jai Lal, J., made an order in the following terms:

> "The order of adjudication is hereby set aside and the case remitted to the District Judge with direction to proceed with the application in accordance with law."

On 30th April 1930, the District Judge refused the application and an appeal from his order was dismissed on 30th July 1930. It is admitted that if the period between the dates of the declaration of insolvency and the dismissal of the application can be omitted in computation of the period of limitation, the suits are within time. The plaintiffs rely on S. 78 (2), Provincial Insolvency Act, and alternatively on S. 14, Limitation Act, in support of their contention, that in computing the time, the period mentioned must be omitted. S. 78 (2), Provincial Insolvency Act, provides that where an order of adjudication has been annulled under the Act, in computing the period of limitation prescribed for a suit which might have been brought but for the making of the order of adjudication, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded. Counsel for the defendant have argued that in the section the word "annulled" is used in a special sense, being coupled with the words "under this Act," and that an order can be said to be "annulled under the Act" only when a valid order has been made and it has been annulled under one of the express provisions of the Act as, e. g. S. 35. They drew our attention to the fact that a portion of the Act commencing from S. 35, is given a sub-title "Annulment of adjudication" and contended that the meaning of the word "annulled" in S. 78, is controlled by its narrow meaning in the portion of the Act under the sub-title.

In support of this argument the learned counsel has cited *Baliram* v. *Supadasa* (*A. I. R.* 1931 *Nag.* 109), the grounds for the decision in which were that

> **"no order adjudicating the defendant an insolvent was legally passed, but that the application of the plaintiff creditor was dismissed under Section 25 (1), Provincial Insolvency Act, and there-**

fore that there could be no order of annulment passed in the case under S. 35 of the Act."

The facts of the case cited and of the present case are similar and the the passage from the judgment which I have cited seems to justify the contention that that case is an authority for the proposition that where an adjudication is not annulled under S. 35 of the Act, S. 78 (2) has no operation. The decision in *Baliram* v. *Supadasa* (*A I. R.* 1931 *Nag.* 109), has as its basis the finding that no order was legally passed. Where, as in the present case, we find that an order has been made in the matter by a Court of competent jurisdiction although that order has afterwards been set aside on appeal, we cannot say that the order was made illegally: and the fact that the Judge erred either in his findings of law or fact does not affect its validity—if an appeal had not been lodged in time or for some reason had not proceeded, the order would have stood good for all time. I have, therefore, no doubt that we are now concerned with a valid order which has been annulled, though the annulment was effected by an order of this Court on an appeal in which the words "set aside" and not the word "annulled" were used. The only case in which the meaning of the word "annulled" appears to have been considered is *Baily* v. *Johnson* (1), where the same point was raised on S. 81, Bankruptcy Act, 1869. In that case Field, Q. C., for the plaintiff argued that S. 81, which provided that the property of the debtor should revert to him upon annulment of the adjudication did not relate to a case where the order of adjudication was discharged on appeal but was confined to cases under Ss. 28 and 84, the only other sections in the Act where the word "annul" is used: the leading judgment of a Court consisting of Cockburn, C. J., Blackburn, Keating, Mellor, Lush, Brett and Grove, JJ., was delivered by Cockburn, C. J., who said:

> "It is quite clear that S. 81 of the statute applies to the case of a bankruptcy being annulled by whatever means and is not limited in the manner suggested in the argument."

The only material distinction in the wording of the English and Indian Statutes is to be found in the addition of the words "under this Act" in the latter. When the High Court annulled the order of adjudication in the present case, it can have acted only under the Act, it is, indeed, by virtue of the provisions of the Act, and the Act alone, that an appeal can be taken to the High Court. I see no reason whatever for treating the words "under the Act" as equivalent of "under S. 35 of this Act." I may add that on general grounds it is difficult to see why a distinction should be drawn between the effect of the annulment of an order under S. 35 and effect of the discharge of an order by a Court of appeal: in both cases, while the order remains operative, rights of action are affected in the same way, and the results on limitation of suits should be the same. I have no doubt that S. 78 (2), Provincial Insolvency Act, operates on the claims now before us so as to bring them within the period of limitation. Taking this view, I find it unnecessary to consider whether S. 14, Limitation Act, also produces the same result.

I would, therefore, dismiss appeal No. 1251 of 1931, with costs, and allow Appeal No. 1334 of 1931, and give the plaintiffs a decree for Rupees 1,638-4-4 with interest at 6 per cent. from 4th October 1930, the date of the institution of the suit till payment, together with costs in all Courts.

Tek Chand, J.—I agree with the order proposed by my learned brother.

K.S. *Appeal dismissed.*

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1. (1872) 7 Ex 263.

A. I. R. 1933 Lahore 954

JAI LAL AND MONROE, JJ.

Kharaiti Ram — Defendant — Appellant.

v.

Chuni Lal and *others* — Plaintiffs — Respondents.

Second Appeal No. 756 of 1932, Decided on 12th July 1933, from decree of Addl. Dist. Judge, Amritsar, D/- 16th February 1932.

Court-fees Act (1870), Sch. 2, Art. 17, Cls. (iii) and (iv), and Sch. 1, Art. 1—Suit for sale of mortgaged property impleading mortgagor and puisne mortgagee—Decree directing that balance of money after paying off plaintiff mortgagee, be paid to puisne mortgagee—In appeal by mortgagor challenging portion of decree in favour of puisne mortgagee ad valorem court-fee on amount due on puisne mortgage should be paid.

In a suit for sale of mortgaged property, the puisne mortgagee and mortgagor were impleaded. The mortgagor denied the puisne mortgage, but the Court found it to be subsisting, and in the decree, ordered that the balance, after paying off the plaintiff mortgagee should be paid to the puisne mortgagee and the surplus, if any, should be given to the mortgagor. In an appeal by the mortgagor challenging the portion of decree in favour of the puisne mortgagee :

Held : that ad valorem court-fee on amount due on the mortgage should be paid and not merely for a declaration. [P 955 C 2]

Nand Lal—for Appellant.

Dev Raj Sawhney — for Respondents.

Jai Lal, J.—One Basakhi Ram instituted a suit for sale of mortgaged property. Defendant 1 was Khairati Ram, the mortgagor. Defendants 2 to 4 were the purchasers of the property from Khairati Ram after the mortgage. Subsequent to the institution of the suit on their own application defendants 5 to 7, who claimed to be the puisne mortgagees of the same property, were impleaded. Khairati Ram, defendant, pleaded inter alia that the mortgage in favour of defendants 5 to 7 did not exist. The trial court framed an issue: was no mortgage-deed executed in favour of defendants 5 to 7 or whether that mortgage deed did not subsist? After recording the evidence of the parties it is found in favour of defendants 5 to 7, that is to say, it held that the mortgage existed and was enforceable and passed a preliminary decree in the following terms:

> "Decree for Rs. 2,252-4-0 with costs and further interest at the rate of 6 per cent per annum till the realization of the decree under O. 34, R. 4, in favour of the plaintiff against defendant 1. The money to be paid within two months, in default of which one-fourth of the house and one-fourth of the shop mortgaged will be sold, and I further order that if any money is left behind after the satisfaction of the decree of the plaintiff then that money will be first paid to defendants 5 to 7 who are the subsequent mortgagees of the shop in dispute and the surplus money, if any, will be given to the judgment-debtor Khairati Ram."

I should have mentioned that the amount found due to defendants 5 to 7 is Rs. 2,400/-. The decree that was prepared in pursuance of the decree of the trial court follows closely the wording of the judgment as sent out above. The decree of course is in the wrong form, as it should have been as provided in form No. 9 of appendix D Sch. 1, Civil P. C. It does not, however, in my opinion, affect the question which is before us. Against the decree passed by the trial Court the defendant Khairati Ram presented an appeal which substantially was against the decision of the Court about the existence of the mortgage in favour of defendants 5 to 7.. In the grounds of appeal, however, the question of the interpretation of the mortgage deed in favour of the plaintiff mortgagee was also raised. On our pointing out this to Dr. Nand Lal the learned counsel has stated that this ground was "foolishly" taken and he has undertaken to withdraw it and he has actually done so by means of a written application. The appeal was preferred to the District Judge who was of opinion that a court-fee stamp of Rs. 10/- paid by the appellant on the memorandum of appeal was insufficient and that ad valorem court-fee should have been paid by the appellant. The appellant, however, was not prepared to make good the deficiency. The learned Judge, therefore, dismissed the appeal. Khairati Ram has consequently presented this second appeal and the only question before us is whether the decision of the District Judge that ad valorem court-fee should have been paid by the appellant on Rs. 2,400/- is correct.

We have of course now assumed that the appeal before the District Judge was merely against the decision in favour of defendants 5 to 7. Dr. Nand Lal for the appellant has relied upon Art. 17, Cls. (iii) and (vi), Sch. 2, Court-fees Act, and has contended that the relief that he really claims is a declaration that the mortgage in favour of the contesting respondents does not exist. The trial court, however, has directed that out of the sale-proceeds of the property in suit, if anything remains after the satisfaction of the plaintiff's claim, the balance should first be paid to defendants 5 to 7 in satisfaction of their mortgage which has been found by him to subsist. It may be that the whole of the amount due to defendants 5 to 7 may not be realized out of the property in dispute or no part of it may be realized, still there may be the question of the personal liability of the appellant. In any case at present as it stands the decree of the trial court must be interpreted to be a decree for the payment of Rs. 2,400/- to defendants 5 to 7 by sale of the mortgaged property and there can be no manner of doubt that on an appeal from such a decree ad valorem court-fee must be paid. I am unable to distinguish the present case from the case if defendants 5 to 7 had instituted a suit for the sale of the mortgaged property and a decree had been granted to them as prayed for by them. The question of the sufficiency or otherwise of the property mortgaged to satisfy the decree does not affect the question of court-fee. A number of authorities were cited on both sides. None of them, however, really cover the present case though some observations made in them might be useful in deciding the appeal. I do not, however, consider it necessary to discuss those rulings because it appears to me that the matter is so clear that

that it does not require any further discussion.

I would, therefore, dismiss this appeal with costs.

Monroe, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 956

BHIDE AND CURRIE, JJ.

Allah Bakhsh—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 368 of 1933, and Murder Ref. No. 72 of 1933, Decided on 8th June 1933, from order of Addl. Sess. Judge, Jhelum, D/- 28-2-1933.

(a) Evidence Act (1872), S. 26 — Oral confession before Honorary Magistrate is admissible under S. 26 — Criminal P. C. (1898), S. 164.

An oral confession made before an Honorary Magistrate is admissible under S. 26, Evidence Act, even though it has not been recorded according to S. 164, Criminal P. C. : *A I R* 1929 *Lah* 794 and *A I R* 1930 *Lah* 534, *Ref.* [P 957 C 1]

(b) Penal Code (1860), S. 302 — Heinous crime carefully planned and carried out in treacherous and cruel manner—Youth of accused is no ground for mitigation of punishment.

Where the crime appears to be a heinous one, and is carefully planned and carried out in a treacherous and cruel manner, the accused's youth alone cannot be considered to be an adequate ground for mitigation of punishment. [P 957 C 2]

(c) Evidence Act (1872), S. 30—Confession of co-accused cannot be accepted without material corroboration connecting accused with crime—Criminal trial.

The confession of a co-accused stands even on a lower footing than that of the evidence of an accomplice, as it is not a statement on oath and cannot be tested by cross-examination ; and it cannot therefore be accepted without material corroboration connecting the accused with the crime : 4 *Cal* 483 and *A I R* 1919 *Bom* 164, *Ref.* [P 958 C 2]

Din Mohd.—for Appellant.

Sunder Das for *Govt. Advocate* — for the Crown.

Bhide, J.—On the 10th of October last, while Head Constable Fazal Hussain Shah was passing through the bazar at Pind Dadan Khan, he saw the appellants Raghbir Nath and Allabux at the shop of a goldsmith named Niaz Ali. Allah Bakhsh was offering 11 gold ear-rings for sale to the goldsmith. Niaz Ali was questioning Allah Bakhsh as the earrings appeared to be of a a Hindu pattern. The Head Constable's suspicions were aroused and he too made enquiries from Allah Bakhsh but was unable to get satisfactory replies. He was then taken to the police station and arrested under S. 411, I. P. C., under the orders of the Sub-Inspector. The other appellant Raghbir Nath was with Allah Bakhsh when he was offering the gold earrings for sale, but as there was no further evidence against him at the time he was allowed to go to his village Dalwal. The Head Constable also went to Dalwal to investigate the matter as the other appellant Allah Bakhsh also belongs to the same village. During the course of the investigation, Raja Muhammmad Afzal Khan, Honorary Magistrate and Ilaqadar, and others made enquiries from Raghbir Nath as Raghbir Nath had been seen with Allah Bakhsh at Pind Dadan Khan and he then made a full disclosure of the facts relating to the crime. He stated that he had an aunt named Mt. Parbati, who was a widow and used to live in the same compound in which he lived with his father. She was believed to have considerable cash and ornaments. Raghbir Nath proposed to Allah Bakhsh, who is his friend, that they should murder her and rob her of her valuables. They decided to commit the deed on the night of the 4th October during the absence of the father of Raghbir Nath, when the latter was expected to go to Pind Dadan Khan to draw his pension from the treasury. Allah Bakhsh procured a hatchet for the purpose from one Manawar Khan. They also prepared a pit in the untenanted house adjoining the shop of Allah Bakhsh with a view to bury the body of Mt. Parbati after the murder. About 11 p. m., on the night of the 4th October Raghbir Nath and Allah Bakhsh went to the kotha of Mt. Parbati and Raghbir Nath asked her to open the door which she did unsuspectingly. Allah Bakhsh then murdered Mt. Parbati with a hatchet and cut off her ears with a view to take off the earrings. One of the ears was taken by Raghbir Nath and the other by Allah Bakhsh. An anant worn by the deceased woman was also taken by Allah Bakhsh. Some boxes in the house were broken open and a little cash (about Rs. 18/-), and some clothes were taken. The dead body was buried in the pit which had been already prepared as stated above. The house of Mt. Parbati was locked and its key was taken by Allah Bakhsh.

Raghbir Nath pointed out to the police the place where the dead body was buried and it was found there. It was in a high state of decomposition but was still capable of identification and was recognised as that of Mt. Parbati. Enquiries were next made from Allah Bakhsh and he too, produced the anant which had fallen to his share and the key of the lock of Mt. Parbati's kotha, which according to Raghbir Nath had been retained by Allah Bakhsh. The kotha of Mt. Parbati was opened and a bloodstained charpoy, broken boxes etc., were found therein, which corroborated the confession of Raghbir Nath. The earrings which were being offered for sale by Allah Bakhsh were also identified as the property of of the deceased.

Both the appellants made confessions before the Committing Magistrate in which they admitted most of the material facts narrated above except that while Raghbir Nath alleged that the hatchet-blows were given to the deceased by Allah Bakhsh, Allah Bakhsh alleged that he was opposed to the murder and that the fatal blows were given by Raghbir Nath and that he only took the earrings and later on helped in the disposal of the dead body. Both of them, however, retracted their confessions in the Sessions Court, alleging that the statements given before the Committing Magistrate had been made under the pressure of the police. Neither of them produced any evidence in defence.

The assessors unanimously found the appellants guilty and the learned Sessions Judge agreeing with them has sentenced them to death.

There were no eye-witnesses to the crime and the conviction of the appellants rests purely on their retracted confessions and the discoveries made in consequence of the information given by the appellants. The cases of the two appellants stand on a somewhat different footing and must be considered separately. So far as the appellant Raghbir Nath is concerned, it is urged that his oral confession made before Raja Mohammad Afzal Khan, Honorary Magistrate, was inadmissible in evidence as it was not recorded according to the provisions of S. 164, Criminal P. C. This contention cannot be upheld. Although there appears to be some conflict of authority on the point, the Punjab Chief Court as well as this Court seem to have held almost uniformly that such an oral confession is admissible under S. 26, Evidence Act: see inter alia *A. I. R.* 1929 ***Lah.*** 794 and *A. I. R.* 1930 ***Lah.*** 534. It was next urged that the confession must have been made under some promise or inducement and should, therefore, be excluded. But there is no foundation for this suggestion. As a matter of fact, no one knew anything at the time about the murder of Mt. Parbati and none could have thought of putting the long story narrated by Raghbir Nath into his mouth. That story was fully corroborated by the recovery of the dead body of Mt. Parbati at the place indicated by Raghbir Nath, recovery of the key of Mt. Parbati's house and her armlet from Allah Bakhsh and by the discovery of broken boxes, a bloodstained charpoy etc., from Mt. Parbati's house. Raghbir Nath stuck to his confession in the Committing Magistrate's Court. He retracted the confession at the trial and alleged that it was made under pressure of the police, but there is nothing on the record to support the allegation. It may be noted in this connection that this appellant was first examined by the Committing Magistrate on 18th October 1932 and again on 8th November 1932 and in both these statements he confessed the crime. In my opinion these confessions were voluntary and genuine and, though retracted, their truth has been established by ample corroboration. I accordingly hold that the guilt of Raghbir Nath has been amply established by the evidence discussed above. As regads the sentence, it was urged that he is a raw youth aged only about 19, but the crime appears to be a heinous one. It was carefully planned and carried out in a treacherous and cruel manner and I do not think the appellant's youth alone can be considered to be an adequate ground for mitigation of punishment in the circumstances of the case. I would accordingly dismiss his appeal and confirm the sentence of death passed on him.

As regards the other appellant Allah Bakhsh, the evidence against him consists of (i) his own retracted confession, (ii) the retracted confession of the co-accused Raghbir Nath and (iii) the recoveries of the gold earrings, armlet and the key of the lock of the deceased's house from him. Mr. Din Muhammad who appeared for this appellant frankly conceded that the evidence was sufficient to prove his guilt under S. 201, I. P. C., but contended that it did not establish the charge of murder. In support of this contention he urged that this appellant in his own confession sated that he was opposed to the murder and that it was Raghbir Nath who gave the blows to Mt. Parbati which resulted in her death. He only admitted having helped Raghbir Nath in removing the dead body and taking some of the jewellery, his confession cannot therefore support the charge of murder.

As regards the retracted confession of the co-accused, Raghbir Nath, it was urged that that confession was inadmissible as it had not been proved against this appellant as required by S. 30, Evidence Act, and secondly because Raghbir Nath did not inculpate himself so far as the charge of murder was concerned. Lastly, it was urged that the confession of Raghbir Nath was at the best a very weak piece of evidence which could only be taken into consideration along with other evidence and could not legally form the basis of a conviction. The evidence as regards the recovery of the gold earrings etc., was not disputed, but there was no charge of robbery framed against the appellant and therefore it was urged that the appellant could at the most be convicted only under S. 201, I. P. C., on the basis of his own retracted confession along with the evidence of these recoveries.

As regards Allah Bakhsh's own confession, it must be said that he has tried to disclaim all responsibility for the murder. He states that he told Raghbir Nath at the very outset that the woman must not be murdered and when at the last moment Raghbir Nath tried to persuade him to do the deed he refused to have to do anything with it. This statement is probably untrue but it has to be taken as it stands and it cannot be construed as a confession of the charge of murder. The evidence as to the recovery of the armlet and the key of the kotha of the deceased from Allah Bakhsh also cannot obviously support the charge of murder and this fact was not disputed. The only other evidence on which the charge could be sustained is the retracted confession of the co-accused Raghbir Nath. The contention of the learned counsel for Allah Bakhsh that this confession has not been "proved" as required by S. 30, Evidence Act, seems to me untenable. Evidence was led with regard to the confession made by Raghbir Nath before Raja Muhammad Afzal Khan and the confession made before the Committing Magistrate was also tendered in evidence as required by S. 287, Criminal P. C. In the Madras cases relied upon by the learned counsel the confession statements were made by the co-accused only at the trial and did not therefore form part of the prosecution evidence led against the accused. These cases are thus clearly distinguishable. The next contention that Raghbir Nath did not inculpate himself so far as the charge of murder is concerned also seems equally untenable. It is true that Raghbir Nath stated that the hatchet blows were given by Allah Bakhsh but according to his statement they were given in furtherance of the common intention of both and there can be no doubt that Raghbir Nath was according to his own statement guilty of the murder by virtue of the provisions of S. 34, I. P. C.

As regards the last point, there is no doubt that the confession of a co-accused stands even on a lower footing than that of the evidence of an accomplice, as it is not a statement on oath and cannot be tested by cross-examination and that it cannot therefore be accepted without material corroboration connecting the accused with the crime: cf. *Empress* v. *Ashutosh* (1) and *Emperor* v. *Sabit Khan* (2). But in my opinion such corroboration is available in the present case. Raghbir Nath has stated in his confession that he had asked Allah Bakhsh to procure a hatchet for committing the murder and there is evidence on the record that he did procure a hatchet from one Manawar Khan. Allah Bakhsh himself admitted in his statement before the Commmitting Magistrate that he was asked to procure a hatchet and reading his statement as a whole, there can be little doubt that he was asked to get it for the purpose of murdering Mt. Parbati. Although Allah Bakhsh has not admitted having procured the hatchet I see no reason to disbelieve the statement of Manawar Khan in this respect. It was Allah Bakhsh himself who gave the information that the hatchet was borrowed by him from Manawar Khan. The learned counsel for the appellant Allah Bakhsh pointed out a discrepancy between the statement of Manawar Khan and the confession of Raghbir Nath as to the date on which Allah Bakhsh borrowed the hatchet from Manawar Khan. But the statement of Raghbir Nath on this point is not very clear and in any case the discrepancy is not so material as it is not alleged that Raghbir Nath was with Allah Bakhsh when the latter borrowed the hatchet. If Allah Bakhsh were really opposed to the murder he would not have procured the hatchet or would have at least withdrawn, when Raghbir Nath insisted on murdering the woman, but it is significant that he did not do so. In addition to this we have the fact that a pit had been dug for

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1. (1879) 4 Cal 483=3 C L R 270.
2. A I R 1919 Bom 164=51 I C 657=20 Cr L J 497=43 Bom 739.

burying the body in an untenanted kotha adjoining the shop of Allah Bakhsh to which access lay through that shop. If the object was robbery only there could have been no necessity for digging the pit and the circumstances leave no doubt that this pit was dug with the help of Allah Bakhsh. Lastly it must be remembered that Raghbir Nath is a nephew of the deceased Mt. Parbati and he could not have gone to her house with Allah Bakhsh for committing robbery only as he would have been identified by her at once.

In view of the above facts I consider that the confession of Raghbir Nath (which I have held above to be voluntary and genuine inspite of its being subsequently retracted) is sufficiently corroborated in material particulars to bring home the charge of murder to the appellant Allah Bakhsh. I would accordingly uphold his conviction also under S. 302, I. P. C. Allah Bakhsh is older than Raghbir Nath being aged about 26. There are no extenuating circumstances in the case of Allah Bakhsh also. I would accordingly dismiss both the appeals and confirm the sentences of death passed on the appellants.

Currie, J.—I concur.

K.S. *Appeals dismissed.*

A. I. R. 1933 Lahore 959

MONROE, J.

Maya Shah and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 578 of 1933, Decided on 26th July 1933, from order of Sess. Judge, Rawalpindi, D/- 17th March 1933.

(a) Stamp Act (1899), S. 64-A—Proof of intent.

For a conviction under S. 64-A proof of intent to defraud is necessary. [P 959 C 2]

(b) Stamp Act (1899), Ss. 62-B and 64-A—Sanction to prosecute under S. 64-A is not an implied sanction for prosecution under Section 62-B—Collector must consider question of fraud when instituting prosecution under S. 62-B.

The offences under S. 62-B and S. 64-A are not respectively minor and major offences and it cannot be presumed that a sanction to prosecution under S. 64-A is a sanction by implication to a prosecution under S. 62-B. The Collector is required by S. 43 of the Act, when instituting a prosecution under S. 62-B, to consider whether there has been fraud. An express sanction would, no doubt, be evidence that he had considered the question. [P 959 C 2]

(c) Stamp Act (1899), Ss. 62-B and 64-A—Complaint brought under S. 64-A — Before accused can be convicted under S. 62-B his attention must be drawn to such fact—Criminal P. C. (1898), S. 237.

Where a complaint is brought under S. 64-A, before accused can be convicted under S. 62-B, the Magistrate must direct the attention of the accused to the fact that though the complaint was brought under S. 64-A they also stood in jeopardy under S. 62-B. [P 960 C 1]

B. *R. Puri*—for Petitioner.

Anant Ram Khosla—for the Crown.

Judgment.—The accused have been convicted under S. 62 (B), Stamp Act, and sentenced to pay a fine of Rs. 51/- each. The charge brought against them originally was under S. 64 (A) of the Act, or a conviction under which proof of intent to defraud is necessary. The trial Magistrate held that no intent to defraud was established and refused to convict under S. 64 (A) but held that an offence under S. 62 (B) for which no intent is necessary had been established. The Sessions Judge upheld the conviction.

The stamp duty in excess of what was paid at the proper time and the penalty for understamping have been recovered by the Revenue Authorities. I agree with the Trial Magistrate that there is no evidence of an intent to defraud on the part of the accused and this view is strongly supported by the fact that they derived no pecuniary advantage from the fraud if fraud there was, on the part of some other person. Mr. Puri for the accused has raised before me many technical points, in which there is much substance. These, however, I do not propose to discuss. I prefer to decide the case on the broad ground that the accused have been subjected to injunction. The offences under S. 62 (B) and S. 64 (A) are not respectively minor and major offences and it cannot be presumed that a sanction to a prosecution under S. 64 (A) is a sanction by implication to a prosecution under S. 62 (B). The Collector is required by S. 43 of the Act, when instituting a prosecution under S. 62 (B) to consider whether there has been fraud. An express sanction, would, no doubt be evidence that he had considered the question, but when as in the present case no sanction of any kind is proved, it is possible that the question was never properly considered in the light of S. 43, if the Collector had considered the question properly, he might have, indeed, if the Trial Magistrate is correct, he ought to have refrained from instituting this prosecution. The serious defect in the proceedings is the omission by the Trial Magistrate to direct the attention of the accused to the fact that though the complaint was brought under S. 64 (A) they also stood in jeopardy under S. 62 (B), this is required by the Criminal P. C., and is an obviously proper position because the defences to the charges, which are of a different character may be entirely different. Accordingly I think that this conviction was improper and I quash it. No further proceedings will be taken against the accused because on the Magistrate's finding that there was no fraud, there ought never to have been a prosecution.

K.S. *Conviction quashed.*

A. I. R. 1933 Lahore 960

COLDSTREAM AND DALIP SINGH, JJ.

Chanan Mal and *others*—Defendants—Appellants.

v.

Salig Ram and *others* — Plaintiffs — Respondents.

Second Appeal No. 3064 of 1927, Decided on 23rd February 1932, from decree of Dist. Judge, Ambala, D/- 22nd August 1927.

Contribution — Costs recovered by decree-holder from some of defendants—Remaining defendants are liable not jointly but only to extent of their respective shares—Costs.

Where some of the defendants had to pay the costs to the decree-holder and they filed a suit for contribution against the remaining defendants and sought to make them jointly liable:

Held : that they were liable only to the extent of their respective shares. [P 960 C 2]

D. C. Ralli—for Appellants.

Dalip Singh, J.—Lal Chand and Chhotu sued Mt. Manohari and the alienees from her possession of certain properties on the ground that the property belonged to them and not to Mt. Manohari or her father Bishamber Das at all and the alienations made by them were void as against the plaintiffs. The plaintiffs obtained a decree with costs against all the defendants in the High Court. Those plaintiffs then recovered those costs from three of the defendants in that suit. Those three defendants Salig Ram, Ramon and Mt. Banti brought the present suit for contribution against the remaining defendants for the costs recovered by Lal Chand and Chhotu. Some of the defendants admitted liability, others denied it and the trial Court gave a decree against those defendants who had admitted the liability and apportioned the share of the costs payable by them. Mt. Manohari was to pay Rs. 415-13-0, defendants 2 to 7 were to pay rupees 209-3-0 and Parsu, defendants 17, was liable to pay Rs. 908-4-0.

The plaintiffs appealed to the District Judge contending that all the defendants were laible and further that defendants 2 to 7 and Mt. Manohari were jointly liable to pay Rs. 625 and not separately liable to Rs. 209-3-0 and rupees 415-13-0 as ordered by the trial Court. The first contention was withdrawn before the learned District Judge. The second contention was accepted and Mt. Manohari and defendants 2 to 7 were made jointly liable to pay Rs. 625 to the plaintiffs together with the costs on that amount. Parsu remained liable to pay the amount decreed against him with costs on that amount. The plaintiffs' costs in appeal were to be paid by defendants 2 to 7.

Defendants 2 to 7 have now come in second appeal and contend that the order of the District Judge in making them jointly liable along with Mt. Manohari for Rs. 625 is incorrect. It is impossible to ascertain and neither Counsel has been able to tell us how this apportionment was arrived at in the trial Court. It is possible as suggested by the learned Counsel for the appellant that Rs. 415-13-0 represented the relative costs on the property which was still in possession of Mt. Manohari and Rs. 209-3-0 represented the proportionate costs on the property alienated to defendants 2 to 7. The relative proportions, however, were not contested before the District Judge and the only question is whether in such a suit the present plaintiffs are entitled to make all their co-defendants jointly liable or only liable severally to the extent of their shares.

In my opinion there can be only one answer to this question and that is that the defendants can only be liable to the extent of their respectivet shares. The very essence of a suit for contribution is that certain monies have been paid on behalf of each of the defendants and in equity they would only be liable for the proportionate share of the costs so paid on behalf of all. Otherwise the result would be that each defendant could execute his decree for contribution against the most solvent defendant and one defendant or some would be left without remedy against the insolvent defendants. It is true that the present plaintiffs might similarly suffer loss by being unable to recover the proportionate share of costs from some of the defendants but this is the result which flows not from the action of any of the present defendants but from the action of the plaintiffs in choosing to recover the entire costs from one of the defendants.

The result, therefore, is that I would accept this appeal and give the plaintiffs a decree for Rs. 209-3-0 against defendants 2 to 7 and a decree for Rs. 415-13-0 against Mt. Manohari. The parties will bear their own costs throughout.

Coldstream, J.—I agree.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 961

DALIP SINGH, J.

Mushtaq Hussain—Defendant—Appellant.

v.

Hakim Mohammad Hassan Khan and *another*—Plaintiffs—Respondents.

Second Appeal No. 1623 of 1932, Decided on 21st June 1933, from decree of Dist. Judge, Delhi, D/- 11th June 1932.

(a) Civil P. C. (1908), S. 2 (2)—Order dismissing cross-objections is decree.

An order dismissing the cross objections would amount to a decree within the meaning of Section 2 (2) if it had been embodied in the decree as it ordinarily is. An appeal was dismissed before the cross-objections were heard by an oversight and the dismissal of the cross-objections was not included in the decree :

Held : that it would be mere waste of time to order the District Judge to incorporate the dismissal of the cross-objections in the decree and then extend time for the appellants to come in appeal and that an appeal did lie from that order. [P 961 C 2]

(b) Words and Phrases—Khairat.

Khairat under Mahomedan jurisprudence might include all kind of things which would not be covered by the word "charity" according to the English system of jurisprudence. [P 962 C 1]

Kishan Dyal—for Appellant.

Mohammad Monier—for Respondents.

Judgment.—One Roshanara Begam died about 1874 and it is alleged that she by an oral will dedicated all her property as Ilallah. After her death there was a dispute as to the validity of this oral will between her sister Badshah Begam and her brother Badrud Din Khan. The parties referred the dispute to one Hakim Salimud Din who made an award dated 19th October 1874 registered on 5th November 1874. That award recited that Mt. Roshanara Begam had made a will in favour of her real sister Mt. Badshah Begam and had laid down that the income should be utilised for charitable purposes and that after the death of Mt. Badshah Begam her descendants would be bound to act as trustees of this will. The arbitrator gave two shares of the property to Mt. Badshah Begam—one share as an heir by inheritance and the other in terms of the will and one was given to Badrud Din Khan. The plaintiffs representing the Mohammadan community of Delhi brought the present suit alleging that certain property belonging originally to Mt. Roshanara Begam was all wakf Ilallah and asking for a declaration to that effect. The defendants appeared and disputed the plaintiffs' allegations so far as certain property was concerned and admitted the plaintiffs' allegations so far as the property called Mahal Sarai was concerned alleging that it was wakf but they contended that the wakf was a private wakf and the plaintiffs' had, therefore, no locus standi. The Court then framed two issues of which only one need concern us:- Is there a public trust in respect of the properties in suit? Qua two properties it held that there was no trust and dismissed the plaintiffs' suit; qua the property Mahal Sarai it held that there was a public trust for religious and charitable purposes and decreed the plaintiffs' suit.

The plaintiffs appealed to the learned District Judge and the defendants cross-objected with reference to the property known as Mahal Sarai. The plaintiffs' appeal was withdrawn and leave to institute a fresh appeal was refused. The learned District Judge dismissed the cross-objections holding that there was a dedication to public for religious and charitable purposes. He rejected the contention that the wakf was void for uncertainty.

The defendants have now come in second appeal and a preliminary objection has been raised by the learned counsel for the respondents that no second appeal lies. He contends that the cross-objections were no doubt dismissed by an order but that order was not embodied in the decree and hence no appeal lies because the order dismissing the cross-objections is not an appealable order and is also not a decree. I consider, however, that the order dismissing the cross-objections would amount to a decree within the meaning of S. 2 (2), Civil P. C., provided it had been embodied in the decree as it ordinarily is. It appears that as the appeal was dismissed before the cross-objections were heard by an oversight the dismissal of the cross-objections has not been included in the decree but it would be mere waste of time to order the District Judge to incorporate the dismissal of the cross-objections in the decree and then extend time for the appellants to come in appeal. I therefore repel the preliminary objection.

Passing to the merits, various points were urged by the learned counsel for the appellants but it is unnecessary to go into all of them as I consider that the appeal must succeed on the point raised by him that there is nothing on the record to show that the original bequest was a public, charitable and/or religious trust. The plaintiffs only alleged that the property was wakf Ilallah and ask for declaration to that effect. The defendants had objected all along that the property might be wakf but it was wakf khas as distinct from wakf-i-am. Accordingly an issue was fixed. So far as the oral evidence goes the trial Court did not accept it and it does not show that the trust was a public trust at all. The trial Court relied on a recital in the award but this merely uses the word khairat. Now khairat under Mohamadan Jurisprudence might include all kind of things which would not be covered by the word "charity" according to the English system of Jurisprudence. In any event the very use of the words "public charitable trust" in S. 92 shows that the Legislature draws some distinction between "public charitable trust" and "private charitable trust" and there is nothing here to show from the recital in the award whether the purposes were public or private. Further I doubt whether the mere recital in the award could be used as evidence to prove the original nature of the oral will propounded as having been made by Mt. Roshanara Begam. The learned District Judge in dismissing the cross-objections stated that all that was argued before him was that as the Mutwalli was a member of the founder's family the trust was a private trust. He rightly rejected this contention and merely proceeded to say that the dedication was for a public religious charitable trust. I do not find anything on the record to support this finding and I therefore accept the appeal and hold that the plaintiffs have not proved that they have any locus standi to bring this suit.

The result is that the plaintiffs' suit is dismissed with costs throughout.

K.S. *Appeal accepted.*

S. N. DAR, B. A. LL. B.,
Vakil High Court.
SRINAGAR (Kashmir)

A. I. R. 1933 Lahore 962

TEK CHAND, J.

(Firm) Ramji Mal-Gordhan Das — Plaintiffs—Appellants.

v.

Bela Ram and *another*—Defendants—Respondents.

Second Appeal No. 1732 of 1932, Decided on 29th June 1933, from decree of Dist. Judge, Delhi, D/. 8th August 1932.

(a) Stamp Act (1899), Art. 1 — Held on facts that document was not acknowledgment.

A document purported to be a letter written by the defendant to the plaintiff firm and contained references to the dealings in question as well as to certain other transactions. The final words in the document that the letter had been written so that it may remain as a sanad and might be of use in time of need referred to the other transactions:

Held: that it was not an acknowledgment within the meaning of Sch. 1, Art, 1 and was admissible in evidence even though unstamped: *A I R* 1924 *Mad* 352, *Appl.* [P 296 C 3]

(b) Interest Act (1839), S. 1—Interest.

In the absence of an agreement or mercantile usage to pay interest, a claim for interest cannot be allowed. [P 963 C 1]

Achhru Ram—for Appellants.

R. C. Manchanda—for Respondents.

Judgment.—On 3rd October 1929, the plaintiffs brought a suit against Bela Ram and his son Brij Lal for recovery of Rs. 1,436 alleged to be due on foot of dealings between the plaintiffs and the firm Bela Ram-Brij Lal from 25th October 1925 to 26th August, 1929. It was alleged that the firm was owned by the defendants, Bela Ram and Brij Lal and that, on the dealing in question, a sum of Rupees 1,039-6-3 was due, on which Rupees 396-9-9 was payable as interest at 12 per cent per annum. Bela Ram denied that he was a partner in the firm Bela Ram-Brij Lal which he pleaded was owned exclusively by his son Brij Lal. Both the Courts below have upheld this plea and the plaintiffs do not claim any relief against Bela Ram in the appeal.

Brij Lal, defendant 2, admitted that his firm had dealings with the plaintiffs. He also admitted that on 24th May 1928, the accounts were gone into and Rs. 725 were found due by him to the plaintiffs, but pleaded that on that date the account was squared on his handing over to the plaintiffs goods worth Rs. 400 and certain jewellery. In support of this allegation he relied on a statement made by Gordhan Das (who was one of the members of the plaintiff firm) in another case on 19th June 1928.

In answer to these pleas the plaintiffs produced three parchas, Exs. P-X., P-Y. and P-Z., containing certain calculations and a letter, Ex. P-1, purporting to be by Brij Lal to the plaintiffs on 28th December 1928 and reciting the fact that Rs. 934-8-9 was due by him to them. Brij Lal admitted that Exs. P-Y. and P-Z., and all the entries in P-X., except the total and date, were in his hand-writing. He however denied his signatures on Ex. P-1 and reiterated that nothing was due by him on the date of the suit. The learned District Judge has held that Ex. P-1 is an acknowledgment within the meaning of Art. 1, Sch. 1, Stamp Act, and being unstamped, is not admissible in evidence. With regard to the alleged signatures of Brij Lal on this document, the learned Judge, disagreeing with the finding of the trial Court expressed his opinion that it had every appearance of being genuine, though he did not record a definite finding on this point. As however he had held that the document, Ex. P-1, was not admissible in evidence and, if it were excluded, the remaining evidence on the record was not sufficient to support the plaintiffs' claim, the learned Judge dismissed the suit.

On second appeal, the first contention raised on behalf of the plaintiffs is that Ex. P-1 has been wrongly held to be inadmissible. After examining the document and hearing both counsel at length, I am of opinion that this contention is well-founded and must prevail. The document purports to be a letter written by the defendant to the plaintiff firm and contains references to the dealings in question as well as to certain transactions relating to the purchase of bamboos with which we are not concerned in this litigation. The final words in the document "that the letter has been written so that it may remain as a sanad and may be of use in time of need" obviously refer to the transactions relating to bamboos, and do not appear to have any connection with the dealings in dispute. The test as to whether a particular document is an acknowledgment, within the meaning of Art. 1, Sch. 1, Stamp Act,, has been laid down in *Chandick* v. *Anant Lal* (1) and numerous other authorities, and applying that test to the document in question there can be no doubt that it is not an acknowledgment, and has been wrongly excluded from evidence. (After discussing the evidence as to genuineness of the signature, and holding it to be genuine, the judgment proceeded). I hold therefore that Rs. 934-8-9 was due by the defendant to the plaintiffs on the date above-mentioned. In addition to this amount they claimed other sums on account of certain alleged subsequent transactions, but of these there is no satisfactory proof on the record and this claim must be disallowed. The plaintiffs have claimed interest at 12 per cent per annum on the aforesaid item, on the strength of an oral agreement and mercantile usage. But no such agreement or usage has been proved and therefore this claim also cannot be entertained.

I accept the appeal and pass a decree for Rs. 934-8-9 in favour of the plaintiffs against Brij Lal, defendant 2. Having regard to all the circumstances of the case I leave the parties to bear their own costs throughout. The cross-objections filed by the respondent necessarily fail and are dismissed.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 963

JAI LAL AND ABDUL RASHID, JJ.

Khem Singh and *others*—Defendants—Appellants.

v.

Mangal Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 1417 of 1931, Decided on 23rd May 1933, from decree of Senior Sub-Judge, Amritsar, D/- 13th June 1931.

Custom (Punjab)—Non-proprietor — Sale of house by non-proprietor occupant to some of proprietors in village—Vendees are entitled to occupy house as co-sharers in village subject to adjustment of area at time of partition.

Although there is a custom that a non-proprietor is ordinarily incompetent to sell the site occupied by him, still where the vendees are proprietors in the village they are not liable to be ejected, because one of the several proprietors of the common land is entitled to appropriate a portion of such land for his own use, provided, in doing so, he does not reduce the area required for the common purposes of the village so as to make the remaining area unfit or insufficient for such purposes, or provided he does not appropriate for his own use land which has been set aside by the village for a particular purpose so as to divert it from the purpose. Hence where a non-proprietor occupant sells his house to some of the proprietors in the village the vendees are entitled to occupy the house, i. e., the land and the materials as co-sharers in the village, but subject to the adjustment of the area claimable by all the proprietors

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1. A I R 1924 Mad 852=74 I C 1029=46 Mad 948.

S. N. DAR, B. A. LL. B.
Vakil High

in the village on partition whenever it takes place: *A I R* 1926 *Lah* 506 ; *A I R* 1928 *Lah* 530 and *A I R* 1930 *Lah* 862, *Rel on* ; *A I R* 1921 *Lah* 157 and *A I R* 1927 *Lah* 197, *Dist.* [P 964 C 2]

Mohammad Amin—for Appellants.
Devi Das—for Respondents.

Jai Lal, J.—This case was originally heard by a learned Judge in Chambers of this Court and has been referred by him for decision to a Division Bench. We have heard Mr. Mohammad Amin for the appellants and Mr. Devi Das for respondent. The facts are these:-

A non-proprietor occupant of a house sold it to three men who are proprietors in the village. The respondent, who is one of the proprietors of the village, instituted a suit for possession of the land and the house on the ground that the sale was invalid. He alleged that his ancestors had given the house to non-proprietor who had sold it and, therefore, he was not entitled to sell it and that it reverted to him, the plaintiff, on its illegal sale. It was alleged that the sale by a non-proprietor of the house including the land occupied by him is invalid by custom and, therefore, the vendees were liable to be ejected. The vendee defendants alleged that there was a special custom in the village which entitled the non-proprietors to sell the houses occupied by them.

The trial Court held that there was no such special custom as was alleged to exist by the defendants and that the plaintiff had not proved that the house had been given to the vendor non-proprietor by his ancestors, but it held that according to the custom prevailing in this province, a non-proprietor was not entitled to alienate the house in his possession and the land on which it stands and, therefore, the sale in this case was invalid. He consequently granted the plaintiff a decree for possession of the land and directed the vendee-defendants to remove the materials of the house purchased by them. Against this decree an appeal was preferred to the Senior Subordinate Judge who has upheld the decree of the trial Cout. Consequently the vendees have preferred this second appeal.

A preliminary objection is taken by Mr. Devi Das on behalf of the respondent that the appeal is not competent without a certificate under S. 41, of the Punjab Courts Act because it is contended that the appellants seek to establish a custom which is opposed to the general custom of the province that a sale of the site of his house by a non-proprietor is invalid and that the vendee is liable to be ejected therefrom. The appellant, however, does not contest the validity of the general custom. On the other hand, his case is that though it is true that there is a custom that a non-proprietor is ordinarily incompetent to sell the site occupied by him, but in this case the vendees being proprietors in the village are not liable to be ejected, because another rule of law, which does not owe its existence to custom, must prevail and this rule is that one of the several proprietors of the common land is entitled to appropriate a portion of such land for his own use, provided, in doing so, he does not reduce the area required for the common purposes of the village so as to make the remaining area unfit or insufficient for such purposes, or provided he does not appropriate for his own use land which has been set aside by the village for a particular purpose so as to divert it from that purpose.

This rule is well recognised in this province as would appear from *Amar Singh* v. *Jat Mal* (1), *Raja Singh* v. *Daulat Ram* (2), *Mota* v. *Puran* (3), all judgments of Judges of this Court sitting in Chambers. There are some cases which it is claimed support the respondent's contention but the law as stated by me and the cases cited by the learned counsel are easily distinguishable from the present case. In *Manji* v. *Ghulam Mahomed* (4), it was remarked that one of the several owners could not appropriate shamilat land or a portion thereof for his own purpose so as to make the remaining land unfit for the purpose for which it was reserved. In *Sultan Mahomed* v. *Surkhru Khan* (5) the sale was originally by a non-proprietor to a proprietor but the latter had transferred it to a non--proprietor and it was held that the vendee was liable to be ejected.

The appellants, therefore, do not seek to attack or establish any custom on this second appeal, but, recognising the custom relied upon by the respondent, they say that the relief which should be given to them is different to what has been given by the trial Court. It is contended that the decree should be for joint possession of the land, but there should be no direction for the removal of the materials of the house as the vendees are entitled to occupy the house, i. e., the land and the materials as co-shares in the village. This

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1. **A I R 1926 Lah 506=94 I C 995.**
2. **A I R 1928 Lah 530=108 I C 183.**
3. **A I R 1930 Lah 862=122 I C 107.**
4. **A I R 1921 Lah 157=61 I C 415=2 Lah 73.**
5. **A I R 1927 Lah 197=100 I C 452.**

contention has force. It must, however, be clearly understood that the vendees can occupy the land as co-shares only subject to the adjustment of the areas claimed by all the proprietors in the village on partition whenever it takes place.

A contention was raised by the respondent's counsel that no opportunity was given to his client to prove that in this particular case the sale of the site would have reduced the area of the remaining land so as to injure the rights of the other village proprietors. This however, cannot obviously be the case because the appellants have not appropriated to their use a vacant site; on the other hand a house already exists on it which will be occupied by the vendees instead of the vendor. In my opinion, therefore, there is no force in the preliminary objection and, on the merits of the appeal the view taken in the three cases cited by me must be followed and the decree of the Courts below modified. There will be no direction for the removal of the materials by the vendees in this case who will be entitled to occupy the land on which the house stands as co-sharers in the village and the materials of the house as full owners. In other words there will only be a decree for joint possession of the site of the house in favour of the respondent as representing the village proprietary body. The respondent shall pay costs of appellants in this Court.

Abdul Rashid, J.—I agree.

K.S. *Decree modified.*

A. I. R. 1933 Lahore 965

HARRISON AND AGHA HAIDAR, JJ.

Abdul Hamid Khan—Appellant.

v.

Punjab National Bank, Ltd., Rawalpindi and *another*—Respondents.

First Appeal No. 1215 of 1926, Decided on 28th February 1933, from decree of Senior Sub-Judge, Rawalpindi, D/- 25th January 1926.

Evidence Act (1872), S. 92 — Evidence to vary terms of written contract —Promissory Note.

One of the executants of a promissory note cannot be allowed to let in evidence to the effect that he signed the promissory note only as a surety : *A I R* 1932 *Cal* 328, *Rel on* ; 8 *C W N* 101 and 18 *I C* 696, *Ref.* [P 965 C 2]

***Nand Lal* and *Shamiar Chand* — for Appellant.**

***Hargopal, Balkishen Mehra* and *Nihal Singh*—for Respondents.**

Agha Haidar, J.—The Punjab National Bank, Limited, Rawalpindi, brought a suit against three individuals, Abdul Hamid Khan, Chaudhri Dharam Das and Mr. Deane, claiming Rupees 10,818-6-0 on a promissory note for Rs. 10,000 and interest. The defendants admitted execution, the promissory note being a straightforward and simple one by which they all bound themselves equally to pay the money, Defendant 3 pleaded that he signed as surety and not as a principal and he was entitled to prove the condition precedent by which his position as such was assured. Defendant 2 absented himself and there is a decree ex parte against him.

The trial Court held that defendant 3 could prove the separate condition precedent under S. 92, Evidence Act, and gave a decree against defendant 1 as principal and defendants 2 and 3 as sureties, the finding apparently being that it was impossible for defendants 2 and 3 to be principals in face of the evidence regarding the preliminaries as concerned both of them. The principal defendant Abdul Hamid Khan now appeals claiming that all three defendants should be made jointly and severally liable inasmuch as the terms of the promissory note have not drawn a distinction between them.

The trial Court has relied upon certain Rangoon authorities: *Maneckjee, J. M.* v. *Maung Po Han* (1), *A. I. R.* 1924 *Rang*. 360 and *Vellian Chetti* v. *Woomily Viramah* (2), these being all Single Bench decisions of the Rangoon High Court. As against these there is not only a reported ruling, *Maung Ko Gyi* v. *U Kyaw* (3), to the contrary but also the authority of both the Calcutta and Madras High Courts in Division Bench rulings. These are to be found in *Narasimhamurti* v. *Ramaswami* (4) which relied upon *Harek Chand* v. *Bishan Chandra* (5), the ruling frequently quoted and relied upon subsequently—and very recently there has been a considered judgment of the Calcutta High Court on the point published as *Radha Kissen Chamaria* v. *Durga Prasad* (6), in which the Rangoon and Calcutta authorities have all been considered, and it has been reaffirmed that evidence is not admis-

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1. A I R 1925 Rang 83=84 I C 1011=2 Rang 482.
2. (1915) 29 I C 760 (F B).
3. A I R 1927 Rang 199=103 I C 79=5 Rang 168.
4. (1913) 18 I C 696.
5. (1904) 8 C W N 101.
6. A I R 1932 Cal 326=148 I C 159=59 Cal 106.

sible, as contended by defendant 3, to vary the terms of the written contract.

The appellant's appeal must therefore succeed on the point of liability of defendants 2 and 3. Nothing has been urged to show that any reasons exist for fixing instalments and this portion of the appeal must therefore fail. The result is that the appeal is accepted in so far as a decree is passed against all three defendants jointly and severally for recovery of Rupees 10,818-0-6 and costs in the trial Court. The costs of the appellant will be paid by respondents 2 and 3.

Harrison, J.—I concur.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 966

SHADI LAL, C. J. AND ABDUL QADIR, J.

Jaswant Singh—Plaintiff—Appellant.

v.

Bhana and *others*—Defendants — Respondents.

Second Appeal No. 2053 of 1928, Decided on 17th May 1933, from decree of Addl. Dist. Judge, Ferozepore, D/- 17th March 1928.

(a) Custom (Punjab)—Alienation —Custom or personal law—Test to be applied in determining such question indicated.

One of the most important tests to be applied in determining whether a particular caste is or is not governed by agricultural custom is to ascertain whether or not they form a compact village community, or at least, a compact section of the village community. If they do so, the presumption is strongly in favour of the applicability of custom. And once this presumption has been established, the onus is shifted on to the party which relies on personal law : *A I R* 1923 *Lah* 557 and *A I R* 1931 *Lah* 637, *Rel on.* [P 968 C 1]

(b) Custom (Punjab)— Alienation—Khatris of village Jhanjian, Ferozepore District, are governed by custom.

The Khatris of village Jhanjian in Ferozepore District are governed by agricultural custom in matters of alienation : *Case law reviewed.* [P 968 C 2]

Achhru Ram for *Badri Das* — for Appellant.

Abdul Qadir, J.—The suit that has given rise to this second appeal was bought by Jaswant Singh, minor son of Jagir Chand, defendant 1, for a declaration that the alienation by mortgages in respect of 230 kanals 3 marlas of land in Mauza Jhanjian, tahsil Ferozepore, by defendants 1 and 2 in favour of defendants 3 and 4 was without consideration and legal necessity and should not affect the rights of the plaintiff after the death of defendants 1 and 2, his father and uncle. The trial Court held that the property was ancestral qua the plaintiff and the alienation could be contested by him, because though the plaintiff and his father and uncle were Khatris by caste, he had succeeded in proving circumstances leading to the presumption that they were governed by agricultural custom. It is also held that the suit was not shown to be collusive. On going into the question of consideration and necessity for the two mortgages involved in the suit, one for Rs. 8,000 and another for Rs. 800, the trial Court came to the conclusion that necessity and consideration was proved for the sum of Rs. 2,060 only, with regard to the first mortgage, and that the second mortgage was without consideration and necessity. It declared therefore that the mortgages shall have no binding force on the plaintiff except for Rupees 2,060 on account of the first mortgage. Half the costs were allowed to the plaintiff and his suit was decreed in the above terms. The mortgagees, defendants 3 and 4, appealed against this decree to the Additional District Judge Ferozepore, who held that the plaintiff had failed to prove that his family was governed by agricultural custom. Examining the questions of consideration and necessity in the light of Hindu Law the learned Additional District Judge found that only an item of Rs. 619 out of Rs. 8,000 paid for the first mortgage remained unproved. He dismissed the plaintiff's suit with regard to the mortgage of Rupees 800 but converted the mortgage for Rs. 8,000 to one for Rs. 7,381 as regards the interest of the plaintiff and ordered him to pay five-sixths of the costs of the defendants throughout. Against this decision the plaintiff filed a second appeal in this Court, which came up for hearing before Dalip Singh, J., who has referred the case for decision to a Division Bench, as the matter was important and the rulings on the point relied on by the counsel for the appellant required a careful examination. The case for the appellant has been argued before us by Mr. Achhru Ram and that for the respondents by Mr. Azim Ullah.

The ancestral nature of the property is not in dispute and the only question argued before us is whether the Khatris of village Jhanjian in Ferozepore district, are governed by Hindu Law or have adopted, what is commonly known agricultural custom, in matters relating to alienation of land. Both sides admit that in case of Khatris, or other high caste Hindus, the initial presumption is that they are governed by their personal law, but it is contended on behalf of the appellant that the initial presumption has been rebutted in this case and that there were sufficient circumstances shifting the onus to the other side to prove that in spite of those circumstances the Khatris of Jhanjian were governed by Hindu Law.

The history of the village, as contained in the settlement record of 1887-88, shows that the village Jhanjian was founded by Jhanjian Khatris and bears their name. This was early in the 18th century. It is also in evidence that the Khatris of this village follow agriculture as a profession. It is noted in the judgment of the trial Court that not a single instance is quoted of any member of this class of Khatris having adopted any other profession than agriculture. It is also shown that the Khatris in this village cultivate land with their own hands. The lambardars of the village appear to have been drawn from this class and Jagir Chand mortgagor, is himself a lambardar. They own about three-fourth of the area of the whole village and 14 out of 19 families belonging to the village are Jhanjian Khatris. The trial Court found that the Jhanjian Khatris formed a compact village community, in spite of the fact that about one-fourth of the population belonged to other castes such as Banias, Brahmans and Aroras. The findings of the trial Court, on the points referred to above, are, on the whole, accepted by the Additional District Judge as correct, but he is of the opinion that, in the absence of any instances proving that agricultural custom was followed by the Khatris of Jhanjian, the facts relied on by the plaintiff did not necessarily lead to the presumption that the Khatris of Jhanjian were governed by custom and did not follow their personal law. In coming to this conclusion he has been particularly influenced by the fact that there was a large number of alienations among the Khatris of Jhanjian which were not shown to have been challenged.

The real question for decision in the case before us is whether on the facts found, the plaintiff can be said to have discharged the onus placed on him by the initial presumption that high caste Hindus are governed by Hindu Law, unless the contrary is shown. I may say at once that no hard and fast rule can be laid down that would be applicable to all cases of this nature. The authorities cited before us dealing with high class Hindus, such as Brahmans or Khatris, in various districts of the Punjab, cover a wide range, and there are among them cases, in which people of these classes have been held to be governed by custom. At the same time there are other cases in which it has been found that, in spite of being engaged in agriculture or possessing some of the characteristics peculiar to agriculturist classes, such Hindus follow Hindu Law. Among the authorities to which we have been referred by the counsel for the appellant the following may be mentioned: *Devi Ditta Singh* v. *Dropti* (1), *Daswandi* v. *Krishna Dev* (2), *Jai Ram* v. *Sardar Singh* (3), *Mt. Ishar Devi, etc.* v. *Bindraban* (4), *Hira Nand* v. *Hayat Mohammad* (5), *Prem Singh* v. *Darbara Singh* (6), and *Genda Singh* v. *Dasaundha Singh, A. I. R.* 1931 *Lah.* 637. Counsel for the respondents, on the other hand, relies mainly on: *Harnam Singh, etc.* v. *Mt. Hardevi* (7), *Labh Singh, etc.* v. *Gurcharan Singh* (8), *Lachhman Das* v. *Ganga Ram* (9), *Salig Ram* v. *Bawhawa* (10) and *Sundar Singh* v. *Sundar Singh* (11). I shall take up all these cases in the order cited above.

Case No. (1), cited on behalf of the appellant, related to Brahmans of Rawal village in Rawalpindi tahsil. It was held that in matters of succession Brahmins of Rawal were governed by the general rules of agricultural custom and not by Hindu law. The main reason for decision in this ruling was that this village was owned by Brahman agriculturists, whose main occupation was agriculture. This decision however is not very helpful as the initial presumption in favour of Hindu Law was not recognised in this decision.

Case No.. 2 concerned Brahmans of the village Dharmsala in Hoshiarpur District, who were held to be governed by the agricultural custom in matters of alienation. The decision was based on the facts that the village was founded by the ancestors of the parties, that

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1. (1909) 56 P R 1909=2 I C 940.
2. (1911) 34 P R 1911=9 I C 841.
3. A I R 1914 Lah 302=26 I C 512=23 P R 1914.
4. (1915) 5 P R 1915=26 I C 886.
5. (1921) 64 I C 180.
6. A I R 1923 Lah 557=72 I C 775.
7. (1911) 43 P R 1911=10 I C 365.
8. (1913) 54 P R 1913=19 I C 780.
9. (1921) 64 I C 264.
10. A I R 1923 Lah 501=73 I C 759=4 Lah 254.
11. A I R 1922 Lah 431=66 I C 45.

the Brahmans constituted a compact community and tilled the land with their own hands. There was an additional reason that there were restrictions on the powers of alienation of land, provided for in the Wajibularz of the village. The third case relates to Brahmans of Dheriala Saigan in Rawalpindi District. In that it was decided that Brahmans were governed by custom in matters of alienation and that one of the most important tests in determining whether a certain caste was or was not governed by agricultural custom was that they formed a compact village community or at least a compact section of the village community. In case No. (4), which related to Sobti Khatris of Alimgarh in Gujrat District, it was recognised that the Khatris followed agricultural custom in matters of inheritance. This village was founded by a Sobti Khatri and he and his descendants had continued in occupation ever since. The lambardar of the patti was a Sobti Khatri and the Sobtis owned 412 out of 1592 ghumaons of land in the village and depended mainly on agriculture. This case is very similar to the case before us.

In case No. 5, Gujral Khatris of Golpur in Jhelum District were held to be governed by custom in matters of alienation on the ground that they formed a compact village community, that almost all of them earned their living by agriculture and tilled the soil with their own hands. It was held that in cases where these circumstances were proved, the burden of proof lay on the party asserting that they were not governed by custom to prove its assertion. Case No. (6) is a Division Bench ruling of this Court, in which Kalals of a village in Sialkot District, were the party concerned and were held to be governed by custom. It was laid down by the learned Judges who decided this case, that one of the most important tests to be applied in determining whether a particular caste is or is not governed by agricultural custom is to ascertain whether or not they form a compact village community, or, at least, compact section of the village community. If they do so, the presumption is strongly in favour of the applicability of custom. The Judges also observed that once this presumption has been established, the onus is shifted on to the party which relies on personal law. In case No. 7, the class concerned were Tarkhans of a village in Jullundur District, but the point that is helpful in this decision is that the tests, which indicate whether a tribe not primarily agricultural, follows custom or not, are fully detailed in this case and the case before us fulfils those tests.

Applying the tests indicated above to the case before me, in my opinion, a good case has been made out by the plaintiff that the Khatris of Jhanjian are governed by agriculture custom in matters of alienation, and I see no reason why the reasons governing the decisions in the cases referred to above should not be followed in the present case. I shall now refer briefly to the rulings relied upon by the respondents. It seems to me that they are either distinguishable from the case with which we are dealing or recognise the value of the tests mentioned above, though holding that in the cases with which they dealt those tests were not sufficiently fulfilled.

Case No. (1) cited on behalf of the respondents concerned Sodhi Khatries of village Bhamipura in Ludhiana District. They were held to be governed by their personal law, though they depended mainly on agriculture, and the family had been established in the village since 1823. The decision was to a considerable extent influenced by the fact that the Sodhis as a rule had a priestly status.

In case No. 2 Khatris of village Kauntrila in Rawalpindi District failed to discharge the initial onus that was placed on them to show that they were governed by custom in matters of alienation of ancestral land. It appears that the tests on which the decisions in favour of the rule of custom were based were not put forward by the plaintiffs in the said case. Another feature of the case is that Kauntrila is a large village, situated within a few miles of the small town of Sukho, and it was pointed out that Rawalpindi being a town of very modern growth, there was not much to distinguish the Khatris of Rawalpindi town from those of the neighbouring villages.

Case No. (3), related to Khatris of Dinga town in Gujrat District. It appeared in that case that the members of the community concerned almost to a man engaged in service or shopkeeping and that the family with which the case was concerned was practically the only family which had any ancestral land in that town. Under these circumstances it is not surprising that it was held that they followed Hindu Law and had been unable to prove that they followed agricultural custom.

In case No. 4, Brahmans of Gokalgarh, in Ambala District were held to be governed by their personal law. It seems that the main test on which they relied was that the personal law had been departed from the tribe as among them a daughter was incompetent to inherit her father's property. It was held by this Court that this did not necessarily lead to the conclusion that agricultural custom had been adopted by the tribe in all other respects.

In case No. (5), Khatris of Mauza Salina in Ferozepore District were held to follow Hindu Law in matters of alienation and succession. It is noteworthy however that the learned Judges of this Court in deciding this case pointed out that on the findings recorded by the Courts below the plaintiff had failed to prove: (a) that the families to which the parties belong formed a compact section of the village community. (b) That the parties ploughed and tilled with their own hands; that the parties depend entirely upon agriculture and have no other occupation.

This shows that the learned Judges recognised the importance of these tests and it was the absence of these features in the case before them that was mainly responsible for the conclusion that the party concerned followed Hindu Law. After carefully considering the authorities cited on both sides, I am of the opinion that the plaintiff has succeeded in the present case in establishing that the Khatris of Jhanjian are governed by agricultural custom in matters of alienation of land. As regards the question of consideration and necessity for the mortgages in dispute, Mr. Achhru Ram has asked us to send back this case to the lower appellate Court for a proper decision on these points on the basis of Customary Law, as the learned Additional District Judge has not examined the matter with reference to Customary Law but has acted on the supposition that the family of the plaintiff is governed by Hindu Law. I would therefore accept this appeal and remand this case for re-decision in accordance with the foregoing remarks. Costs will abide the event.

Shadi Lal, C. J.—I concur.

K.S. *Appeal accepted.*

** A. I. R. 1933 Lahore 969

BHIDE AND CURRIE, JJ.

Allah Rakhi and *another*—Petitioners.

v.

Karam Ilahi—Opposite Party.

Criminal Revn. Appln. No 1532 of 1932, Decided on 23rd May 1933

**** Criminal P. C. (1898), S. 488—Parties governed by Mahomedan law—Minor daughters in custody of divorced wife—Demand by father of custody of children as condition for maintaining them amounts to refusal within meaning of S. 488.**

Where the minor daughters of a Mahomedan are in the custody of their mother who is the lawful guardian though divorced, the offer of the father to maintain the children on condition that they are entrusted to his custody amounts to a refusal within the meaning of S. 488 and the father is bound to maintain them.

Though it is not the function of a criminal Court to decide questions as regards the right to guardianship of children, there is no reason why it should not take notice of the fact that the mother is (as in this case) their lawful guardian under the personal law and that the father is not prima facie entitled to demand their custody : 18 *P R* 1894 *Cr* ; 22 *P R* 1917 *Cr* ; *A I R* 1927 *Lah* 480, *Expl* and *Dist* : *A I R* 1928 *Lah* 543 ; *A I R* 1930 *Lah* 1043, *Appr* ; 6 *Bom L R* 536, *Foll.* [P 921 C 2]

Badri Nath for *Mehar Chand* — for Petitioners.

Ghulam Mohyuddin—for Respondent.

Bhide, J.—This is a petition for revision arising out of an application for maintenance under S. 488, Criminal P. C. The application was made on behalf of the two minor daughters of the respondent Karam Ilahi, aged about 7 and 10 years. The girls are living with their mother, who has been divorced by the respondent. The respondent offered to maintain the girls if they were entrusted to his custody. The trial Magistrate held that in view of this offer, respondent could not be said to have refused to maintain the daughters within the meaning of the provisions of S. 488, Criminal P. C. In support of this view he relied upon *Man Singh* v. *Dharamam* (1), *Ralla* v. *Mt. Alti* (2) and *Sultan* v. *Mahtab Bibi* (3.) The application was accordingly dismissed. A petition for revision was presented to the Sessions Judge who held (following *A. I. R* .. 1928 *Lah.* 543) that the mother being the lawful guardian of the daughters under the Mohamedan Law till they attain the age of puberty the respondent was bound to maintain them, even while they were in the custody of the mother. He accordingly for-

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1. (1894) 18 P R 1894 Cr.
2. AIR 1914 Lah 417=24 I C 841=15 CrLJ 529.
3. AIR 1926 Lah 526=98 IC 891=27 CrLJ 1319.

warded the petition to this Court with a recommendation that the order of the learned Magistrate be set aside and the applicants be awarded a sum of Rs. 8 p. m., by way of maintenance. The petition came up at first before a Single Judge, but has been referred to a Division Bench as he thought that there was some conflict of authorities on the point involved.

I may state at the outset that it is not suggested that the respondent's offer to maintain his daughters, if they are entrusted to his custody, is not bona fide, and I shall assume for the purposes of this petition that it is a bona fide offer. The question of law for consideration is whether such an offer is a good answer to an application for maintenance under S. 488, Criminal P. C., on behalf of minor children who are in the custody of their lawful guardian. The contention of the learned counsel for the respondent is that there is a provision in S. 488 entitling the wife to refuse to live with her husband on certain grounds when the husband offers to maintain her, if she lives with him, but there is no such provision in the case of children and this shows that children cannot claim any pecuniary allowance under S. 488, Criminal P. C., from their father, when he offers to maintain them provided they live with him. The learned counsel further contended that a criminal Court is not concerned with questions of guardianship and for the purposes of S. 488, Criminal P. C., it is immaterial whether the children are living with their lawful guardian or otherwise and whether the father is entitled to their custody. In support of these contentions the learned counsel mainly relied on *Man Singh* v. *Dharman* (1) and certain later rulings of the Punjab Chief Court in which that ruling was followed, viz: *Abdul Majid* v. *Emperor* (4), *Ralla* v. *Mt. Ratti* (2) and *Sardar Mahomed* v. *Mir Mahomed* (5), and two rulings of this Court reported as *Sultan* v. *Mahtab Bibi* (3) and *A. I. R.* 1927 *Lah.* 430. He further submitted that two recent rulings of this Court, viz., *Sarfraz Begam* v. *Miran Bakhsh* (6) and *A. I. R.* 1930 *Lah.* 1043, in which a different view was taken do not lay down the law correctly.

As regards *Man Singh* v. *Dharam* (1), which has been followed in most of the Punjab rulings relied upon by the respondent, it would appear from a perusal thereof that the learned Judges in arriving at their conclusion that the father in that case could not be held to have refused to maintain the children did not ignore the question of guardianship, but actually took into consideration the fact that he was their lawful guardian under the Hindu Law by which the parties to that case were governed and as such entitled to their custody. They observed as follows:

> "As to the two minor sons, we are of opinion that they are not entitled to an order for separate maintenance on this application by order of a criminal Court under S. 488, Criminal P. C. A father is prima facie guardian of his minor children and entitled to their custody as well as to that of his wife and he is not under an obligation to make them a money allowance for their maintenance apart from himself merely because he is the husband, or the father, and by refusing to do so he does not refuse to maintain them."

But the position might be different, where the father is not the guardian of the children and this fact is recognised by the learned Judges as would appear from the following remarks which appear in the judgment:

> "It is competent to the mother to apply to the Court under Act 8 of 1890 to give her the guardianship of the children which can only be done on proof that the father is an unfit person and when this is done and the father refuses to make an allowance for a child, it may be that she can resort to S. 488, Criminal P. C."

It is thus clear that the learned Judges who decided *Man Singh* v. *Dharam* (1) did not mean to lay down that even in the cases where the mother is the lawful guardian of the children and they are living with her, the father is within his right in offering to maintain them only if they are entrusted to his custody. In all the later Punjab Chief Court cases on which the learned counsel for the respondent has relied, it appears that the father was the guardian and hence all those cases are clearly distinguishable on this ground. As regards the two rulings of this Court on which he has relied, viz. *Sultan* v. *Mahtab Bibi* (5) and *A. I. R.* 1927 *Lah.* 430, the former was decided on the report of the Sessions Judge without hearing any arguments. The case of children is dealt with very briefly and most of the rulings relied on therein appear to relate to cases where the father was the lawful guardian of the children and as such entitled to their custody. In *A. I. R.* 1927 *Lah.* 430 also the order is very brief and contains no discussion of the

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4. (1904) 1 Cr L J 40=7 P L R 1904.
5. (1917) 22 P R 1917 Cr=41 I C 331=18 Cr L J 811.
6. A I R 1928 Lah 543=112 I C 476=29 Cr L J 1052=9 Lah 313.

point raised before us. The case related to Hindus and the father was apparently the lawful guardian. There is a remark in the report of the Sessions Judge that the father had applied for the custody of the daughters and the applications had been dismissed. But it is not clear on what grounds it was dismissed. In any case it does not appear from the report that the mother had been actually appointed a guardian of the daughter who was living with her. There was moreover a definite finding of fact by the Magistrate that the father had not neglected or refused to maintain the daughter.

The Punjab cases relied on by the learned counsel for the respondent thus do not help him. On the other hand, the two recent rulings of this Court which have been relied upon on behalf of the petitioners, viz., *Sarfraz Begam* v. *Miran Bakhsh* (6) and *A. I. R.* 1930 *Lah*. 1043, are in point and are clearly against him. It was held in these rulings that where the children are in the custody of their mother and she is their lawful guardian, they are entitled to claim maintenance from their father while living with the mother. *Man Singh* v. *Dharam* (1), which is the mainstay of the argument of the learned counsel for the respondent as well as *Sardar Mahomed* v. *Mir Mahomed* (5), were carefully considered and distinguished in one of these rulings, vide: *Sarfraz Begam* v. *Miran Bakhsh* (6).

The learned counsel for the respondent was not able to cite a single decision of any other chief Court or High Court in India in support of his argument, while the view taken in *Sarfraz Begam* v. *Miran Bakhsh* (6) is supported by the following decisions of the Bombay and Madras High Courts and the chief Court of Burma. *Emperor* v. *Aysha Bai* (7) which was followed in *Mahomed Jusab* v. *Haji Adam* (8), *Moideen, In re* (9) and *Murugesan Mudaliar* v. *Sodiamma* (10). The facts in *Emperor* v. *Aysha Bai* (7) are practically on all fours with those of the present case.

The mere fact that S. 488, Criminal P. C., contains a proviso entitling the wife to refuse to live with the husband on certain grounds while there is no such provision in the case of children does not seem to be of significance. The minor children cannot be expected to have any voice in the matter and the law will presume that for the sake of their welfare they should be in the custody of their lawful guardian, i. e., their guardian under the personal law, or a guardian appointed by a competent Court, if any. In the present instance it is not disputed that the mother, though divorced, is the guardian of the daughters under the Mahomedan Law by which the parties are governed as the daughters have not yet attained the age of puberty. It was urged that the mother may be disqualified to be the guardian in certain circumstances (vide para. 258 of Mulla's Principles of Mahomedan Law). But, if she is so disqualified, it is open to the respondent to move a competent Court to appoint him or some one else as the guardian of the daughters. Until he does so, she is the natural guardian and there is nothing in the provisions of S. 488, Criminal P. C., to show that he is entitled to demand the custody of the daughters from their lawful guardian as a condition precedent to maintaining them. To place any such construction on that section is in fact likely to defeat its object. For in that case a father may easily be able to escape liability for the maintenance of his children by the simple device of demanding their custody when he knows full well that owing to their infancy or other reasons the mother would be unwilling to entrust them to his care. It is true that it is not the function of a criminal Court to decide questions as regards the right to guardianship of children, but there is no reason why it should not take notice of the fact that the mother is (as in this case) their lawful guardian under the personal law and that the father is not prima facie entitled to demand their custody. In my opinion an offer by a father to maintain the children provided they are entrusted to his custody in such circumstances is tantamount to a refusal to maintain them within the meaning of the provisions of S. 488, Criminal P. C., as held in *Emperor* v. *Aysha Bai* (7). I would accordingly accept the recommendation of the learned Sessions Judge and setting aside the order of the learned Magistrate direct the respondent to pay Rs. 8 per mensem to the petitioners by way of maintenance with effect from the date of the application (10th May 1932).

Currie, J.—I concur.

K.S. *Revision accepted.*

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7. (1904) 6 Bom L R 536=1 Cr L J 599.
8. (1913) 37 Bom 71=15 I C 520.
9. (1913) 14 Cr L J 597=21 I C 469.
0. (1915) 16 Cr L J 656=30 I C 480.

* * A. I. R. 1933 Lahore 972

JAI LAL AND ABDUL RASHID, JJ.

Gurdas Mal—Defendant—Appellant.

v.

Punjab-Sindh Bank Ltd., Rawalpindi, and *another*—Plaintiff and Defendant—Respondents.

First Appeal No. 1651 of 1927, Decided on 23rd June 1933, from preliminary decree of Senior Sub-Judge, Rawalpindi, D/- 21st March 1927.

* **(a) Transfer of Property Act (1882), S. 59—Mortgage by deposit of title-deed is valid in Punjab.**

The Transfer of Property Act is not in force in the Punjab. The result is that S. 59 does not prohibit the creation of a mortgage by deposit of title deeds in the Punjab Hence such mortgages are valid: 9 *M I A* 307 (*PC*) and 31 *P R* 1916, *Ref.* [P 973 C 2]

* * **(b) Transfer of Property Act (1882), S. 59—Mortgage by deposit of title deed is invalid if effected in Cantonment area even though property is situated in place where such mortgages are valid—Cantonments Act (1924), S. 287.**

A mortgage by deposit of title-deeds is invalid, if effected within a Cantonment area where such transactions are prohibited even though the property is situated in a place where such mortgages are valid. The determining factor in the matter of the validity of the mortgage in such cases is not the place where the property alleged to have been mortgaged is situated, but the formalities required by the law for the creation of a valid mortgage at the place where the title deeds are alleged to have been delivered to the creditor: *AIR* 1932 *Cal* 823, *Foll. Case law discussed.* [P 974 1, 2; P 976 C 1]

(c) Transfer of Property Act (1882), Ss. 4 and 59—Effect of S. 4 is not to take away effect of S. 59.

Section 4 properly read means, so far as it is applicable to the case of mortgages that if and when a document of mortgage is executed it must be registered as provided in the Registration Act, but this section does not in any way do away with the effect of S. 59 which expressly provides that in certain areas a mortgage can be the only means of an instrument in writing. [P 976 C 1, 2]

(d) Transfer of Property Act (1882), S. 59—Partition suit referred to arbitration—Certain property given to a person by award—Award filed in Court and decree passed thereon—Copy of award is evidence of title and deposit of same creates a valid mortgage.

The arbitrators gave their award in a partition suit referred to them, by virtue of which the property in dispute was awarded to *R*. The award was filed in Court in pursuance of an application made to file the same and a decree was given in accordance therewith. *R* obtained a copy of the award and deposited it with a Bank as evidence of his title to the property mortgaged by him.

Held: that as the original was filed in Court the award was evidence of *R's* title to the property in dispute and deposit of the same created a valid mortgage on the property in dispute: *AIR* 1930 *Lah* 731 and *AIR* 1932 *Cal* 589, *Rel on*; *AIR* 1929 *Rang* 65, *Ref.* [P 976 C 2]

J. N. Aggarwal and *Dev Raj Sawhney*—for Appellant.

M. C. Mahajan and *Daulat Ram*—for Respondents.

Jai Lal, J.—The Punjab and Sindh Bank Limited of Rawalpindi instituted a suit against Chaudhri Raja Singh and Lala Gurdas Mal for the recovery of Rs. 12, 513-15-0 by sale of mortgaged property which was described to be two double-storyed shops situated in the Raja Bazar of Rawalpindi City. It was alleged that on 3rd October 1918, Raja Singh executed a promissory note for Rs. 5,000, in favour of the plaintiff bank and promised to pay interest at the rate of 9 per cent per annum and in order to secure the repayment of the amount the borrower deposited the title-deeds . of the two shops with the Bank and also that on 10th September 1919, Raja Singh executed another promissory note for Rs. 10,000 in favour of the Bank carrying interest at Rs. 9 per cent per annum on the same security. It seems that the amounts of the two promissory notes were not actually advanced to the borrower at the time of their execution but that the promissory notes were executed in order to cover a limit of a cash credit account which the Bank opened in the name of Raja Singh against which the latter was entitled to draw cheques to the extent of Rs. 5,000 and 10,000 respectively. It may further be mentioned that the first cash credit account of Rs. 5,000 was consolidated with the second account of Rs. 10,000. It was also alleged that on the 25th April 1922, Raja Singh on a demand being made by the Bank professed his inability to pay the amount due but agreed to increase the rate of interest to ten per cent per annum which was to be paid monthly as before. On 20th April 1923, Raja Singh is alleged to have made an application to the Bank that his account be transferred from the Cantonment Branch of the Bank to the City Branch in Rawalpindi and accordingly a promissory note for Rs. 10,000 was executed by him in favour of the City Branch on that day carrying interest at the rate of Rs. 10 per cent per annum payable monthly. Thus the account of Raja Singh was transferred from the Rawalpindi Cantonment Branch of the Bank to the Rawalpindi City Branch. The defendant Gurdas Mal, it was stated, claimed to be a mortgagee of the same property but the plaintiffs did not admit the genuineness or the validity of the mortgage and in any case, claimed priority in respect of their own mortgage effected by means of deposit of title-deeds.

Gurdas Mal denied any knowledge of the transactions between the plaintiffs and Raja Singh and contested the right of the Bank to claim enhanced rate of interest. He alleged that he held a registered mortgage deed on the property in dispute which was executed in his favour by Raja Singh on 12th September 1922. This mortgage was alleged to be with possession. He, therefore, contended that the Bank was not entitled to a decree for the sale of the property in suit in discharge of any amount that may be due to them.

Raja Singh generally supported Gurdas Mal and alleged that his account was transferred to the City Branch of the Bank as a result of a trick played on him by the then Manager of the Bank. He admitted the execution of the three promissory notes in favour of the Bank but denied liability for compound interest and also denied that he had mortgaged any property to the plaintiff. He alleged that the title deeds had been given to the Bank to satisfy them that he had sufficient property to pay the money borrowed from them but it was never intended that they should have a lien on any property.

The trial Judge has held that the amount claimed by the plaintiffs was due to them with a slight difference and that the title deeds had been handed over by Raja Singh to the Bank in order to secure the repayment of the amount due from him to the Bank. thus creating a mortgage by deposit of title deeds of the two shops. The learned Judge has also held that the same property has been mortgaged to Gurdas Ram by means of a registered mortgage deed dated the 12th of September 1922 but as the first mortgages by deposit of title deeds in favour of the Bank were prior in date to the mortgage in favour of Gurdas Mal the Bank was entitled to priority. He, therefore, passed a decree in plaintiffs' favour for sale of the mortgaged property. Against this decree Gurdas Mal has presented this appeal.

The main question raised before us was of the priority between the claims of the Bank and Gurdas Mal respectively. Counsel on both sides proceeded on the assumption and the respondents' counsel conceded that the third mortgage effected in favour of the Bank by Raja Singh on 20th April 1923, in the City Branch of the Bank did not affect the question at issue as the mortgage deed in favour of Gurdas Mal was prior to it in time. The appellant's case was that a mortgage by deposit of title deeds is prohibited within the area of the Rawalpindi Cantonment and, therefore, no valid mortgages had been created in favour of the Plaintiff Bank by Raja Singh on 3rd October 1918, and 10th September 1919, respectively. The decision of the present appeal therefore depends upon a determination of this question. It will be convenient to set out from the statutory provisions of the law which bear on this question. S. 59 of the Transfer of Property Act is as follows:-

> "Where the principal money secured is one hundred rupees or upwards, a mortgage, other than a mortgage by deposit of title-deeds, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

The words "other than a mortgage by deposit of title deeds" in this section have been inserted by means of an amendment made in the year 1929 and the following paragraph was deleted by the same amendment:-

> "Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, by delivery to a creditor or his agent of documents of title to immovable property, with intent to create a security thereon."

This paragraph is as it existed in the year 1919, and it is not necessary to set out the various additions and alterations that have been made to it prior to that year because that matter does not affect the decision of the present question. At the same time in the year 1929 a paragraph was added to S. 58 of the Act. That section defines a mortgage and describes the different kinds of mortgages. The relevant added paragraph is (f). It is as follows:-

> "Where a person in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, and in any other town which the Governor-General-in-Council may, by notification in the Gazette of India, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds."

Now, the Transfer of Property Act is not in force in the Punjab. The result is that S. 59 of the Transfer of Property Act does not prohibit the creation of a mortgage by deposit of title deeds in the Punjab. That such mortgages are valid and recognised by the Courts in this province is beyond controversy: see the decision of their Lordships of the Privy Council in *Varden Seth Sam* v. *Luckpathy Royjee Lallah* (1) and also *Jessie Moyle Stewart* v. *Bank of Upper India* (2), indeed the learned counsel on both sides conceded this proposition.

S. 287, of the Cantonment Act 1924, however, provides as follows:-

> "(1) Paragraphs 2 and 3, S. 54 and Ss. 59, 107 and 123, T. P. Act, 1882, with respect to the transfer of property by registered instrument, shall, on and from the commencement of this Act, extend to every cantonment; (2) where a Cantonment has not been constituted a sub-district or district for the purposes of the Registration Act, 1908, under S. 9 of that Act, the Registrar of the district in which the cantonment is situated shall cause a copy of such entries in Indexes Nos. 1 and 2 as relate to immovable property within the Cantonment to be forwarded to the Cantonment authority annually or at such shorter intervals as the Local Government may prescribe."

The corresponding section of the previous Cantonment Act, 1910, is S. 29. Reference was also made at the Bar to S. 4 of the Transfer of Property Act which is as follows:-

> "The chapters and sections of this Act which relate to contracts shall be taken as part of the Contract Act, 1872. And S. 54, paras 2 and 3, 59, 107 and 123 shall be read as supplemental to the Registration Act, 1908."

Before proceeding with a discussion of the effect of these sections on the present case it is necessary to repeat that the property in dispute is situated within the limits of Rawalpindi City where no part of the Transfer of Property Act is in force and the two promissory notes and the acts of deposit of title-deeds relating to this property, which, according to the plaintiff Bank, give them priority, took place within the limits of Rawalpindi Cantonment. The Bank has a branch both within the limits of the Cantonment and of the City.

An examination of the statutory provision mentioned above establishes that but for S. 287 of the Cantonment Act a mortgage by deposit of title deeds would have been valid even in Rawalpindi Cantonment. The appellant's case is that S. 287 prohibits the creation of a mortgage by deposit of title deeds within the limits of the Rawalpindi Cantonment and it is immaterial whether the property secured is situated within the limits of the Cantonment or is situated in a place where a mortgage by deposit of title deeds is permissible. According to the appellant, therefore, a transaction purporting to create a mortgage by deposit of title deeds is invalid if it is effected at a place where such transactions are prohibited, the situation of the property mortgaged in such cases being immaterial. The case of the respondent bank, on the other hand is that the prohibition applies only if the transaction of deposit of title-deeds takes place within the limits of the Cantonment and the property mortgaged is also situated within such limits. In other words, according to the respondent a valid mortgage by deposit of title deeds can be created within the limits of a Cantonment if the property mortgaged is outside such limits and if the creation of a mortgage by deposit of title deeds is not prohibited where the property is situated in the same manner as a mortgage by deposit of title deeds relating to property situated within the limits of a cantonment can legally be effected if the deposit is made in a place where a valid mortgage by deposit of title deeds is permitted. This last proposition is supported by authority as will presently appear but not so the first proposition.

The question involved, in my opinion, is not free from difficulty, but, after a careful consideration of the case law on the subject and the statutory provisions quoted above, I am of the opinion that the contention of the appellant must prevail.

The following authorities were cited on behalf of the appellant:- *Muhamad Beg* v. *Amar Nath* (3), in which this Court held that the gift of houses situated within the limits of a Cantonment must be made in the manner provided by S. 123 of the Transfer of Property Act, that is to say, by means of a registered deed. It seems that the gift was made within the limits of the Cantonment and the houses which were subject of the gift were also situated in the Cantonment. This case, therefore, is not of material help. In *Ralli Brothers Karachi* v. *Punjab National Bank* (4), a mortgage effected by deposit of title deeds in Delhi of properties situated in Delhi and in Karachi was held to be valid on the ground that the Transfer of Property Act was not at the time of the deposit, in force in Delhi and that Karachi is one of the towns where validity of mortgages of property by deposit of title deeds is explicitly recognised by S. 59 of the Transfer of Property Act. But it was remarked that even apart from the exception contained in S. 59 of the Trans-

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1. (1861-63) 9 M I A 307 (PC).
2. (1916) 31 P R 1916=34 I C 937.
3. AIR 1920 Lah 249=54 I C 829.
4. AIR 1930 Lah 920=129 IC 21=11 Lah 564.

fer of Property Act with regard to Karachi the mortgage would have been valid. In *Imperial Bank of India* v. *Rai Gyaw Thu and Co.* (5) their Lordships of Privy Council held that a mortgage created in Akyab by deposit of title deeds relating to property situated in moffusil took priority over a subsequent mortgage created by a registered deed. Akyab, it is to be noted, is one of the towns mentioned in S. 59 of the Transfer of Property Act where mortgages by deposit of title deeds are permitted and the property in dispute in that case was situated in a place where the Transfer of Property Act was in force. This case, therefore, is an authority in support of the proposition that a valid mortgage by deposit of title deeds can be effected in a place where such mortgages are not prohibited even if the property mortgaged is situated in a place where a mortgage by deposit of title deeds is not recognised. In *Papiah Naidu* v. *Naganatha Sethupathi* (6) their Lordships of the Privy Council held that in the case of a mortgage by deposit of title deeds made at one of the places mentioned in the proviso to S. 59 of the Transfer of Property Act relating to property situated at a place where the Transfer of Property Act, is wholly applicable, the onus is on the party inpugning the validity of the mortgage to establish its invalidity by proving some special prohibition. In *Madho Das* v. *Ram Kishan* (7), it was held that it is not necessary to the validity of a mortgage by deposit of title deeds under S. 59 of the Transfer of Property Act that the property to which the title deeds relate should be situated within the limits of one of the towns where such mortgages are allowed. The same view was taken in *Behram Rashid* v. *Sorabji Rustamji* (8), where the deposit of title deeds took place in Bombay and the property was situated at Nasik, Bombay being one of the places mentioned in S. 59 of the Transfer of Property Act and Nasik being a place where the Transfer of Property Act applied. But in that case the learned Judges could not enforce the mortgage as the documents which were produced in evidence of the deposit were found to require registration. *A. I. R.* 1932 *All.* 451 relates to a reference under the Indian Income Tax Act and it appears that the deposit of title deeds at a place outside the towns mentioned in S. 59 and of property situated at a place where the Transfer of Property Act applied was held not to create a valid mortgage. This case, therefore, does not materially help us.

In *A. I. R.* 1932 *Cal.* 823 it was held that where title deeds of certain property alleged to have been mortgaged are delivered at Bhowanipur, i. e., outside Calcutta with the intention by such a deposit to create a mortgage on the property to which they relate, such delivery does not create a valid mortgage on the property which is situated in Calcutta. It is to be noted that Calcutta is one of the towns which is mentioned in S. 59 of the Transfer of Property Act and the Act is in force in Bhowanipur in the presidency of Bengal. This case, therefore, is a direct authority in support of the appellant's contention.

The respondents' counsel attempted to distinguish this case on the ground that it does not effect the validity of mortgages in places where the Transfer of Property Act does not apply at all. The argument of the learned counsel so far as I was able to follow him, was that the Transfer of Property Act is in force in the whole of the presidency of Bengal and is therefore in force even in Calcutta, that S. 59 which read with S. 58 allows the creation of a mortgage by deposit of title deeds in Calcutta is really an exception to the general rule which is that by the deposit of title deeds in a place where the Transfer of Property Act is in force no mortgage can be effected; but in the present case, the counsel argued, the situation is reversed as the Transfer of Property Act is not in force in the Punjab and therefore normally a mortgage by deposit of title deeds is permissible in this province. His contention was that S. 287 of the Cantonment Act merely extends S. 59 of the Transfer of Property Act inter alia to the Rawalpindi Cantonment therefore it should be interpreted to mean that it prohibits the creation of a mortgage in the Cantonment and relating to property which is situated in the Cantonment but that it does not affect the validity of a mortgage by deposit of title deeds relating to property situated in places where equitable mortgages are recognised.

In my opinion, however, in principle there is no difference whether

S. N. DAR, A.LL.B.,
Vakil High Court,

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5. AIR 1928 P C 211=76 I C 910=50 I A 283 =1 Rang 687=51 Cal 86 (PC).
6. AIR 1931 PC 289=134 I C 828=58 I A 383 (PC).
7. (1892) 14 All 288=(1892) A W N 97.
8. AIR 1914 Bom 15=28 I C 140=38 Bom 372.

whole of Transfer of Property Act applies to an area or particular sections of that Act are applicable to it. It is by virtue of S. 59 that the creation of a mortgage by deposit of title deeds is not recognised in the presidency of Bengal and it is similarly by virtue of that section that such a transaction is not recognised within the limits of a Cantonment and it is by virtue of the same section or rather of the exception contained in it that a mortgage by deposit of title-deeds is permitted in Calcutta. The permission to create such a mortgage in the Punjab is no doubt not on account of anything contained in S. 59 but the practical effect is the same, that is, both in Calcutta and in the provinces of Punjab mortgage by deposit of title deeds are legal. They are prohibited in the presidency of Bengal. except Calcutta, by S. 59 of the T. P. Act, and they are prohibited in the Cantonment of Rawalpindi by the same section which is made applicable to it by S. 287 of the Cantonment Act. The net result, in my opinion, is the same.

A consideration of the law on the subject shows that the determining factor in the matter of the validity of the mortgage in such cases is not the place where the property alleged to have been mortgaged is situated but the formalities required by the law for the creation of a valid mortgage at the place where the title deeds are alleged to have been delivered to the creditor.

S. 59 of the Transfer of Property Act as applied to the facts of the present case would read as if the words in the Rawalpindi Cantonment were prefixed to the section as it now exists after the words "title deeds" the towns mentioned in paragraph (f) of S. 58 had been specified in the section. If read as thus framed it would follow that no valid mortgage by deposit of title deeds could be effected in the Cantonment of Rawalpindi wherever the property alleged to be mortgaged is situated.

Mr. Mehr Chand Mahajan relied upon S. 4 of the Transfer of Property Act and contended that S. 59 is supplemental to the Indian Registration Act and therefore must be read to mean that if a document is executed it must be registered but that otherwise it does not affect the question of validity of mortgages in the Cantonments. I cannot appreciate the argument of the learned counsel. In my opinion S. 4 properly read means, so far as it is applicable to the case of mortgages, that if and when a document of mortgage is executed it must be registered as provided in the Indian Registration Act, but this section does not in any way do away with the effect of S. 59 which expressly provides that in certain areas a mortgage can be only by means of an instrument in writing. Similarly sub-S. 2 of S. 287 of the Cantonment Act has no bearing on the present question. It merely provides the procedure which is to be followed by Registrars in cases where documents relating to property within the Cantonment limits are registered in their districts.

Following the judgment of the Calcutta High Court, therefore, in *A. I. R.* 1932 *Cal.* 823, I would hold that a valid mortgage by deposit of title deeds relating to property situated in Rawalpindi City could not have been made by Raja Singh in favour of the Bank considering that the deposit took place within the limits of the Rawalpindi Cantonment where S. 59 of the Transfer of Property Act is in force.

The above discussion practically disposes of this appeal but another minor point was raised on behalf of the appellant. It was contended that in the present case no title deed had been deposited by Raja Singh with the Bank so as to create a valid mortgage on the property in dispute. It appears that the property was jointly owned by Raja Singh with others and the matter of the partition of the whole of the joint property was referred to arbitation.

The arbitrators gave their award by virtue of which the property in dispute was awarded to Raja Singh. The award was filed in Court in pursuance of an application made to file the same under the provisions of the second Schedule of the Civil Procedure Code and a decree given in accordance therewith. Raja Singh obtained a copy of the award and deposited it with the Bank as evidence of his title to the property mortgaged by him. It is contended that the original award should have been filed by Raja Singh and not a copy thereof. The original award, however, had been filed in Court and could not be produced by Raja Singh who could only produce a copy thereof. In my opinion, under such circumstances the copy was the evidence of Raja Singh's title to the property in dispute and a deposit of the same could have, but for what has been stated above, created a valid mortgage on the property in dispute. The learned counsel for the appellant relied upon ***V. E. A. R. M. Chettyar Firm*** v.

A. K. R. M. M. K. Chettyar Firm (9). In that case an English case is cited where no title deed in favour of the alleged mortgagor was deposited with the creditor and it was held that the deposit in such cases should be of the deed evidencing the title of the mortgagor. In *Surendra Mohan Rai* v. *Mohendra Nath* (10), it was remarked that there was no clear rule relating to the deposit of copies of title deeds and that if the original be not available a copy of the title deed could be filed. In *Punjab and Sindh Bank Ltd.* v. *Amir Chand* (11), the title deed deposited with the creditor was a copy of the registered deed of relinquishment. It was held that as the depositor could not be in possession of the original title deed of the property mortgaged he could produce only a copy of the deed and the mortgage was consequently upheld.

The result is that I would accept this appeal and hold that the plaintiff Bank has no lien on the property in dispute, but as the suit is both against Gurdas Mal and Raja Singh and the latter has confessed judgment so far as personal decree against him is concerned I would pass a simple money decree for rupees 12,179-10-0 with costs and future interest at Rs. 9 per cent per annum from the date of the suit till realization against Raja Singh alone in favour of the Bank thus exonerating the property in dispute from the mortgages claimed in this suit by the plaintiffs. The appellant's costs in both the Courts shall be paid by the Bank. Raja Singh will pay his own costs in this appeal.

Abdul Rashid, J.—I agree.

K.S. *Appeal allowed.*

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9. AIR 1929 Rang 65=116 I C 575=7 Rang 98.
10. AIR 1932 Cal 589=140 I C 662=59 Cal 781.
11. AIR 1930 Lah 731=125 I C 631=11 Lah 694.

A. I. R. 1933 Lahore 977

TEK CHAND AND MONROE, JJ.

Punjab Singh Ujagar Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 472 of 1933, Decided on 17th August 1933, from order of Sess. Judge, Karnal, D/- 28th February 1933.

(a) Penal Code (1860), S. 120-A—Direct proof of agreement between several members is difficult—Question is matter of inference deduced from act of persons concerned.

The essence of the offence of criminal conspiracy is agreement between two or more persons to commit an offence or do any of the other acts mentioned in S. 120-A in the matter described therein. This being so, it is often difficult, if not impossible, to obtain direct proof of the alleged agreement between the various accused and in most cases the question becomes a matter of inference "deduced from acts of the persons concerned done in pursuance of an apparent criminal purpose in common between them:" *R.* v. *Brisac*, 4 *East* 164; *Mulcahy* v. *Reg*, 3 *H L* 306 and *R.* v *Duffield*, 5 *Cox* 404, *Ref.*

[P 981 C 2]

(b) Penal Code (1860), S. 396—Murder committed by one of dacoits in attempting to carry away stolen property soon after dacoity—Every one of dacoits is liable to be punished for same even though they have not abetted or actually taken part in it.

Where in attempting to carry away the stolen property one of the dacoits commits a murder, within a very short time of the commission of the dacoity, the murder must be held to have been committed "in the commission of the dacoity" within the meaning of S 396, and every one of the dacoits is liable to be punished with death, transportation for life or rigorous imprisonment which may extend to ten years. And in order to render the other dacoits liable under S. 396 for the act of one of their associates it is not necessary that murder should have been within the contemplation of all or some of them when the dacoity was planned, nor is it necessary that they should have actually taken part in or abetted its commission; indeed they may not have been present at the scene of murder, or may not have known even that murder was going to be, or had in fact been, committed. But nonetheless they all will be liable for enhanced punishment, provided a person is in fact murdered by one of the members of the gang in the commission of the dacoity: *AIR* 1921 *Lah* 115; *AIR* 1923 *Lah* 329; *AIR* 1925 *Lah* 142 and 17 *All* 86, *Ref.*

[P 984 C 1; P 985 C 1]

(c) Penal Code (1860), S. 396—Dacoity committed in British India but murder committed soon after in Native State—Offenders can be tried under S 396 in British India without certificate under Criminal P. C. (1898), S. 188.

Dacoity was committed in British India, but murder was committed soon after dacoity in attempting to carry away stolen property in a Native State.

Held: that British Indian Court within whose jurisdiction dacoity was committed had jurisdiction to try the offenders under S. 396 without certificate under S. 188, Criminal P. C.

[P 984 C 2]

(d) Penal Code (1860), Ss. 149, 302 and 396—Conspiracy to commit dacoity—Murder committed by one of dacoits in commission of dacoity—Other decoits should not be convicted under S. 302/149.

Where the object of a conspiracy is to commit a dacoity and not to commit a murder, and if murder is committed by one of the dacoits in the commission of the dacoity, all the others can be convicted only under S. 396 but not under S. 302/149.

[P 985 C 2]

(e) Penal Code (1860), S. 303—Murder committed by one of dacoits in commission

of dacoity—All dacoits cannot be sentenced under S. 303.

Section 303 has no application to the case of persons, other than the actual murderer, who are liable to enhanced punishment for the act of one of their associates under the special provisions of S. 396. Such persons cannot be said to have been convicted of "murder"; the offence of which they have been found guilty is "dacoity," though they are liable to enhanced punishment by reason of their complicity in a dacoity in the commission of which one of the members of the gang had committed murder under S. 302. [P 986 C 1]

(f) **Penal Code (1860), Ss. 149 and 120-B —Conviction and separate sentence for act constituting conspiracy—Separate sentence for offence under S. 120-B is not necessary.**

Even the act of the accused in entering into a conspiracy to beat, rob arms and to escape is per se an offence under S. 120-B; if they have been convicted and sentenced separately for the several acts which constitute such conspiracy, separate sentence for offence under S. 120-B is not called for: 42 *Cal* 1153; 83 *I C* 513; 17 *P R* 1915 *Cr.* and *AIR* 1922 *Cal* 107, *Ref.* [P 986 C 2]

Dev Raj Sawhney and *M. L. Whig*—for Appellant.

Shiv Narain—for the Crown.

Tek Chand, J.—At a trial held at Rohtak, the Sessions Judge of Karnal has convicted and sentenced Bachan Singh, Achhar Singh, Punjab Singh, Mohammada, Narain Singh, Teja Singh, Swaran Singh, Diwan Singh and Jawand Singh, as follows: (1) All the nine persons aforesaid to death under S. 120-B, Penal Code; (2) all of them to death under S. 396, Penal Code; (3) (a) Narain Singh, Teja Singh, Swaran Singh and Diwan Singh to death under Ss. 302/149 and 303, Penal Code; (b) Jawand Singh to death under S. 302/149, Penal Code; (4) (a) Narain Singh, Teja Singh, Swaran Singh and Diwan Singh to death under S. 307/149, Penal Code; (b) Jawand Singh to rigorous imprisonment for ten years under S. 307/149, Penal Code; (5) all the nine to rigorous imprisonment for two years each under S. 224, Penal Code; and (6) all the nine to rigorous imprisonment for three years each, under S. 332/149, Penal Code.

Against these convictions and sentences the convicts, other than Diwan Singh, have filed appeals (Criminal Appeals Nos. 472 and 557 to 563 of 1933) and their cases, as well as that of Diwan Singh, are also before us under S. 374, Criminal P. C., (Murder Reference No. 87 of 1933). It has been established beyond dispute, and is indeed no longer denied, that all the nine accused persons are previous convicts and had been transported to the Andamans to undergo the sentences which had been passed on them by different Courts in the Punjab from 1925 to 1928. Seven of them, namely, Bachan Singh, Punjab Singh, Mohammada, Narain Singh, Teja Singh, Swaran Singh and Diwan Singh, had been convicted of murder and sentenced each to transportation for life; Achhar Singh had been convicted under Ss. 392 and 326, Penal Code, and sentenced to ten years' rigorous imprisonment; while Jawand Singh had been sentenced to transportation for ten years under S. 304, Part 2.

In April 1932 the authorities decided to transfer some prisoners from the Andamans to various jails in India. Twenty-five of such prisoners, (fourteen Sikhs, nine Mohamedans and two Hindus) including the accused, were Punjabees, and they were ordered to be sent to the Central Jail at Lahore. Accordingly they were first brought to the Presidency Jail at Calcutta and after staying there for three days, they left for Delhi in charge of an escort provided by the Bengal Police. The Sikh prisoners were accommodated in one compartment and the Mohamedans in another. The police escort changed at Gaya, Allahabad and Aligarh. The prisoners left Aligarh on the 22nd April at 2-15 p. m., in charge of head-constable, Mubarik Hussain (P. W. 5), who was accompanied by one Naik and eight foot constables, all of the U. P. Police. They arrived at Delhi at about 5. p. m., and halted at the station for about four hours, as the next train for Lahore (via Bhatinda) was due to leave at 9-5 p. m. The original arrangement was that the escort from Aligarh would be relieved at Delhi and the prisoners taken to Lahore by the Delhi Police. Mubarik Hussain telephoned to the Delhi Suddar Police Station for relief, but was informed in reply that no men from Delhi could be spared as the entire local police was busy in dealing with certain local disturbances; and that the Aligarh Police should escort the prisoners to Lahore. Accordingly the party left Delhi by the 61 U. P. Passenger at 9-5 p. m. No arrangements for carrying the prisoners in a specially protected carriage had been made, and the 25 prisoners and the 10 members of the escort were all accomodated in an ordinary third class compartment. The doors of this compartment were not locked or bolted, nor were the prisoners handcuffed, though all of them had bar fetters on their feet. The escort were armed with five muskets, five bandoliers, each containing 20 rounds of ammunition, and four batons.

It is alleged by the prosecution, that at about 1 a. m., when the train was running at full speed between Ghaso and Narwana railway-stations, the nine accused and one Ratan Singh (who was subsequently killed in the Hoshiarpur district in an encounter with the police) suddenly and simultaneously got up, beat the escort, and snatched four muskets, three bandoliers and two batons. The train was brought to a standstill by some one of the prisoners pulling the communication cord, and all ten of them escaped. Six of the prisoners, namely, Ratan Singh, Narain Singh, Teja Singh, Swaran Singh, Diwan Singh and Jawand Singh jumped down to the left side of the train carrying three muskets and one bandolier, while, Bachan Singh, Achhar Singh, Punjab Singh and Mohammada escaped to the right with one musket and two bandoliers.

In the train three members of the North-Western Railway Police, Amar Nath, Head-Constable and Kishen Chand (P. W. 23) and Sher Zaman (P. W. 45) Constables were travelling: each of them armed with a musket and twenty rounds. As soon as the train stopped, Amar Nath and Kishen Chand got down to the left and Sher Zaman to the right, to find out what the matter was. They heard the jingling of bar fetters and a number of persons running, and they gave pursuit. Rattan Singh, who, with five others, had escaped towards the left, fired and hit Amar Nath in the forehead who fell down unconscious. Another shot was fired from the same direction and it struck Kishen Chand in the thigh. Kishen Chand fired thrice but without success. On the right side of the train, Sher Zaman fired a shot. The prisoners however had gone very far and none of them was hit or caught.

In the meantime one of the constables of the Aligarh Police had gone to the engine and told the driver that some of the prisoners had beaten them, and had escaped carrying away muskets and bandoliers. The driver immediately detached the engine and took it at full speed to Narwana, which was at a distance of two miles. There he reported the matter to the station staff who flashed messages in all directions, and communicated with the local police. The driver returned to the spot within half an hour with a number of policemen and railway employees. By this time Amar Nath had been brought back to the train and placed in a first class compartment. The engine was, re-attached to the train, and it was taken to Narwana. It is alleged that immediately after the arrival of the train at Narwana, Amar Nath expired. The local Sub-Assistant Surgeon, Dr. Raja Ram (P. W. 66) examined Kishen Chand, and the members of the Aligarh escort. He found a gunshot wound in the right thigh of Kishen Chand, and 34 injuries, inflicted with blunt weapons on nine members of the Aligarh Police escort.

Mr. Ryall (P. W. 19), Assistant Inspector General of the Railway Police, Punjab, took up the investigation in his own hands and within a very short time succeeded in spreading a network of search parties consisting, (it is stated) of no less than 1,500 police and 30,000 villagers over an area of 22,000 square miles in British India and several Native States. The pursuit of the escaped prisoners was carried on with great vigour and organization and, on 25th April 1932, one of the search parties succeeded in arresting Swaran Singh at Mauza Kharkhara in the Hissar district. At the time of his arrest he was found sitting under a kikar tree near a pond, having a gunshot wound in his leg. One of the stolen U. P. Police muskets (Ex. P-1) was in his possession at the time. The next day, another of the stolen muskets (Ex. P-2) was recovered from the fields adjoining the pond. On the same day another search party arrested Diwan Singh and Jawand Singh in a neighbouring village in the Hissar district. Four days later, on the 30th April at about 1 p. m., Bachan Singh, Achhar Singh and Punjab Singh were found sleeping under a pipal tree in the outskirts of Mauza Gawara near Dhuri in the Patiala State. By the side of Bachan Singh, was found lying another of the stolen muskets (Ex. P-3) and from his person were recovered 38 live cartridges of No. 104 bore, which have been proved to have been supplied to the U. P. Police escort. On proceeding towards the abadi of Mauza Gawara, some members of the search party met Mohammada, bringing food for four men, and he also was taken in custody. The two remaining appellants Narain Singh and Teja Singh were arrested at a well near Mauza Tera Kalan in the Amritsar district as late as 1st August 1932. The tenth escaped prisoner Rattan Singh successfully evaded detection and arrest for more than two months and a half and after several encounters with the police and other persons who were searching for him, he was killed on 15th July 1932 in a village in the Hoshiarpur district, after he had fatally shot three policemen and one villager and wounded several others.

After the completion of the investigation, the nine arrested persons were produced before the Sessions Judge, Karnal, on 9th December 1932, when, on an application made by the Crown under the Government of India Notification No. 345-1/346-1, dated 2nd July 1924 the learned Judge decided to take cognizance of the case without commitment by a Magistrate. He followed the procedure for the trial of warrant cases and after recording a large volume of evidence for the prosecution and the defence convicted and sentenced the nine accused as stated above. Before us it was contended by some of the learned counsel appearing on behalf of the appellánts that the trial was illegal, firstly, because the Notifications aforesaid were ultra vires of the Governor-General in Council and secondly, that in any case they were inapplicable as some of the alleged offences for which the accused persons have been tried and convicted were not committed within the area to which the Notifications were intended to apply.

After hearing counsel at great length I am of opinion that the first of these contentions is without any substance whatever and I have no hesitation in rejecting it. The railway line between Ghaso and Narwana admittedly lies within the territory of the Patiala State but by an "Agreement" entered into between the Patiala State and the British Government in 1900, His Highness the Maharaja of Patiala ceded to the British Government "full and exclusive power and jurisdiction of every kind over the lands" in the said State which were then, or might thereafter be occupied by the Southern Punjab Railway which has since been taken over by the North-Western Railway, and of which the line between Ghaso and Narwana is admittedly a part and over "all persons and things whatsoever within the said lands"—see Aitchison's Treatise, Engagements and Sanads, (Vol. 8, p. 250, No. 85). By the Indian (Foreign Jurisdiction) Order in Council, 1902, issued by Command of His Majesty on 11th June 1902, the Governor-General in Council was empowered to make such rules and orders as might be expedient for determining the law and procedure to be observed in "territories of India outside British India × × × " in which jurisdiction vests in the British Government and is exercised by or on behalf of His Majesty through the Governor-General of India in Council or any authority subordinate thereto:

"and also for determining the Courts, authorities, Judges and Magistrates by whom such jurisdiction is to be exercised."

In exercise of the powers so conferred on the Governor-General in Council Notification No. 515-I-B, dated 17th March 1913 and Notifications Nos 343-1 to 346-1 dated 2nd July 1924 were issued, and these will be found reproduced in extenso in the Rules and Orders of the High Court, Vol. 4, Ch. 15-F, pp. 13 et seq. By these Notifications several enactments, including the Indian Penal Code and the Code of Criminal Procedure, were declared to be in force within the limits of the area over which jurisdiction was ceded by the Patiala Darbar to the British Government by the "agreement" of 1900 aforesaid. In the schedule attached to Notification No. 344-1, the Deputy Commissioner of Rohtak was declared to be the District Magistrate for the portion of the Southern Punjab Railway known as "Budhalada-Jind Frontier near Uchana," on which the line between Ghaso and Narwana is situate, and the District Judge of that district was invested with the powers of a Court of Session. In the same schedule, (vide item No. 21) the Sessions Judge is expressly authorised:

at his discretion to take cognizance of an offence without the accused person being committed to the Court of the Session by a Magistrate, provided that in that case he is bound to follow the procedure laid down for the trial of warrant cases by Magistrates."

It is clear from what has been stated above that the Notifications in question are all intra vires of the Governor-General in Council, that the Sessions Judge of Karnal Division (which includes the Rohtak District) had got jurisdiction to try offences alleged to have been committed within the area occupied by the railway between Ghaso and Narwana, and that he could take cognizance of such offences without commitment by a Magistrate and try it in accordance with the special procedure, which he has followed in this case.

It is conceded that on the allegations for the prosecution in the case before us, the offence under Ss. 120-B

224 and 332, Penal Code, were committed within the "railway lands" and therefore they were covered by the Notifications, but it was argued that as the shot which killed Amar Nath was fired from a spot about 300 feet outside the fencing, the appellants could not be tried under the special procedure laid down in the Notification for offences under Ss. 396, 302/149 and 307/149. Obviously this argument has no force, so far as the offence under 396 is concerned as on the finding of the learned Sessions Judge, with which we are in complete agreement, the dacoity was committed in the railway train and Amar Nath expired at Narwana within the limits of the railway lands. As regards the offences under Ss. 302/149 and 307/149, it does not seem necessary to discuss this question, as in our view of the evidence, the convictions under these sections cannot be sustained.

Dr. Nand Lal counsel for Achhar Singh raised another legal objection that the lower Court could not take cognizance of the offence of criminal conspiracy, punishable under S. 120-B, Penal Code, without a complaint made by, or under the authority of, the Governor-General in Council or the Local Government, or the written consent to the initiation of the proceedings given by the Local Government or a District Magistrate duly authorized in this behalf. S. 196-A, Criminal P. C., however clearly provides that no such complaint or consent in writing is necessary where the object of the alleged conspiracy is to commit a cognizable offence, punishable with death, transportation, or rigorous imprisonment for a period of two years or upwards. In the present case the accused persons were charged with having entered into a criminal conspiracy to

> "escape from lawful custody of the police, to rob them of their arms and to cause hurt and even death in prosecution of the aforesaid objects."

These offences are admittedly punishable with death, transportation for life and rigorous imprisonment for two years. It follows therefore that the lower Court was fully empowered to take cognizance of the case without any complaint made or consent in writing given by, or under the authority of, the Governor-General in Council or the Local Government or any other officer.

On the merits, it will be convenient to deal first with the offence under S. 224, Penal Code. As has been stated already, all the nine accused had been undergoing punishments imposed on them by Courts in the Punjab after regular trials, and by order of proper authority they were being transferred from the Andamans to the Central Jail Lahore, in charge of a police escort. They were therefore in lawful custody, and it is admitted that they all escaped from it without permission. There can be no doubt therefore that on these facts their guilt under S. 224, is fully established.

The question on which there has been much argument before us is whether on the materials on the record the nine accused could be held to have entered into a criminal conspiracy, and if so with what object or objects. It is hardly necessary to point out that the essence of the offence of criminal conspiracy is agreement between two o more persons to commit an offence o do any of the other acts mentioned in S. 120-A, Penal Code, in the manne described therein. This being so, it i often difficult, if not impossible, to ob tain direct proof of the alleged agree ment between the various accused an in most cases the question becomes a matter of inference:

> "deduced from acts of the persons concerned done in pursuance of an apparent criminal purpose in common between them: per Grose, J., in *R.* v. *Brisac* (1)."

affirmed by the House of Lords in *Mulcahy* v. *Reg.* (2). As observed by Erle, J., in the well-known case of *R.* v. *Duffield* (3):

> "It does not happen once in a thousand times when the offence of conspiracy is tried, that anybody comes before the jury to say that he was present at the time when the parties did conspire together, and when they agreed to carry out their unlawful purposes; that species of evidence is hardly ever to be adduced before a jury; but the unlawful conspiracy is to be inferred from the conduct of the parties; and if several men are seen taking several steps, all tending towards one obvious purpose, and they are seen through a continued portion of time taking steps that lead to one end, it is for the jury to say whether those persons had not combined together to bring about that end, which their conduct appears so obviously adopted to effectuate."

The question for determination therefore is whether the prosecution have succeeded in establishing the facts necessary for raising the inference against some or all of the accused. It appears to have been suggested that the idea must have matured before the party

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1. 4 East 164.
2. 3 H L 306.
3. 5 Cox 404.

must have mutured before the party reached Delhi, and that it was in pursuance of this design that at Delhi the Sikh prisoners wanted separate accommodation, and on the railway platform when the prisoners were having their meals, Rattan Singh and some others recited a certain slogan condemning non-violence. In my opinion these facts, even if they be taken to have been established cannot have any bearing on the question before us. As has been stated already, from Calcutta to Delhi the Sikh and Mohamedan prisoners had been accomodated in separate compartments, and at Delhi it was intended to put them all in one compartment, and to this objection was raised by the Sikhs on the ground that the Mohamedans would be smoking in the compartment and this would wound their religious susceptibilities. In my opinion, this demand might have been made quite innocently and does not establish any criminal intention on the part of any of the Sikh prisoners. Moreover according to the case for the prosecution, the alleged conspiracy was not confined to the Sikhs alone, for one of the prisoners convicted under S. 120-B is Mohammada, appellant, and it is in evidence that there were in the compartment five other Sikh prisoners who did not attempt to escape or beat the escort. The evidence as to Rattan Singh having uttered a slogan at the railway station at Delhi is meagre and conflicting and it cannot be held to have been definitely proved that Rattan Singh or the other prisoners actually recited the slogan. But even if they did, this circumstance is no indication of their intention to commit any crime. Admittedly all the prisoners who were being brought from the Andamans had been convicted previously of serious offences like murder and dacoity, and there was nothing extraordinary in their singing a song praising "violence" and condemning the "creed of non-violence." We must therefore confine ourselves to the acts and conduct of the various accused persons shortly before and after their escape and see if they lead to the inference that they were acting in agreement.

The learned Sessions Judge has held —and after a careful examination I have no doubt that his conclusion is correct—that the attack on the escort —in the railway train must have been the result of the concerted action on the part of the prisoners who escaped between Ghaso and Narwana. First of all we have the important fact that these prisoners kept awake till 1 o'clock, even though there was ample accomodation in the compartment for them to recline or sleep. Secondly, all ten of them got up suddenly and simultaneously and, taking full advantage of the fact they were not in handcuffs and the members of the escort were not on the alert, fell upon them and beat them. It is established beyond dispute that the head-constable received seven injuries, and the eight other constables twenty-seven injuries on their persons on this occasion, three of them having been wounded on the head and caused to bleed profusely. It is also beyond question that the assailants succeeded in seizing from the escort four muskets, three bandoliers and two batons, and after some one of them had brought the train to a standstill by pulling the communication cord, all ten of them escaped.

It was contended before us that the escort were not beaten by the nine accused, and it was suggested that what really happened was that the members of the escort had gone to sleep and the appellants taking advantage of their negligence quietly escaped, taking away the arms with a view to disable the escort from pursuing them, and that it was after they had alighted that the remaining fifteen prisoners who had remained in the compartment had a scuffle with the constables and caused them injuries. There is however not a scintilla of evidence on the record to support this suggestion and the circumstances point unmistakably to the conclusion that the injuries were inflicted by Rattan Singh and his nine associates just before their escape. It seems clear that the constables were not as vigilant as they should have been, and it is quite likely that some of them might have felt sleepy at the time, but it is impossible to believe that they surrendered their arms and ammunition to the prisoners without a struggle, and I have no doubt that it was in this struggle that they were injured. Again it is most significant that the four prisoners who escaped to the right, namely, Bachan Singh, Punjab Singh, Achhar Singh and Mohammada, remained together for a week until their arrest in Mauza Gawara near Dhuri, on the opposite border of the Patiala State. It is in evidence that on the day following the escape Bachan Singh purchased a file from Khair Din (P. W. 58) at Mauza Narwana, and apparently it was with this file that he cut the fetters of his three associates, pieces whereof were recovered from the fields in the neighbourhood. On the night of 29th April at about 1-30 a. m., these four accused attempted to cross the canal by the railway bridge near Daulatpura, and when challenged stated that they were going to offer parshad at the Gurdwara at Malerkotla. The villagers, who were guarding the bridge, refused to allow them to go, whereupon one of them fired at the guard, wounding P. Ws. Toti and Udhe Singh. They then went together towards Mauza Gawara, where they were arrested the next day. At the bridge two used cartridges (No. 104 bore), which have been proved to have been stolen from the escort, were recovered and at the time of the arrest Bachan Singh was found in possession of the musket (Ex. P-3), which had been seized from Imam Din constable, and 38 live cartridges of the same bore. It is most important to note that according to the evidence of the members of the escort, Bachan Singh had snatched away the musket only, and the two bandoliers had been seized by Punjab Singh and Mohammada. These bandoliers contained 40 cartridges, and apparently were handed over by Punjab Singh and Mohammada to Bachan Singh, after they had gone some distance from the place of escape. The only inference that can reasonably be drawn from these facts is that these four persons had been acting in concert throughout.

The remaining six had, as stated already, escaped to the left. It is in evidence, which there is no reason to disbelieve, that the search party was able to follow the tracks of six men from the train to a distance of eleven miles, throughout which they appeared to have walked together. At a short distance from the place of escape, a number of pieces of bar fetters were found early next morning. This indicates that some one of the prisoners must have had with him a file or some other instrument of like nature, and with it he must have helped to make the movement of his associates free, as soon as they had gone a safe distance from the train. It is admitted by Swaran Singh that he was carrying concealed on his person a number of sovereigns, out of which he gave some to Rattan Singh in order to purchase food for them. They seem to have quarrelled over the return of this money and eventually Rattan Singh shot at Swaran Singh in the leg. Rattan Singh himself had seized the musket (P. 4) only, but at the time of his death in Hoshiarpur district he was found in possession of eight cartridges (No. 104 bore) which were evidently taken from one of the bandoliers stolen by one of the other accused persons.

In my opinion, all these facts lead to one conclusion and one only, that Rattan Singh and the nine accused had entered into a criminal conspiracy to forcibly seize from the police escort their arms and ammunition after beating them, and then to escape with the arms, and that they all acted in concert. I am however doubtful that from the facts, as established, it can be inferred with any degree of certainty, that it was one of the objects of the conspiracy to commit the offence of murder. The design appears to have been conceived and carried out in a very short time and I think that the idea which was predominant in the minds of the conspirators at the time was to snatch away the arms after beating the escort and to escape, and that it is not safe to presume that there was an agreement between them to commit the offence of murder with the muskets which they intended to seize. I therefore hold that the nine accused entered into a criminal conspiracy, the object of which was to beat the policemen, to rob them of their arms and to escape.

The next question for decision is whether the accused committed the offence of dacoity and whether they have been rightly punished under S. 396, Penal Code. It has been shown above that ten persons, i. e., the nine accused and Rattan Singh, conjointly stole arms and ammunition from the escort and in doing so, as well as in carrying away the stolen property, they voluntarily caused hurt to the constables. These acts clearly constitute the offence of "dacoity" as defined in S. 391, Penal Code, and this was not seriously disputed by the learned counsel for the appellants. The evidence also establishes that as soon as the train was brought to a standstill and the ten prisoners had escaped, three members of the railway police guard, namely, Amar Nath, Kishen Chand and Sher Zaman, who were on duty with the train, got down immediately, Amar Nath and Kishan Chand going to the left and Sher Zaman to the right, and on hearing the Jingle of the fetters and seeing a number of persons running away Amar Nath and Kishan Chand pursued the fugitives. They had gone about 100 yards from the railway line when there was an exchange of shots between the pursuers and the pursued. Amar Nath was hit in the forehead, fell down unconscious, and died soon afterwards: Kishen Chand was wounded in the thigh, but survived. There was some controversy before us whether Amar Nath was killed by the dacoits. It was argued for the defence that he was accidently hit by a shot fired by his companion Kishen Chand, but after hearing counsel at length, I have no hesitation in rejecting this suggestion as wholly unwarranted. There is ample evidence on the record to show that Amar Nath and Kishen Chand were both going abreast, that they had loaded their muskets, and that they were about to fire in the same direction when one of the fugitives turned back, knelt and fired at them hitting Amar Nath on the forehead. Amar Nath fell down instantaneously and never recovered. The learned Sessions Judge has accepted this evidence as true and I have no doubt that his finding is correct. The relative position of the two constables, the shape of the wound on the forehead of the victim, and the probabilities all justify this conclusion, whereas there is nothing whatsoever on the record to support the wild suggestion put forward by the defence.

From what has been stated above, it is abundantly clear that all the dacoits are liable to the enhanced punishment prescribed in S. 396, Penal Code. All ten of them conjointly stole property in the railway train; in doing so they caused hurt to the members of the escort; and in attempting to carry away the stolen property, one of them murdered Amar Nath, within a very short time of their escape from the train in which they had committed the dacoity. It is settled law that in such circumstances, the murder must be held to have been committed "in the commission of the dacoity" within the meaning of S. 396, and every one of the dacoits is liable to be punished with death, transportation for life or rigorous imprisonment which may extend to ten years: *Lashkar* v. *Emperor* (4), *Karim Bakhsh* v. *Emperor* (5), *Sundar* v. *Emperor* (6) and *Queen-Empress* v. *Teja* (7).

It was however suggested that as at the time when the fatal shot was fired both the assailant and the victim were in the open space outside the railway fencing (see plan, Ex. P-Q), and therefore not in the territory over which jurisdiction had been ceded by the Patiala State to the British Government, the offence must be held to have been committed outside British India, and consequently the offenders could not be tried and punished under S. 396, Penal Code, by the Sessions Judge, Karnal, without a proper certificate from the agent of the Governor-General (Punjab States) granted in accordance with the provisions of S. 188, Criminal P. C. After hearing counsel at length, I have no doubt that this argument is fallacious and is based on a misconception of the provisions of S. 396, Penal Code. In my opinion, on the findings of fact recorded by the learned Sessions Judge which I have upheld above, S. 188, Criminal P. C., was not applicable, and no certificate from the agent of the Governor-General was necessary. It is conceded that the offence of "dacoity" was committed exclusively within the "railway lands" —the escort were beaten in the train; the arms and ammunition were seized by the prisoners while they were still in the compartment; and in doing these acts more than five were acting conjointly.

This being so, I have no doubt that the Courts in British India had jurisdiction to try the offenders, and impose on them the enhanced punishment prescribed in S. 396. An examination of the relevant sections of the Indian Penal Code will show that the offence of dacoity is defined in S. 391 and Ss. 395, 396 and 397 provide graduated penalties for the offence in accordance with the gravity and seriousness of the attendant circumstances. If the dacoits are found guilty of simple dacoity they will be punished under S. 395. If in a particular case, it is held that at the time of committing dacoity a deadly weapon was used, or grievious hurt caused, or an attempt made to cause grievous hurt or death, the punishment will be as provided in S. 397. And if "in the commission of the dacoity," one of five or more persons, who have conjointly committed the offence, commits murder, every one of these persons is liable to be punished with death or the other penalties mentioned in S. 396. It seems to me that in all these cases, jurisdiction to try the offence primarily vests in the Courts of the place where the dacoity was committed, though the offenders may also be liable to be tried for

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4. AIR 1921 Lah 115=63 I C 623=22 Cr L J 687=2 Lah 275.
5. AIR 1923 Lah 329=76 I C 1029=25 Cr L J 319.
6. AIR 1925 Lah 142=81 I C 188=25 Cr L J 700.
7. (1895) 17 All 86=(1895) AWN 12.

one or other of the offences by the Court within whose jurisdiction the grievous hurt or death was caused. In this connection it is also important to note that in order to render the other dacoits liable under S. 396 for the act of one of their associates it is not necessary that murder should have been within the contemplation of all or some of them when the dacoity was planned, nor is it necessary that they should have actually taken part in, or abetted, its commission. Indeed they may not have been present at the scene of murder, or may not have known even that murder was going to be, or had in fact been, committed. But nonetheless they all will be liable for enhanced punishment, provided a person is in fact murdered by one of the members of the gang "in the commission of the dacoity."

It does not seem necessary to pursue this matter further, for in the case before us, we have the important fact, proved by the positive and uncontradicted evidence of Sultan Mohammad (P. W. 18) and Sher Zaman (P. W. 45) that Amar Nath, though wounded outside the "railway lands" actually expired at the railway station, Narwana, after the train, carrying him and the other wounded persons had arrived there. For all these reasons, I am of opinion that the learned Sessions Judge had jurisdiction to try the offence under S. 396 and a certificate by the agent to the Governor-General was not necessary.

Before concluding this part of the judgment I may mention that at the commencement of the trial before learned Sessions Judge the Public Prosecutor actually filed a certificate from the agent to the Governor-General (Punjab States) purporting to have been given under S. 188, Criminal P. C., (see p. 5 of the paper-book). This document however is defective in all material particulars and we would have been constrained to reject it as not being in accordance with the law if we held that a certificate was necessary. It does not set out the title of the case correctly nor does it contain any other details of the alleged crime for which the agent was certifying that the offenders should be tried in British India. There is on the face of the document nothing to connect it with the case before the Court, nor was any evidence led at the trial to supply these defects. However in view of my finding that the present case is not governed by S. 188, Criminal P. C., and no certificate was necessary, this question is of no practical importance.

The learned Sessions Judge has further convicted Narain Singh, Teja Singh, Sawaran Singh and Diwan Singh under Ss. 302/149, and 303, and Jowand Singh under S. 302/149, Penal Code, for being members of an unlawful assembly, in prosecution of the common object of which Amar Nath was murdered. He has also convicted these five persons under S. 307/149, Penal Code, for being members of an unlawful assembly in prosecution of the common object of which an attempt was made to murder Kishen Chand. In my opinion, both these convictions are unjustified and must be set aside. I have already held that the commission of murder was not one of the objects of the conspiracy, nor does the evidence show that after their escape from the train the prisoners formed themselves into a new unlawful assembly in the furtherance of the common object of which offences under Ss. 302 and 307 were committed. As has been shown above, the murder of Amar Nath and the murderous assault on Kishen Chand were made by one of the dacoits in the "commission of dacoity" and these facts have been taken into consideration in punishing all the surviving members of the gang under S. 396, Penal Code. I hold therefore that the convictions and sentences under these sections are bad and must be quashed.

The learned Sessions Judge has also convicted the nine accused under S. 332/149, I. P. C., for voluntarily causing hurt to the police escort in the struggle to seize arms and ammunition from them. This act however is one of the essential ingredients of the offence of dacoity for which the accused have been separately convicted, and which conviction I have upheld. It has been very properly conceded by the learned Public Prosecutor that in view of the provisions of S. 71, Penal Code, the offenders cannot be punished twice for this act. Accordingly the conviction under S. 332/149 must be set aside.

The result of the foregoing discussion is that the eight appellants and Dewan Singh have been proved to have committed offences under Ss. 396, 224 and 120-B, Penal Code, and are liable to be punished accordingly.

With regard to the punishment for the offence under S. 396, Penal Code, it was contended by the learned Public Prosecutor that as seven of the accused persons, viz., Bachan Singh, Sawaran Singh, Punjab Singh, Dewan Singh, Mohammada, Teja Singh and Narain Singh were under sentences of transportation for life, the only sentence, which it is open to the Court to impose on them is of death, and in support of this contention he referred us to S. 303, Penal Code. That section however is expressly limited to the case of a person or persons, "who being under sentences of transportation for life, commit murder," and in my opinion, its operation cannot be enlarged in the manner suggested. I have no doubt that S. 303, Penal Code, has no application to the case of persons, (other than the actual murderer), who are liable to enhanced punishment for the act of one of their associates under the special provisions of S. 396, Penal Code. It is conceded that such persons cannot be said to have been convicted of "murder;" the offence of which they have been found guilty is "dacoity," though they are liable to enhanced punishment by reason of their complicity in a dacoity in the commission of which one of the members of the gang had committed murder under S. 302. Admittedly the punishment to be imposed on them is not that prescribed in S. 302, but the punishment laid down in S. 396, under which the Court has a much wider choice. I hold therefore that S. 303 has no application to this case and we are not bound to sentence every one of the accused persons to death.

It has been stated already, that the shot which killed Amar Nath had been fired by Rattan Singh, who has himself been killed since, in an encounter with the police. Of his nine associates, whose cases are before us, Sawaran Singh, Bachan Singh, Punjab Singh, Mohammada and Dewan Singh appear to have taken very prominent part in committing the dacoity. According to the evidence they seized the muskets and the bandoliers from the members of the escort, and inflicted the more serious of the injuries on Mubarik Hussain and the other constables. They all were under sentences of transportation for life for crimes committed previously and there are no extenuating circumstances whatever. In my opinion the learned Sessions Judge was fully justified in sentencing each of them to death under S. 396, Penal Code. Narain Singh, Achhar Singh and Teja Singh took part in the assault and beat ten constables but did not actually seize the arms, nor was any incriminating article found with them at the time of arrest. I think the ends of justice will be met by passing a sentence of transportation for life against each of them.

The case of Jowand Singh however stands on a different footing. He was undergoing a sentence of transportation for ten years in the Andamans and according to the police witnesses, he appears to have taken a much minor part in the assault in the train. No arm or ammunition was seized by, or recovered from him. In his case I think that a sentence of rigorous imprisonment for ten years will be sufficient.

In an earlier part of the judgment I have held that the nine accused had entered into a criminal conspiracy to beat the escort to rob them of their arms, and to escape. Their act in entering into such a conspiracy is per se an offence under the Indian Penal Code and they are liable to be convicted and punished for it under S. 120-B, even though the offences which had formed the object of the conspiracy were not committed at all. In the present case however the offences which constituted the object of the conspiracy were actually and in fact carried out within a very short time, and indeed it is principally from these overt acts that we have been able to infer the existence of the conspiracy. For committing these acts, the appellnts have been convicted and sentenced separately. In these circumstances, I do not think a separate sentence for the offence under S. 120-B is called for: see *Harsha Nath* v. *Khagendra Nath* (8), *Kali Das Basu* v. *Emperor* (9), *Balmokand* v. *Emperor* (10) and *Abdul Salim* v. *Emperor* (11).

The offence under S. 224 stands however on a different footing. It is wholly independent and separate from dacoity and for this separate sentences must be imposed. For this offence the learned Sessions Judge has sentenced each of the appellants to rigorous imprisonment for two years which is the maximum penalty prescribed in the section and I have no doubt that, in the peculiar circumstances of this case, this sentence is fully justified and must be upheld.

For the foregoing reasons, I would accept these appeals to this extent:

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8. (1915) 42 Cal 1153=16 Cr L J 9=26 IC 313.

9. (1915) 33 IC 513=26 Cr L J 33.

10. (1915) 17 P R 1915 Cr=16 Cr L J 354=28 I C 738.

11. AIR 1922 Cal 107=69 I C 145=23 Cr L J 657=49 Cal 573.

that I would set aside the convictions and sentences of the various appellants under Ss. 302/149, 303, 302/149, 307/149, 332/149 and 120-B, Penal Code, but I would uphold their convictions under Ss. 396 and 224 and would sentence them as follows:

(A) (1) Bachan Singh, Swaran Singh, Punjab Singh, Diwan Singh and Mohammada to death under S. 396, Penal Code; (2) Achhar Singh, Narain Singh and Teja Singh to transportation for life under S. 396, Penal Code; (3) Jowand Singh to rigorous imprisonment for ten years under S. 396, Penal Code; and (B) All the nine accused to rigorous imprisonment for two years under S. 224, Penal Code.

The sentences under Ss. 396 and 224, Indian Penal Code, against Achhar Singh, Narain Singh, run concurrently and shall begin at the expiry of the sentences which they were already undergoing at the time of their escape from the train.

Monroe, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 987

ABDUL QADIR, J.

on difference between

COLDSTREAM AND JAI LAL, JJ.

Amrit Lal—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 621 of 1932, Decided on 2nd June 1933, from order of Addl Sess. Judge, Multan, D/. 18-4-32.

(a) Evidence Act (1872), S. 24—Confession by accused to Magistrate, not improperly induced can be proved though made under hope of pardon and even though not recorded as required by S. 164—Criminal P. C. (1898), S. 164.

Where the accused in a conversation with the remanding Magistrate stated to the Magistrate that the police wanted him to turn approver; that he had given true facts to the police; that he was in fact guilty and that he had told the police where he had sold the stolen property:

Held: Per *Coldstream, J.*—A confession, by the accused to a Magistrate can be proved, if it is not improperly induced and the fact that the accused made it under the hope of getting a pardon does not render it inadmissible, and the fact that it was recorded without taking the precautions required by S. 164, Criminal P. C., will not compel its exclusion, but under the circumstances there was no such confession in the case. All that was said to the Magistrate was that the accused had made disclosures to the police on the promise of pardon: *A I R* 1933 *Lah* 716, *Ref.* [P 989 C 1, 2]

(b) Criminal P. C. (1898), S. 162—List of stolen things given to supplement first information report is admissible and can be referred to under S. 158 and proved under S. 159 — Evidence Act (1872), Ss. 158 and 159.

Per *Coldstream, J.*—A list of the stolen things given to supplement the first information report is admissible and can be referred to under S. 158 and proved under S. 159, Evidence Act. The fact that a copy of such a list had been given to the police would not affect the admissibility of the informant's list: *A I R* 1925 *Cal* 959; *AIR* 1929 *Cal* 448 and *A I R* 1931 *Oudh* 83, *Ref.* [P 990 C 1]

(c) Evidence Act (1872), S. 114 (b) — Approver's evidence which is changing in material particulars on different occasions should not be believed—Criminal Trial.

Where the only real evidence in a case was that of an approver and his description on one occasion of the persons who took actual part in the theft differed from that given on another occasion:

Held: Per *Abdul Qadir, J.* — His testimony cannot be held to be reliable or convincing. [P 996 C 2]

(d) Penal Code (1860), S. 411 — Sale of ornaments after more then a month after theft does not in itself lead to inference that they were proceeds of theft.

Per *Abdul Qadir, J.*—It will not be safe to draw the inference that certain ornaments are the proceeds of a burglary from the mere fact that they were sold by the accused more than a month after a theft. [P 997 C 1]

Shiv Ram Sawhney and *Ram Lal*—for Appellant.

D. C. Ralli—for Respondent.

Coldstream, J.—On the night of the 24th June 1930 the house of Mohan Ram a money lender in Dera Ghazi Khan (who was absent at the time) was broken into and many ornaments were stolen. The crime was reported next morning by Mohan Ram's son Ram Kishen who mentioned that a trunk containing ornaments belonging to his father and a box containing ornaments deposited in pawn with him had disappeared. Lists would be given later. The police investigation was infructuous and the case was "struck off". On the night of the 15th November the house was again broken into and during the course of investigation a clue was discovered to the identity of the persons who had committed the burglary of the 24th June with the result that five men, Amrit Lal (a Sub Inspector of Police), Mohammad Ayub his orderly, Ahmad his servant, Massu and Nura were sent up for trial charged under Ss. 457 and 380 read with S. 149, Indian Penal Code the principal witness being Daulat Ram, another servant of Amrit Lal, who was alleged to have been party to the crime and had been granted a pardon and turned approver. The proceedings began in Dera Ghazi Khan district but the trial was by the Additional Sessions Judge of Multan. The learned Judge held that the approver's story inculpating all the accused was satisfactorily corroborated by independent evidence against Amrit Lal alone. Acquitting the others, he sentenced Amrit Lal to four years' rigorous imprisonment under S. 411, Indian Penal Code, dismissing the charge under S. 457. Amrit Lal has appealed against this conviction and judgement (No. 621 of 1932) and we have also before us an appeal on behalf of the Crown against his acquittal on a charge under S. 457, Indian Penal Code, with a prayer for enhancement of his sentence under this section (No. 918 of 1932). The learned Judge has also brought it to the notice of this Court that the sentence passed by him is in excess of the maximum permitted by S. 411, Indian Penal Code. This judgment will dispose of this reference as well as the two appeals.

We have heard counsel for the appellant and on behalf of the Crown, and have read and considered the evidence in the light of their arguments and criticisms. To corroborate the testimony of the approver, the Crown produced evidence to prove the following circumstances:-

(1) When the police took into custody his servant Ahmad, Amrit Lal had made strenuous efforts to procure his release. (2) Acting on information given by Amrit Lal the Police discovered that he had sold a number of ornaments to Gobind Ram, a saraf of Bhera, doing business at Rawalpindi on the 30th July 1930. The approver's evidence was that Amrit Lal told him that he had sold the ornaments at Rawalpindi. (3) On 3rd December 1930 a ring (Ex. P-3) was recovered from Sardar Begam the mother of Nagina a Multan prostitute with whom Amrit Lal had been openly associating both in Multan and Dera Ghazi Khan and with whom he was admittedly very much in love. It is not disputed that the ring was given by Amrit Lal to Sardar Begam. The prosecution alleged that it was part of the stolen property while Amrit Lal declared it belonged to him. (4) On 3rd August Amrit Lal paid Rs. 396 to Radha Kishen Gogia to whom he was indebted. The fact of this payment is not disputed. (5) Amrit Lal, Daulat Ram and Mohammad Ayub had been seen together on the night of the theft. (6) Amrit Lal had been produced before M. Tassaduq Husain City Magistrate for the purpose of a remand on the 2nd December 1930. At the trial M. Tassaduq Husain was called as a defence witness to support the contention that Rai Sahib Shiv Sahai, Inspector of Police, Amrit Lal's superior officer, was at enmity with Amrit Lal, being his rival for the affections of the prostitute Nagina. In cross examination M. Tassaduq Husain stated that before he ordered the remand he had a conversation with Amrit Lal in the course of which Amrit Lal told him that the police wanted him to turn approver, that he had given the true facts to the police in writing, that he was in fact guilty, and that he had told the police where he had sold the stolen property. The prosecution contended that this was an independent confession to the Magistrate admissible in evidence.

The learned Sessions Judge held that Amrit Lal's efforts made personally and in writing to secure his servant's release from custody did not connecting personally with the offence. It was alleged that in making them he had expressed a fear that Ahmad might turn "traitor". This allegation the Sessions Judge was not prepared to believe.

The learned Sessions Judge dismissed as unsatisfactory the evidence of the chance witnesses and rejected as inadmissible the evidence of the alleged confession to M. Tassaduq Husain, citing as authority-*Allah Dad* v. *Emperor* (1). He has, however, in agreement with the unanimous opinion of the assessors (who held all the accused guilty) found it established beyond any doubt that the articles sold by Amrit Lal at Rawalpindi were part of the stolen property and that Amrit Lal's story that he sold them on behalf of the defence witness Ram Asra Mal of Bhera (D. W. 7) to whom they belonged was false. He has also held it proved that the ring Ex. P/3 was part of the stolen property, disbelieving the defence evidence that it belonged to Amrit Lal. Further he has found that the payment of Rs. 396 to Radha Kishen Gogia corroborates the prosecution story. It is on these findings that the appellant has been convicted.

For the appellant it is argued before us that these findings are not justified by the evidence which is clearly fabricated so far as it relates to the list of property given by Mohan Ram's son to the police after the theft had been reported and the list of pawned property submitted subsequently by Mohan Ram and so far as it relates to the identity of the ring P/3. As regards the

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1. (1931) 137 I C 57=33 Cr L J 377.

sale of ornaments at Rawalpindi counsel contends that the prosecution have failed to prove their identity with the stolen articles, the lists mentioned being forged and not admissible in evidence and the entries in Gobind Ram's bahi not tallying with any reliable evidence as to what the stolen ornaments were (the ornaments themselves have disappeared. It is not shown what Goind Ram did with them); while, on the other hand, the defence evidence proves that the ornaments belonged to Ram Asra Mal. It is also contended that the ring P/3 is proved to have been given to Amrit Lal by Dr. Mohindar Lal to whose daughter Amrit Lal was engaged to be married in 1927. As regards the payment of Rs. 396 to Radha Kishen it is admitted that Amrit Lal belongs to a wealthy family and that he had in 1929 cashed a cheque for Rs. 600.

In reply counsel for the Crown relies not only on the evidence accepted by the lower Court but also on the alleged confession to M. Tasaddak Hussain which he asserts was wrongly excluded as inadmissible. The evidence of the chance witnesses who say they saw the appellant and other accused together is of a worthless kind and was rightly rejected, and counsel for the Crown has not asked us to take it into consideration. I also agree with the learned Sessions Judge in attaching special significance to the evidence relating to Amrit Lal's efforts to release Ahmad from custody. It is possible that Amrit Lall did express his fear that Ahmad might turn "traitor" but this does not necessarily point to his guilt in this case. From the letter of 11th November written by him to R. S. Shiv Sahai, district Inspector of Police it is clear that he had a fancied or real grievance of a serious nature against that officer. The grievance according to the defence story related to Nagina whose dances R. S. Shiv Sahai used to attend with Amrit Lal.

As regards the alleged confession, if there was an independent confession to M. Tasaddak Hussain (D. W. 1), I have no doubt that it was open to the prosecution to prove it, there being no suggestion that it was improperly induced. No doubt Amrit Lal hoped for a pardon but this part alone would not render the confession inadmissible. Nor will the fact that it was not recorded with the precautions required by S. 164, Criminal Procedure Code, compel its exclusion in the circumstances alleged. This has been clearly decided by the recent Full Bench ruling in *Abdullah v. Crown* (2). But I am not satisfied that Amrit Lal said any more than that he had made disclosures to the police on the promise of pardon. Had there really been a confession, it would surely have been put in evidence by the Crown. A police officer P. W. 8, Asa Nand, was present at the conversation. This officer was a prosecution witness (P. W. 18) but was not questioned about any confession. M. Tasaddak Hussain was not called by the prosecution. The affidavits filed with and in reply to Amrit Lal's application for transfer of the trial from Dera Ghazi Khan to Multan show that Amrit Lal's brothers had given evidence against M. Tesaddak Hussain in a departmental enquiry and that M. Tasaddak Hussain had been accused of enmity towards Amrit Lal on this account. The evidence of the confession is not free from suspicion and I do not rely on it.

The admitted payment of Rs. 396 to Radha Kishen is suspicious but does not by itself clearly connect Amrit Lal with the theft, having regard to the fact that it is not proved that Amrit Lal was in straitened circumstances. The account with Radha Kishen shows that the latter acted as Amrit Lal's banker. Amrit Lal admittedly belongs to a wealthy family. As regards the source from which he obtained the Rs. 396, he attempted to call evidence by the issue of interrogatories to which, however, no reply was received in time to be used. All that can be said of this payment is that it proves that after Amrit Lal returned from Rawalpindi he had a considerable sum of ready money at his disposal, which is a fact consistent with the approver's story.

There remains only the question whether the ring given to Sardar Begam and the ornaments sold at Rawalpindi are proved to have been part of the stolen property.

Here it is necessary to examine the three lists T/1, T/2 and T/3. According to Ram Kishen (Mohan Ram's son), the list T/1 was dictated to him by his mother and he prepared the duplicate list T/2. The list T/1 was given to the police after he had reported the theft. T/2 was produced in the Committing Magistrate's Court. The list T-3 (list of property pawned) was given by Mohan Ram to the police on the 26th June. Mohan Bai, Ram Kishen's mother (P. W. 17) in giving evidence says no-

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2. A I R 1933 Lah 716=1933 Cr C 902=14 Lah 290.

thing about the duplicate list. In cross-examination it was elicited that in the Committing Magistrate's Court she had stated that the list of stolen property was dictated by her to the police. The truth seems to be that when the investigating officer Bakhshi Ram Lubhaya (P. W. 18) went to the house before recording any statement other than the first report, a list was made out by Mohan Bai and her son and given to him. It is contended by Amrit Lal's counsel that a list so given must be excluded from the evidence, being a statement made to the police. He relies on two Calcutta rulings *A. I. R.* 1925 *Cal.* 959 and *A. I. R.* 1929 *Cal.* 448. A list given to implement and complete the first report is certainly admissible as was held in *Autar* v. *Emperor* (3), and *Emperor* v. *Narain* (4). No doubt there may be cases where a description of property given during police investigation cannot be proved in view of the provisions of S. 162, Criminal P. C. But a list might be made for the informant's own benefit shortly after the crime which could certainly be referred to under S. 158 and proved under S. 159 of the Indian Evidence Act. The fact that a copy of such a list had been given to the police would not affect the admissibility of the informant's list. As regards the list T-2, it was clearly not written with the same pen and ink as T-1, as Ram Kishen says it was, and I think it probable that T-2 was prepared to overcome any possible objection to the admission in evidence of T-1 in view of the rulings referred to above. As to Ex. T-3, it is obviously a supplement to the first information report which could only be made by Mohan Ram as made clear in the first report itself.

It is argued that the list T-1 is highly suspicious. There is no suggestion that Mohan Ram had any list of his ornaments and I think that the omission to produce it and refer to it raises the presumption that he had done. Mohan Bai is illiterate (does not write her name) and she dictated the list to her son. The list contains not only a description of each article and its value but also its weight. It is contended that it could not have been possible for Mohan Bai to recollect the weights and value of each article and emphasis is laid on her statement in cross-examination that she could not say what the weight of the ring (alleged to be P. 3) referred to in T-1 where it is described as weighing about $5\frac{1}{4}$ mashas and worth Rs. 8. The ring weighs $5\frac{1}{4}$ mashas. But Mohan Bai was not asked in cross-examination to say how she had previously remembered the approximate weight of each stolen article and I do not see anything very remarkable in an Indian lady's being able to state the approximate weight of her own golden ornaments. We are asked to believe that this list Ex. T-1 was fraudulently substituted by the police for the one dictated by Mohan Bai to her son at a late stage of the investigation after it was known what kind of ornaments had been sold by Amrit Lal at Rawalpindi. Now had any such dishonest fabrication taken place surely care would have been taken to make the descriptions given to correspond more closely and clearly with those in Gobind Ram's books. Such close correspondence would have avoided the use of approver's evidence to establish the charge against Amrit Lal. I have no doubt that Mohan Bai when she said she could not tell the weight of the ring P-3, meant that she could not say exactly what it weighed. She had already stated its weight to be approximately $5\frac{1}{2}$ mashas. Mohan Ram also could not say what the ring weighed, but it was not his. I believe that the list Ex. P. T-1 is the list dictated after the theft was reported and Ex. P. T-3 the list given by Mohan Ram.

The ring included in the list is described as having a white stone. This ring Ex. P-3 has a poor greenish white gem and is such as could be easily identified with certainty by anyone who had handled it. The question is simply whether the evidence of Ram Kishen Mohan Ram and Mohan Bai is to be believed when they identify it as having belonged to Mohan Bai. (After examining the evidence, the judgment proceeded). I do not believe the defence evidence about the ring. At the same time the prosecution evidence relating to it is not wholly convincing, and I am doubtful whether it was the ring stolen from Mohan Bai. It is not probable that Amrit Lal wore openly a stolen ring shortly after the theft.

The greater part of the counsel's arguments have centred round the evidence relating to the ornaments sold at Rawalpindi. The learned Additional Sessions Judge has dealt very fully and

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3. A I R 1931 Oudh 74=1931 Cr C 130=126 I C 498=31 Cr L J 1017.
4. A I R 1931 Oudh 83=1931 Cr C 211=131 I C 72=32 Cr L J 630.

carefully with this part of the evidence at pp. 6 to 18 of his judgment which shows that the arguments addressed to him were similar to those put forward before us. I do not think it necessary to discuss the evidence in detail here. The entries in Gobind Ram's book, even if they corresponded much more closely with the description in the list than they do, would not establish beyond possibility of error the identity of the goods sold and the goods stolen, but, as the learned Additional Judge points out, some of the goods reported stolen could be described as they are described in Gobind Ram's book. It is just because in the absence of the ornaments themselves, their identity cannot be conclusively proved that the prosecution have had to rely upon the approver, putting forward the evidence that similar gold ornaments were sold by the appellant shortly after the theft as strong corroboration of Daulat Ram's statement that Amrit Lal shared in the loot procured by the thieves from Mohan Ram's house.

I have carefully considered the defence evidence relating to the sale of the ornaments in the light of counsel's criticism and am perfectly satisfied for the reasons given in the uidgment of the lower Court that it is wholly false. The ornaments were sold by Amrit Lal as his own.

Putting aside all possible doubtful evidence we have established beyond doubt the following facts:-

Gold ornaments such as bracelets and necklaces were stolen from Mohan Ram's house on the night of the 24th June. On the 1st December Amrit Lal informed the police (S. Gopal Singh) that he had sold some ornaments at Rawalpindi through a saraf with six fingers. This led immediately to the discovering of Gobind Ram as the man to whom gold ornaments such as bracelets and necklaces similar to some of those stolen had been sold by Amrit Lal. It has been brought out very clearly in cross-examination of Daulat Ram by defence counsel that Daulat Ram had accused Amrit Lal as a receiver of some of the stolen property in his statement to the police. (The cross-examination of Daulat Ram was directed energetically upon discrepancies between his first and his subsequent statements in regard to the exact part taken by Amrit Lal in the offence). To meet the case against him Amrit Lal produced evidence which is certainly fasle in order to prove that the ornaments sold at Rawalpindi belonged to another person and were not sold by him as his.

These circumstances and Amrit Lal's conduct must lead, in my opinion irresistibly, to the conclusion that the ornaments sold by Amrit Lal were part of the property looted from Mohan Ram's house, as the learned Additional Sessions Judge, in agreement with the assessors, had decided,

As regards the evidence of Daulat Ram there is no reason to regard it either as more or as less reliable than that of any other approver, which cannot safely be relied upon without independent corroboration.

Amrit Lal denied before the Sessions Judge that Daulat Ram was in his service. This denial was false; he refused to make a statement about this before the Committing Magistrate. He alleged no enmity between him and Daulat Ram. In the Committing Magistrate's Court, while denying that he had conspired with the approver and the other accused and committed burglary he refused to answer the question whether he had received or sold the stolen ornaments and said nothing about anyone's enmity towards him. At the trial he declared that he had been falsely accused by R. S. Shiv Sahai and L. Kundan Lal prosecuting inspector of police who were fast friends. R. S. Shiv Sahai was, he declared, jealous of him because of his success with Nagina and had threatened to have him transferred. Amrit Lal's "relative", a barrister, had appeared against Ghulam Ghaus Sub-Inspector in a case at Jhang and Bakhshi Ram Labhaya Sub-Inspector at the City Police Station disliked him because he had submitted diaries direct to the Superintendent of Police.

Much has been made by the defence counsel of the fact that when his first statement was taken by the police Daulat Ram omitted to mention many of the facts to which he subsequently deposed. The great majority of these omissions are not contradictions or inconsistent with his evidence and I fail to understand how the learned Magistrate allowed them to be made use of under S. 162 of the Procedure Code but in any case there is no reason for assuming that Daulat Ram told the whole truth from the beginning before he was sure of a pardon. He says that he made partly true and partly false statement to the police and this is exactly what one would expect of a man in the circumstances.

Lala Kundal Lal P. W. 6 declares that he never had any unpleasantness with Amrit Lal but treated him as his brother and the letter Ex. P. E E E E E written to him by Amrit Lal on 20th November 1930 shows that Amrit Lal was on very friendly and confidential terms with him (he calls him dear and respected Bhapaji).

The letter to R. S. Shiv Sahai written by Amrit Lal on 11th November 1930 certainly proves that he had a grievance, real or imaginary, against the Rai Sahib, who is accused in it (untruly according to the Rai Sahib) of having abused him. But the Rai Sahib (P. W. 7) declares that Amrit Lal had received certificates of good work on his recommendation. It is curious that no questions about Nagina were put to the Rai Sahib, the only evidence in support of the allegation of his jealousy on her account being that of the prostitute herself who, the evidence shows, had been greatly profited by her hold over Amrit Lal (Ex. P. B B B) who was madly in love with her (Ex. P. C C C).

Bakhshi Ram Labhaya (P. W. 18) was not questioned about his alleged enmity towards Amrit Lal. The evidence of R. S. Shiv Sahai is that Ram Labhaya was not on bad terms with Amrit Lal although there had been a dispute between them over the submission of reports by Amrit Lal direct to the Superintendent of Police.

Against Sardar Sahib Gopal Singh (P. W. 9), the Deputy Superintendent who recorded Amrit Lal's statement on the 1st of December and arrested him, there is not even the allegation of hostility. That the whole of the case against the appellant is the outcome of a despicable conspiracy between all the local Police and Daulat Ram to get him into trouble because R. S. Shiv Sahai was jealous of him is inconceivable.

I believe that the approver's story that Amrit Lal dishonestly received part of the proceeds of the burglary is true. For the conviction of Amrit Lal established practice requires no more than that this part of Daulat Ram's story should be corroborated by independent evidence which tends to implicate him personally: see *R.* v. *Baskerville* (5) followed in Barkat Ali's case *A. I. R.* 1927 *Lah.* 581 at p. 589.

The fact which I find established that Amrit Lal sold part of the stolen ornaments soon after the theft is undoubtedly sufficient corroboration of the approver. I would accordingly maintain the conviction and dismiss Amrit Lal's appeal against his conviction. Amrit Lal might have been convicted under S. 457, I. P. C., and I would have upheld a heavier sentence but in view of the fact that a sentence of three years' rigorous imprisonment and fine of Rs. 500 is a substantial punishment and having regard to the result which a conviction must involve in the case of the appellant I do not think it necessary to alter the conviction to one under S. 457 in order to maintain the sentence of four years' rigorous imprisonment passed, or to enhance it. I would accordingly dismiss the petition submitted on behalf of the Crown and alter the sentence of imprisonment to one of three years' rigorous imprisonment, the maximum permitted by S. 411, I. P. C., as proposed in the reference made by the lower Court.

Jai Lal, J.—In my opinion, this appeal should be accepted and the appellant acquitted of the charge on which he was tried. Most of the prosecution evidence led against him has been rejected as unreliable by the Additional Sessions Judge, and also by my learned brother. The only evidence on which the conviction is sought to be based now is the testimony of the approver and the sale by the appellant at Rawalpindi of the alleged stolen property. My learned brother differing from me Additional Sessions Judge, is of opinion that the recovery of the ring from Mt. Sardar Begam should not be treated as evidence against the appellant. In my opinion this view is correct. The claim by the complainants that the ring is their property is obviously untrue. It is alleged that this ring was presented to Mt. Mohan Bai at the time of her marriage 35 years ago. The make of the ring is such that it is difficult to believe her, as this pattern of the ring could not have been in fashion in places like Dera Ghazi Khan at that time and the fact that the appellant is proved to have been wearing it openly after the theft falsifies the claim of the complainants. Moreover there is the evidence of prosecution witnesses from which it appears that before the theft the accused was seen in possession of the ring. The evidence of Dr. Mohindar Lal Sayal, a gentleman whose veracity is not open to any

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5. (1916) 2 K B 658=86 L J K B 28=60 S J 696 =25 Cox C C 524=80 J P 446=115 L T 453.

reasonable doubt in this case is that he gave the ring in question to Amrit Lal. At the time when he gave this evidence the betrothal of his daughter with Amrit Lal had been broken off. He had therefore no reason to favour the accused. I consider therefore that the ring has clearly been proved not to be part of the stolen property.

As to the ornaments sold in Rawalpindi the lists, Exs. P-T-1 and P. T-2 are palpable fabrications. Ram Kishan says that these two lists were prepared at the same time and with the same ink and pen. Even a casual observation will show that this is untrue. They are supposed to have been dictated by Mt. Mohan Bai and it is curious that the weights of the ornaments, almost exact, have been mentioned therein. The lists were not dictated from any record but from memory. It is impossible to believe that Mt. Mohan Bai, an illiterate woman of this class, would remember not only the exact weights but also the values of the ornaments stolen. I feel no doubt that these lists were prepared after the description of the ornaments had been obtained by the investigating agency from Rawalpindi and it was in order to make the description of the ornaments given in the books of the goldsmiths at Rawalpindi correspond to the statement of the complainants that these two lists were prepared and it is significant that the ring which has not been found to be stolen property is described in these lists with remarkable exactitude.

In order however to conceal a slavish copy of the Rawalpindi list an attempt has been made to describe the ornaments by different names in some instances and thus unconciously the persons concerned have fallen into a trap as appears from the evidence of the goldsmith of Rawalpindi that the descriptions do not correspond. I have therefore no doubt that these two lists are fabrications. Mt. Mohan Bai says that she dictated the lists to her son, yet she has not been able to repeat it. She was unable to give the weight of the ring when cross-examined though she had given the exact weight and description in the list. The prosecution did not even ask her to repeat the list of ornaments stolen. The list, Ex. P-T-1 was read to her and she stated that it was correct but apart from the lists there is no evidence as to the description of the stolen property. In my opinion therefore it has not been established that the ornaments sold by Amrit Lal in Rawalpindi were part of the stolen property in this case.

The exact information alleged to have been given by him to the investigating police officer which resulted in the recovery of these properties has not been proved and probably could not be proved in view of the authority of the judgment of the Full Bench of this Court. It is however to be noted that according to the approver the accused had told him on return from Rawalpindi that he had sold the ornaments there. If that is true then the information should have been given by the approver to the investigating agency before the accused gave the information. In view of the fact that the accused admits that he sold the ornaments in Rawalpindi and that the ornaments belonged to Ram Asra Mal, the alleged information given by him cannot incriminate him unless the identity of the stolen property is otherwise established. This as I have already stated has not been done by the prosecution.

The fact that the appellant sold the property through a goldsmith of his own town and wrote his name and full and correct description when selling the ornaments indicates absence of guilty knowledge and intention on his part. The story that the ornaments belonged to Ram Asra Mal is said to be untrue, still it is significant that the Rawalpindi witness admits that no other person accompanied the appellant when he sold the ornaments and Ram Asra Mal says that it was he, though the witness has not been able to identify him. Thus in connection with the sale of the jewellery there was no attempt at concealment by the appellant and this fact goes in his favour. If the appellant sold the jewellery which he knew to be stolen it was easy for him to destroy its identity by melting it before its sale.

The case was investigated by police officers some of whom were the appellant's enemies. Rai Sahib Shiv Sahai and Kundan Lal have been proved to be inimically disposed towards him; allegations were made to him against them in his affidavit filed in this Court when an application for transfer of the case was made. The letters on the record clearly indicate this enmity. There is abundant material on the record which indicates that Amrit Lal was a bad character and there had been a quarrel between him and Shiv Sahai in any case over a prostitute. It is notorious that when such men quarrel about women of ill-fame they stoop to all sorts of devices to injure each other. Admittedly some false evidence has been produced for the prosecution under the circumstances it is not safe to support the conviction by evidence of the witnesses described above.

The approver was a domestic servant of the appellant. He is a young man and resident of Dera Ghazi Khan. He was engaged by the appellant at Dera Ghazi Khan. He used to get a salary of Rs. 4 to Rs. 6 per mensem. The case for the prosecution is that some constables and others were accomplices of the appellant. It was not therefore necessary to secure the assistance of such a person as the approver is and it is unlikely that the appellant would take a man of his status into his confidence specially when he was not an old acquaintance of his and the appellant had no hold over him. The statement of Daulat Ram, approver, that he accompanied the appellant on the night of the robbery is not believable because there was absolutely no object on the part of the appellant to take him with him. The approver, in my opinion, has given an incredible story and has not stated the truth. It may be that the appellant who is obviously a man of bad character has been duped by others and his explanation of some facts is not true, still we have to judge him on the strength of the prosecution evidence. This I regard to be entirely unreliable in this case and would therefore acquit him.

(On account of this difference of opinion, the case was heard by a third Judge).

Abdul Qadir, J.—Amrit Lal a Sub-Inspector of Police in Dera Ghazi-Khan, was suspected of having conspired with some of his subordinates and others to have burglaries committed in the houses of people in order to obtain money for the luxurious way in which he is said to have been living. It is alleged that he was in love with a dancing girl at Multan and was spending a lot of money on her. Ten cases, nine of which related to specific instances of burglary, and one to the existence of a gang of thieves for the purpose of committing thefts were started against him and were tried by the Additional Sessions Judge, Multan, with the result that Amrit Lal was acquitted in all but one case, which related to the burglary in the house of Mohan Ram, a money lender of Dera Ghazi Khan, on the night of 24th June 1930. Some of the persons, co-accused with him, were however convicted in some of the other cases. The trial Court convicted Amrit Lal of an offence under S. 411, Penal Code, and sentenced him to rigorous imprisonment of four years and a fine of Rs. 500 or in default further rigorous imprisonment for nine months. He had been charged under S. 547, Penal Code, but he was not convicted of that offence. He appealed to the High Court against his conviction and sentence and the Crown also lodged three appeals in this Court:

(1) Against the acquittal of two of the accused in the gang case; (2) in the case in which burglary was committed in the house of Bosa Ram of Dera Ghazi Khan; and (3) against the acquittal of Amrit Lal under S. 457, Penal Code, in Mohan Ram's case. The Crown also prayed for an enhancement of his sentence in the last mentioned case. The appeal in the gang case is still pending. The appeal of the Crown against the acquittal of Amrit Lal in Bosa Ram's case has been dismissed. The appeal against his acquittal under S. 457, Penal Code, has also been rejected.

A mistake has occurred in the judgment of the trial Court in Mohan Ram's case, with regard to the sentence of Amrit Lal, under S. 411, Penal Code, has also been corrected, i. e., the punishment has been reduced from four years' to three years' rigorous imprisonment, which is the maximum awardable under that section. Two of the learned Judges constituting the Bench, which heard the appeal of Amrit Lal against his conviction in Mohan Ram's case have however differed in opinion as to the result of that appeal. Coldstream, J., has upheld the conviction of Amrit Lal under S. 411, Penal Code, while Jai Lal, J., has written a judgment acquitting him. In consequence of this difference of opinion between my learned brothers, the case has been referred to me. Lengthy arguments have been addressed to me on behalf of the appellant Amrit Lal, and I have also heard Mr. Ralli on behalf of the Crown. He supports the view taken by my learned brother, Coldstream, J.

The story of the prosecution, briefly, is that Mohan Ram was away from his house on the night of the burglary in question, when thieves entered his house and took away a lot of property, including jewellery belonging to Mohan Ram's wife and also some of the jwellery pawned to him as a money lender. The theft was reported to the police the next morning, when a list of stolen property prepared from memory by Mt. Mohan Bai, wife of Mohan Ram was also given to the police. It is marked P. T-1. Mohan Ram, was informed of this burglary and came back on 26th June 1930, and put in a supplementary list of the property stolen which is marked P-T-3. For some time no clue as to who committed this crime was found and the case was struck off at the instance of the police. There was a second theft in the same house on the night of 15th November 1930, in connection with which some persons including Ayyub and Ahmad were suspected. In the course of enquiry into that case suspicion fell on Amrit Lal and Daulat Ram, a servant of Amrit Lal, as having been instrumental in the commission of this crime.

Daulat Ram was got hold of by the police at Ratra, a police station, to which Amrit Lal had been in the meantime transferred. The police got hold of Daulat Ram on 25th November and he is said to have made some disclosures on the 27th November, implicating Amrit Lal, Ahmad, Massu, Nura and Ayyub, and alleging that there was a conspiracy among them to commit thefts and that he was in the confidence of the conspirators. After this, Amrit Lal was suspended. He was arrested on 30th November 1930 and investigation against him began. In a statement that Amrit Lal made to Mr. Gopal Singh, D. S. P., on 1st December 1930, he is said to have mentioned that some ornaments were sold by him to one Gobind Ram, saraf of Rawalpindi. The police then went to Rawalpindi and inspected the bahis of Gobind Ram and took down his statement. They found however that the ornaments sold by Amrit Lal had all been melted by then. It was decided at this stage to tender a pardon to Daulat Ram, and his statement was recorded by a Magistrate on 17th December 1930 at Taunsa. He was then made an approver and gave evidence against Amrit Lal and the persons co-accused with him in the Court of the Committing Magistrate, as well as in the Sessions Court. This conviction is based on the evidence of Daulat Ram, approver, coupled with two pieces of evidence relied upon by the prosecution as corroborating his testimony: (1) the sale of ornaments by Amrit Lal, which the prosecution presumed to be stolen property: (2) the presentation by him of a ring Ex. P-3) to Mt. Sardar Begam, mother of Mt. Nagina, the dancing girl at Multan was claimed by the complainant as his property.

With regard to the value of the evidence of Daulat Ram, approver, Coldstream J's. opinion is that he is no better and no worse than an ordinary approver, and holding the sale of ornaments by Amrit Lal at Rawalpindi to be a corroboration of the statement of the approver, he has found that the offence has been brought home to the appellant. On the contrary, Jai Lal, J., is of the opinion that the approver in the present case has given an incredible story and has not told the truth. He is also of the opinion that the prosecution has failed to prove that the ornaments sold by Amrit Lal at Rawalpindi were those stolen from the house of Mohan Ram, on 24th June 1930. As to the ring, Ex. P-3, which was found in the possession of Mt. Sardar Begam, both the learned Judges have expressed the opinion that it is not proved that the ring was a part of the property stolen from the house of Mohan Ram. In fact Jai Lal, J., has gone a step further and said that the claim of the prosecution that the ring was a part of the stolen property is untrue.

It is common ground between the parties that the approver Daulat Ram was a menial servant of Amrit Lal appellant and had been with him for some months before this occurrence. He was getting Rs. 4 a month for working in his house. It is contended on behalf of Amrit Lal that it is highly improbable that a man of that position, who did not possess any special qualifications for helping burglaries, would be taken into confidence by the appellant, if he wanted to have burglaries committed According to the story of the prosecution, the persons whom he had engaged for the purpose were a constable named Ayyub, who was acting as his orderly, and one Ahmad, some of whose relations were involved in burglaries and two others named, Nura and Massu, who are said to have been more or less experienced in committing thefts. It is argued that in the presence of such accomplices, any assistance for Daulat Ram in the matter of committing a theft was not required. Mr. Ralli points out that, according to the approver, his services were unilised in finding out a suitable house for committing a theft in, and that he gave a clue to the house of Mohan Ram. This statement of Daulat Ram does not appear to me to be convincing as I do not suppose that the Sub-Inspector himself or his orderly or the other accomplices said to have been engaged by him, would be any worse informed than Daulat Ram as to the houses of well-to-do people in that locality. Mr. Sawhney invites attention to a point against the credibility of the story of Daulat Ram, which appears to have weighed considerably with Jai Lal, J. What has been alleged by the approver is that on the night of the burglary two persons Nura and Massu went to the house of Mohan Ram to commit theft and that some time after that Amrit Lal also went towards the same house, accompanied by Ayyub (both in uniform) and the approver Daulat Ram, and that Ahmad was left behind in the house to wait for the thieves if they returned with the booty, to see that they do not take away anything till Amrit Lal returns. He further alleges that on the way Hukma Ram, a vegetable-seller, met Amrit Lal and without any reason the latter gave him one or two slaps and that after that Ghulam Haidar chaukidar met him and he was also ill-treated by Amrit Lal. He adds that Amit Lal then returned without reaching the house of Mohan Ram. As observed by Jai Lal. J., there was no occasion for the appellant to take Daulat Ram with him that evening, if all that was to be done by him was to see how the burglars were getting on. Apart from this, the story as to Amrit Lal slapping two persons without any reason, on the occasion when he was going out towards a place where burglary was being committed at his instance, seems to me to be very improbable. It would be very much prejudicial to his interest to pick up any unnecessary quarrel that evening, which could possibly bring a number of people to the scene. The evidence of these two witnesses Hukman Ram and Ghulam Haidar (P. Ws. 12 and 13), who came to corroborate this part of the approver's story, has been disbelieved by the learned Additional Sessions Judge, as well as by my two learned brothers, and I have no hesitation in rejecting the same. Mr. Sawhney, points out, in this connection, that the desire to introduce these two false witnesses, was probably the reason why this story was put into the mouth of the approver, who had made no reference to it in the statement he originally made to the police. This last-mentioned statement has been duly proved and is marked D-A and the approver has been confronted with it.

My attention has been drawn to the fact that there are a number of important details which the approver has mentioned in his statement in Court but had not mentioned to the police when he gave the statement marked D-A. Mr. Ralli meets this objection by saying that the statement made by Daulat Ram,' when he was a suspect and was being questioned by the police, shortly after he was got hold of, was not complete or exhaustive and therefore any omission in the statement as made by him at the time cannot be taken as contradictions and questions relating to them in cross-examination were hardly justified. He frankly admits however that there is one contradiction between the statement embodied in Ex. D-A and the statement of the approver in Court which is material. It was stated by the approver in Ex. D-A that on the occasion of the burglary under consideration, Ahmad, Massu and Nura went to commit the theft and Ayyub went with them, while his statement in Court is that Nura and Massu went to commit the theft, and some time after them Amrit Lal and Ayyub followed the accused, while Ahmed remained behind. Mr. Ralli says that perhaps the approver was not accurate when he made his statement to the police and is probably giving more correct details in Court; but I think; contradiction like this, changing the story in material particulars is significant and when the only real evidence in the case is that of an approver and his description on one occasion of the persons who took actual part in the theft, differs from that given on another occasion, such testimony cannot be held to be reliable or convincing. I agree therefore with the view taken by my learned brother, Jai Lal, J., as to the incredibility of the evidence of the approver, and differ, with the greatest respect, from the opposite view taken by my learned brother, Coldstream, J.

Coming to the question of the corroboration of the approver, it hardly arises, when I hold that the evidence of the approver in the present case is not credible; but as the question has been dealt with in the judgments of my learned brothers, I must say a few words about it. *Gobind Ram* has produced his bahi and deposes that on 30th July 1930 a number of ornaments were sold to him by Amrit Lal. The entry was duly signed by Amrit Lal, whose story is that he was accompanied by another man, whom the saraf did not know. Gobind Ram goes on to say that Amrit Lal stated at the time that the ornaments belonged to a friend of his. As has been mentioned already, these ornaments have been melted since and not a single one of them was available in its original condition at the time the police went to Rawalpindi. Under these circumstances naturally the complainant or his wife or other relatives are not in a position to say that the ornaments sold to Gobind Ram by Amrit Lal were identical with the ornaments that were stolen from the house of Mohan Ram. In my opinion, it would not be safe to draw from the mere fact of the sale of ornaments by the appellant more than a month after the theft, the inference that they were the proceeds of the burglary at the house of Mohan Ram, and there is nothing more than the inference suggested that I can see to connect the ornaments sold at Rawalpindi with the ornaments stolen at Dera Ghazi Khan. The appellant produced a friend of his named Ram Asra, D. W. 7, who stated that he went with him at the time of the sale of the ornaments and that the ornaments belonged to him (Ram Asra). Nothing has been pointed out to me that would be a sufficient reason for rejecting this evidence, but the question of the truth or otherwise of this evidence need not be discussed, in view of the fact that in my judgment, the prosecution has failed to prove the identity of the ornaments sold to Gobind Ram with the stolen property. The result of this finding is that, in my opinion, no corroboration of the story of the approver is furnished by the sale of ornaments at Rawalpindi by Amrit Lal.

It is difficult to say what substance there was in the general allegations of the prosecution against Amrit Lal. He appears to be a man who had fallen into bad company and suspicions arose against him, but it seems to me that in the case before me, his conviction is not justified. I would therefore accept his appeal and acquit him.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 997

DALIP SINGH, J.

Asa Nand—Decree-holder—Appellant.

v.

Bishan Singh and *others* — Judgment-debtors—Respondents.

Misc. Second Appeal No. 837 of 1933, Decided on 5th October 1933, from decree Dist. Judge, Attock, D/- 9th February 1933.

Provincial Insolvency Act(1920), Ss. 17 and 41—On death of insolvent, there is automatic termination of proceedings—Property distributed prior to death, still proceedings do automatically terminate.

Oridinarily speaking insolvency proceedings would not terminate until there has been a discharge of the insolvent, but the matter is otherwise where the insolvent is dead. In such a case there is an automatic discharge of the insolvent and where the property has been distributed prior to his death, the proceedings must automatically be held terminated: 9 *S L R* 34, *Diss from*,; *A I R* 1918 *Sind* 38, *Ref.* [P 998 C 1]

R. L. Anand—for Respondents.

Judgment.—The facts of this appeal are sufficiently given in the judgment of the trial Court. I have to point out to the learned District Judge that the language of his Court is Urdu and therefore I do not see the relevancy of the remark that the appellant does not know English.

Two points of law arise in the case. The first is whether by reason of the bar under S. 16 of the old Insolvency Act, in the proceedings against the insolvent the time for execution of any decree obtained prior to the insolvency proceedings is extended by the insolvency proceedings from their commencement till their termination. There does not seem to be any section corresponding to S. 78 of Act 5 of 1920 in Act 3 of 1907 and S. 15, Limitation Act, does not seem in terms to apply. I do not think it however necessary to decide this point as the case can be disposed of on the second question, namely, the question of termination of insolvency proceedings. In this particular case distribution of the available assets, had taken place in 1914. One of the insolvents died in 1915 and the second insolvent died in 1918. Now, I do not agree with the Courts below in thinking that the insolvency proceedings ended with the distribution of assets in 1914. The learned counsel for the respondent relied on *Gopal Das* v. *Pahlumal* (1), but the learned Judge who gave that ruling himself resiled from it in *Jivanji Mamooji* v. *Ghulam Husain* (2). The definition there

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1. (1915) 9 S L R 34=30 I C 37.
2. A I R 1918 Sind 38=47 I C 771=12 S L R 20.

given of the pendency of insolvency proceedings is, I think, correct. Ordinarily speaking then insolvency proceedings would not terminate until there had been a discharge of the insolvent but the matter is otherwise where the insolvent is dead. In such a case there is an automatic discharge, it seems to me, of the insolvent and where the property has been distributed prior to his death it seems to me that the proceedings must automatically be held to have terminated. In this view of the case the present application would be barred by limitation, as one of the insolvents died in 1915 and the other in 1918 as already stated above. The point is not free from difficulty and I therefore dismiss the appeal but make no order as to costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 998

BHIDE AND CURRIE, JJ.

Moti Ram Bhoja Ram—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 65 of 1933, Decided on 10th May 1933, from order of Sess. Judge, Ferozepore, D/- 4th January 1933.

(a) Evidence Act (1872), S. 26—Oral confession to Magistrate soon after arrest is admissible.

An oral confession made to a Magistrate soon after arrest when the police could scarcely have any opportunity to bring pressure upon the accused is admissible in evidence under S. 26: *AIR* 1930 *Lah* 534; *AIR* 1932 *Lah* 498; 21 *P R* 1881 *Cr.*; 52 *P R* 1887 and 11 *P R* 1918, *Cr Ref.* [P 999 C 1]

(b) Criminal Trial—Affidavit by prosecution witness that evidence given by her is false produced at time of appeal cannot be taken notice of.

The wife of the deceased who was a prosecution witness produced an affidavit at the hearing of the appeal by the accused against his conviction that the evidence given by her was false and that it was given under the influence of the police.

Held: that there was no provision in the Criminal Procedure Code under which such an affidavit could be produced or taken notice of. [P 999 C 1]

(c) Penal Code (1860), S. 302—Deliberately planned murder—No extenuating circumstances—Sentence of death is proper.

Where a murder is deliberately planned and carried out by a young man and there are no extenuating circumstances justifying mitigation of the sentence, sentence of death is proper. [P 999 C 2]

R. C. Sone—for Appellant.

Mohammad Monir—for the Crown.

Bhide, J.—The appellant Moti Ram, an Ahir of Ferozepore, has been convicted under S. 302, Penal Code, of the murder of one Girdhari Lal and has been sentenced to death.

It appears that Girdhari Lal, who belonged to Agra, came to Ferozepore with his wife, Mt. Durga Devi, (aged about 18), in search of living and after spending about a month there went to Pakpattan, leaving his wife behind. Mt. Durga Devi began to live in the house of the mother of the appellant and during this period contracted an illicit connexion with the appellant. When Girdhari Lal returned, he began to live in the same house and this made it difficult for the appellant to carry on his intrigue with Mt. Durga Devi. On the night of the murder, the appellant, Girdhari Lal and Mt. Durga Devi were sleeping in the same room. About 2-30 a. m., the appellant is said to have attacked Girdhari Lal with a hatchet while he was asleep and inflicted injuries on his neck and face which resulted in his death. Mt. Durga Devi, who was sleeping by the side of her husband, was awakened and saw the appellant committing the deed. The appellant suggested that she should elope with him. She was frightened and consented at first, but on coming out of the kotha raised an alarm upon which the appellant ran away. Mitter Sain, Nazir and Dogar, who live in the same ahata (compound) heard Mt. Durga Devi's cries and learning from her what had happened tried to pursue the appellant, but the appellant soon disappeared and could not be caught. Mt. Durga Devi then reported the matter at once at the police station which is close by. The appellant was brought under arrest the next day at about 11 a. m., and confessed his crime before Sheikh Feroze Din, Tahsildar. His confession was recorded later by the Additional District Magistrate under S. 164, Criminal P. C. At the time of his arrest the appellant was wearing a bloodstained jhaggi. This was taken possession of by the police and sent to the Imperial Serologist whose report shows that it was stained with human blood.

The appellant pleaded not guilty at the trial and stated that the confession recorded by the Additional District Magistrate was made by him at the instance of the police as he was led to believe he would be let off if he made the confession. He denied having had any illicit connection with Mt. Durga Devi and stated that on the night of the murder he was sleeping at his shop and not in the kotha where the murder was committed. He offered no explanation however of the evidence given by the prosecution witnesses and produced no evidence in defence.

The learned counsel for the appellant criticised at some length the evidence of the witnesses Mittar Sain, Dogar and Nazir and urged that their evidence was not recorded by the police promptly and that the story given by them was unnatural. (After discussing the evidence, and holding that there was nothing improbable, the judgment proceeded). The learned counsel for the appellant urged that this confession is not admissible in evidence as the appellant was then in police custody and also because it was not recorded under S. 164, Criminal P. C. But there is ample authority for the proposition that even an oral confession made to a Magistrate is admissible in evidence under S. 26, Evidence Act: cf. *A. I. R.* 1930 *Lah.* 534, *A. I. R.* 1932 *Lah.* 488, *Shere Singh* v. *Empress* (1), *Buta* v. *Empress* (2) and *Feroz* v. *Emperor* (3). The confession was made soon after the arrest of the appellant when the police could scarcely have had any opportunity to bring any pressure upon him. The appellant has not been able to offer any reasonable explanation of the bloodstained jhaggi which was found on his person when he was arrested. The detailed confession made by the appellant before the Additional District Magistrate is also an important piece of evidence against him. The confession appears to have been taken with all necessary precautions to see that it was voluntary and I see no reason to doubt its genuineness, though the appellant retracted it later on.

The learned counsel for the appellant produced an affidavit of Mt. Durga Devi at the hearing of the appeal in which she declared that the evidence given by her against the appellant at the trial was false and that it had been given under the influence of the police. The learned counsel for the appellant conceded that there was no provision in the Code under which such an affidavit could be produced or taken notice of. No case for taking additional evidence under S. 428, Criminal P. C., has been made out. This woman admitted at the trial that she had illicit intimacy with the appellant. The appellant stated in his confession that the offence was committed at her instigation. Her affidavit seems to be merely a belated attempt to save her paramour. She states in the affidavit that she was kept by the police in their custody till the decision of the case; but this allegation seems to be clearly false as she herself stated in her deposition in the Sessions Court that she was living at the time with one Babu Lal, who belonged to her village.

In my opinion, the offence with which the appelllant was charged has been established beyond any doubt. The appellant is a young man aged about 21, but the offence seems to have been deliberately planned and carried out and there are no extenuating circumstances justifying mitigation of the sentence.

I would therefore dismiss the appeal and confirm the sentence of death.

Currie, J.—I concur.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 999

DALIP SINGH, J.

Ganga Ram and *others*—Defendants—Appellants.

v.

Relu—Plaintiff—Respondent.

Second Appeal No. 1064 of 1931, Decided on 4th October 1933, from decree of Dist. Judge, Ambala, D/- 17th March 1931.

(a) Civil P. C. (1908), O. 1, R. 1—Joint owners—Ejectment suit—Cosharers.

On a suit for ejectment of a trespasser, all the joint owners are not necessary parties. [P 999 C 2]

(b) Punjab Tenancy Act (16 of 1887), S. 77—Whether a person is occupancy tenant or not is to be decided by Revenue Court.

The question whether a person is an occupancy tenant or not should be decided by a Revenue Court, and not by a civil Court. [P 1000 C 1]

M. L. Puri and *M. C. Sud*—for Appellants.

Fakir Chand and *Chandra Gupta*—for Respondent.

Judgment.—A preliminary objection has been raised to the hearing of the appeal on the ground that one of the appellants died and his representatives were not brought on the record in time. The case however, seems to me analogous to that of one of several joint owners suing to eject a trespasser and all the joint owners are not necessary parties to such a suit. I, therefore, overrule the preliminary objection.

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1. (1881) 21 P R 1881 Cr.
2. (1887) 52 P R 1887.
3. AIR 1918 Lah 92=45 I C 848=19 Cr L J 651 =11 P R 1918 Cr.

Passing to the merits it would seem that the respondent Relu would be entitled to succeed to Ghanaya as under S. 5 (1) (a) the presumption is that the common ancestor, the grandfather occupied the land. The learned counsel for the appellant however contends that the question whether Ghanaya was or was not an occupancy tenant should be decided by a Revenue Court and not a Civil Court. This objection appears to have force and is not contested by the learned counsel for the respondent. I, therefore, order that the decree of the learned District Judge be registered as a decree of the Collector and the parties be referred to the Revenue Courts for decision of the only remaining question involved in the case. The cross objections are not pressed and are dismissed. No order as to costs.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 1000

TEK CHAND, J.

Pal Singh and *others*—Defendants—Appellants.

v.

Sunder Singh and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1879 of 1932, Decided on 11th July 1933, from decree of Dist. Judge, Gurdaspur, D/- 10th August 1932.

Mortgage—Mortgage of property belonging to two brothers by one of them—Other not ratifying former's action—Mortgagee paying off pre-existing encumbrances which are valid charge on share of brother not joining in mortgage and his debts—Though mortgage is invalid against him, his share is liable to prior encumbrances and his debts—T. P. Act (1882), S. 101.

One of the two brothers executed a mortgage in respect of the shares of both of them in certain agricultural land. The mortgagee paid off prior encumbrance on the share of the brother, who had neither joined in the execution of the mortgage nor ratified the action of his brother, and also some of his debts. In a suit for declaration that the mortgage was not binding on him:

Held: that the mortgage was invalid, but that the mortgagee should be presumed to have intended to keep alive for his own benefit the prior mortgages and debts which were redeemed by the invalid mortgage, and that the plaintiff's share was liable to the extent of the prior incumbrances on his share and his debts which had been paid off: 10 *Cal* 1035 (*PC*); 38 *P R* 1894 and *A I R* 1922 *Lah* 275, *Ref.* [P 1001 C 1]

Muhammad Amin Khan for *S. C. Chatterji*—for Appellants

Charanjiva Lal Aggarwal—for Respondents.

Judgment.—Plaintiff Sundar Singh and his brother Waryam Singh are the recorded owners of certain agricultural land which was under mortgage with certain persons. Proceedings were taken before the revenue authorities for the partition of this land and, the question of the validity of certain mortgages having been raised, the plaintiff was referred to a civil Court. He accordingly brought a suit in the Court of the Subordinate Judge, 2nd Class, Gurdaspur, for a declaration to the effect that he was the owner of one-half of the land in question and was entitled to have it partitioned and get possession of his share through the revenue Courts. The suit was resisted by the mortgagees.

The trial Judge dismissed the suit but the learned District Judge has passed a decree declaring that the plaintiff, as owner of one-half of the land in suit, was entitled to claim partition with his brother Waryam Singh and that he was not bound by the mortgage effected by Waryam Singh on the 24th March 1915 in favour of Kishan Singh. It appears that on 24th March 1915, Waryam Singh, purporting to act for himself and Sundar Singh, executed a mortgage-deed in favour of Kishan Singh, father of appellants for Rs. 3,000. It is conceded that Sundar Singh was absent from the village at the time and Waryam Singh had no express or implied authority to effect a mortgage of his share. The mortgagees, however, urged that Sundar Singh had ratified the transaction by an agreement dated the 20th March 1916. The learned District Judge has held this document to be unproved and this finding cannot be challenged in second appeal. It must, therefore, be taken as settled that the mortgage of the 24th March 1915 is not binding as such on the plaintiff. But this does not settle the matter. It appears from the mortgage-deed and the other evidence on the record that a number of prior mortgages existed on Sundar Singh's share in the land, which had been created either by his father or by Sundar Singh himself. These mortgages were redeemed by the transaction of the 24th March 1915, by which some other debts of the plaintiffs were also paid off. If, therefore, the mortgage, in favour of the appellants is to be taken to be invalid, so far as the plaintiff's share in the land is concerned, he cannot escape liability for the pre-existing encumbrances, which were a valid charge on his share in the land at the time of the mortgage and he must also re-imburse the appellants for the other debts paid by them or their father on his behalf. Under the rule laid down by their Lordships of the Privy Council in *Dos Gopal Dos* v. *Puran Mal Prem Sukh Das* (1), and followed in this province in *Ghanaya* v. *Chhajjie* (2), *Bur Singh* v. *Hazara Singh* (3) and numerous other rulings, there can be no doubt that an alienee must be presumed to have intended to have kept alive for his own benefit the prior subsisting mortgages which were redeemed by the invalid mortgage. The declaration granted to the plaintiff must, therefore, be subject to the rider that his share is liable to these prior encumbrances and debts. As counsel are not agreed as to the amount of these prior encumbrances and debts the case must be sent back to the District Judge for determining the amount.

I accept the appeal, set aside the judgment and decree of the learned District Judge and remand the case to him for redecision in the light of the foregoing remarks. Court-fee on this appeal shall be refunded; other costs shall be costs in the cause.

K.S. *Case remanded.*

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1. (1884) 10 Cal 1035=11 I A 126 (P C).
2. (1894) 33 P R 1894.
3. A I R 1922 Lah 275=63 I C 760=3 Lah 99.

A. I. R. 1933 Lahore 1001

JAI LAL AND ABDUL RASHID, JJ.

Punjab & Sindh Bank, Ltd., Rawalpindi—Plaintiff—Appellant.

v.

Ishar Singh Asa Singh and *others* — Defendants—Respondents.

First Appeal No. 1976 of 1927, Decided on 23rd June 1933, from decree of Senior Sub-Judge, Rawalpindi, D/- 15th June 1927.

(a) Civil P. C. (1908), O. 22, R. 4—Appeal by mortgagee — Death of one of puisne mortgagee respondent but legal representative not brought on record — Appeal does not abate in its entirety.

Where in an appeal by a mortgagee one of the respondents, a puisne mortgagee, dies and his legal representative is not brought on record, the appeal abates only as against that person but not in its entirety. [P 1001 C 2]

(b) Transfer of Property Act (1882), S. 59 —Mortgage by deposit of title-deeds within limits of Cantonment to which S. 59 is extended is not valid—Cantonments Act (15 of 1910), S. 287.

A mortgage by deposit of title-deeds cannot be effected within the limits of a cantonment to which S. 59 has been extended: *A I R* 1933 *Lah* 972, *Ref.* [P 1002 C 1]

M. C. Mahajan and *Daulat Ram*—for Appellant.

J. N. Aggarwal, Govind Das and *Narotam Singh*—for Respondents.

Jai Lal, J.—The Punjab and Sindh Bank, Limited, Rawalpindi, instituted a suit against Messrs. Isher Singh-Asa Singh, for the recovery of Rupees 21,787-8-0 by sale of mortgage property.

The mortgages relied upon by the plaintiff were alleged to have been created by deposit of title deeds of certain property described in the plaint and situated in the city of Rawalpindi, the deposit having taken place in the Cantonment. Some persons were impleaded as defendants, who were either subsequent mortgagees under registered mortgage deeds or vendees of the properties alleged to have been mortgaged. A plea was raised that the alleged mortgage in favour of the plaintiff is not valid as S. 59, T. P. Act, has been extended to Rawalpindi Cantonment by S. 287, Cantonments Act. The Senior Subordinate Judge held that the amount claimed by the plaintiff was due to them but that, in the Cantonment of Rawalpindi, no mortgage by deposit of title-deeds could be validly created; he therefore granted a simple money decree with costs for the amount claimed against the original debtor in favour of the Bank, with interest at Rs. 9-12-0 per cent per annum from the date of suit till realization. This decree was ex parte. The judgment says that the other defendants "would be free." He left them to bear their own costs. The Bank has presented this appeal in this Court.

A preliminary objection is raised that as Thakar Singh, one of the subsequent mortgagees, has died and no legal representative was appointed in his place within the prescribed time, the appeal against him has abated and that it has also abated in its entirety. Some attempt was made by the Bank to show that they did not know of the death of Thakar Singh, but the affidavits filed by the parties clearly show that the appellants have been negligent in the matter. Thakar Singh died on 30th April 1929 and an application to substitute his legal representatives was not filed till 16th January 1931. In my opinion, the appeal has clearly abated as against Thakar Singh, but there is no authority for holding that it has abated in its entirety. Thakar Singh was a puisne mortgagee and, if the plaintiffs can succeed in establishing a valid mortgage in their favour, the only result would be that they would be postponed to Thakar Singh. This would not affect the other parties because their priority would be decided independently of the case of Thakar Singh. The appeal therefore does not abate as against the other respondents. On the merits however it must fail. In my opinion, the Senior Subordinate Judge has rightly held that no mortgage by deposit of title deeds can be effected within the limits of the Cantonment. I have already discussed this matter in detail in my judgment in *Gurdas Mal* v. *Punjab Sindh Bank Ltd.* (1).

I would therefore hold that there is no force in this appeal and dismiss it with costs.

Abdul Rashid, J.—I agree.

K.S. *Appeal dismissed.*

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1. A I R 1933 Lah 972.

A. I. R. 1933 Lahore 1002 (1)

TEK CHAND, J.

Bhartu—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 678 of 1933, Decided on 9th September 1933, from order of Addl. Sess. Judge, Rohtak, D/- 4th March 1933.

Penal Code (1860), Ss. 376 and 511 — Accused throwing down girl, putting sand in her mouth and getting on her chest to have intercourse with her but prevented from doing so by arrival of other persons—His act amounts not only to preparation but to attempt to commit rape—Penal Code, S. 354.

The accused caught hold of a girl, threw her down, put sand in her mouth, got on her chest and attempted to have intercoruse with her. She resisted and cried and her screams attracted the witnesses on seeing whom accused ran away:

Held: that the accused had gone much beyond the stage of "preparation", and if he had not been prevented by the sudden arrival of the witnesses, there was not the least doubt that he would have had intercouse, with her and that his act clearly amounted to an attempt to commit rape and not merely an offence under S. 354: 8 *I C* 257, *Ref.* [P 1002 C 2]

Shamair Chand—for Petitioner.

R. C. Soni—for the Crown.

Judgment.—The petitioner Bhartu, a 20 years old Jat of Mauza Garhi Sampla, district, Rohtak, has been convicted under S. 376/511, Penal Code, and has been ordered to be detained for a term of four years in the Borstal Jail at Lahore. His appeal has been dismissed by the learned Additional Sessions Judge, and he has preferred a petition for revision in this Court.

The facts found are that on 18th November 1932, just before sunset, P. W. 1, Mt. Bhano, a Kumbar girl, 14 years of age, had gone out in the fields to gather cow-dung. The petitioner happened to come there, caught hold of her, threw her down, put sand in her mouth, got on her chest and attempted to have intercourse with her. She resisted and cried and her screams attracted Daya Chand (P. W. 3) and Mt. Chhotto (P. W. 2) on seeing whom the petitioner ran away.

I have examined the record and am of opinion that the evidence fully justifies this finding, which has not been seriously contested by counsel for the petitioner. His main argument before me is that on the facts as found, the offence falls under S. 354, Penal Code, and not under S. 376/511. In my opinion, this contention is without force. The petitioner had gone much beyond the stage of "preparation" and if he had not been prevented by the sudden arrival of Mt. Chhotto and Daya Chand, there is not the least doubt that he would have had intercourse with her. His act clearly amounted to an "attempt" to commit rape. If any authority for this proposition is necessary reference may be made to the ruling of the Chief Court in *Khadam* v. *Emperor* (1), the facts of which case are almost identical with those of the present case. On the facts found, the petitioner has been rightly convicted under S. 376/511, and having regard to all the circumstances, I do not think that the sentence of four years detention in the Borstal Jail is excessive. I dismiss the petition.

K.S. *Petition dismissed.*

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1. (1910) 11 Cr L J 611=8 I C 257.

A. I. R. 1933 Lahore 1002 (2)

ADDISON, J.

Tej Ram and *others*—Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 476 of 1933, Decided on 13th July 1933, from order of Addl. Dist. Magistrate, Delhi, D/- 18th March 1933.

Criminal P. C. (1898), S. 342—Non-compliance with provisions necessitiate retrial—But where case is petty one, Court need not order retrial.

Non-compliance with the provisions of S. 342 would necessitate a retrial from that stage. But where the case is a petty one, the Court need not order retrial and conviction may be set aside. [P 1003 C 1]

Shamair Chand—for Petitioners.

Order.—I do not like the reasons put forward for setting aside the convictions by the Additional District Magistrate. There is nothing on the record on which to found an inference that there was anything wrong with the warrant, when it issued, and such suggestions should not be made except on proper evidence. I note however that the provisions of S. 342, Criminal P. C., have not been complied with and this would necessitate a re-trial from that stage. The case however is petty and I am not prepared to order a re-trial. For the reasons given by me, I accept the petition and set aside the convictions of the petitioners. Fines, if paid, will be refunded.

K.S. *Petition accepted.*

A. I R. 1933 Lahore 1003

DALIP SINGH, J.

Diwan Chand — Plaintiff—Appellant.

v.

Municipal Committee, Amritsar—Defendant—Respondent.

Second Appeal No. 1568 of 1932, Decided on 20th October 1933, from decree of Dist. Judge, Amritsar, D/. 25th April 1932.

(a) Punjab Municipal Act (3 of 1911), S. 132—In absence of proof as to when license or grant of land was made there is presumption that Municipality acted under S. 132.

In a suit for a perpetual injunction to abate the nuisance caused by water running in a Municipal channel being blocked, in the absence of any proof as to when, if ever, any license or grant was made by the plaintiff, it is sufficient to assume that the Municipality acted without protest on the part of the plaintiff under the provisions of S. 132. [P 1004 C 1]

(b) Punjab Municipal Act (3 of 1911), S. 132—Municipality is not entitled to keep open channel through a person's land something not used as drainage or sewerage—If water in such channel accumulates and causes damage to that person's property such person is entitled to injunction against Municipality—Injunction.

The Municipal Committee are not entitled under any law to keep open as a channel or as pit passing through another person's land something which is not used by way of drainage or sewerage. These are the only relevant purposes which are mentioned in S. 132 and in the absence of these, a person whose property is damaged by accumulation of water, is entitled to an injunction against the Municipal Committee ordering them to close the opening passing under his house. [P 1004 C 1]

M. C. Mahajan—for Appellant.

Dev Raj Sawhney—for Respondent.

Judgment.—The plaintiff in this case sued the Municipal Committee, alleging that there was a certain drain in his property which had been made by the Muncipal Committee with his consent 10 years previously for the purpose of carrying water to the Durgiana temple, that the water was no longer being carried to the Durgiana temple, and that the drain had become blocked by various causes and the water collected in the said drain became stagnant, was of foul smelling and by percolation damaged the plaintiff's wall. Hence the plaintiff asks for an injunction directing the Municipal Committee to block the drain at both ends and for the damage caused to his house already. It appears that the plaintiff had given a notice as early as 1926 to the Municipal Committee complaining of this stagnation of water under his house. The Municipal Committee claimed that the land belonged to them and that at any rate they had acquired adverse possession of it and raised various other pleas. The trial Court found that the plaintiff was not entitled to damages but that the drain was undoubtedly in the property of the plaintiff and that the Municipal Committee had failed to establish any adverse possession, that the circumstances led to the presumption that there had been a licence on the part of the plaintiff to the Municipal Committee to carry the water through this drain and that therefore the plaintiff was entitled to an injunction as the licensee, the Municipal Committee, had failed to carry out the conditions of the license and was therefore bound to restore the land to the plaintiff in its original levelled condition.

On appeal by both sides to the learned District Judge, he held that the Municipality had proved adverse possession over the watercourse. In opposition to the above finding, he held that the land comprising the watercourse was both owned and possessed by the plaintiff. He held that the drain had been made more than 40 years ago and that the house had been built at some time subsequently. From the simple fact that the drain had existed for 40 years he deduced adverse possession. On issue 2 of which the onus lay on the defendant, namely, that the defendant had acquired the land from the plaintiff, he held that there was no evidence and therefore the issue was decided against the plaintiff.

The point arising before me in this second appeal is whether the finding of the learned District Judge as to adverse possession can be maintained. The learned counsel for the respondents has stated before me that the drain itself is over a mile long and passes through the lands of various persons and cost about a lac of rupees to them.

It is impossible to believe that the Municipal Committee deliberately trespassed on other people's land and constructed a drain of this magnitude and spent all this money recklessly, hoping that all the owners would acquiesce in the action of the Municipal Committee. It seems to me much more probable either as conjectured by the trial Court that the drain being for the Durgiana temple the owners of the lands did not object to the drains passing through their lands or that the Municipal Committee acted under S. 132, Municipal Act, and that the owners were unable to protest in the matter at all. It is unnecessary to come to any distinct finding on the question of license in the way I propose to deal with this matter. It is sufficient to hold that it is not proved that the Municipality had any adverse possession over the land at all or that at any time they had acquired it. The khasra numbers in the revenue entries are shown as in the ownership and possession of the plaintiff and the simple fact that at sometime or other he constructed a house over the watercourse is to my mind a conclusive proof that there was no adverse possession on the part of the Municipal Committee. In the absence of any proof as to when if, ever, any license or grant was made by the plaintiff, it is sufficient to assume that the Municipality acted without protest on the part of the plaintiff under the provisions of S. 132. It is now common ground between the parties that for the last six years no water has been taken to the Durgiana temple at all and the drain itself has been blocked by the action of the Railway. The result is that the water which flows into this drain whether as a rain water or from the surrounding lands collects in the portion under the plaintiff's house, and there is evidence to show that it has damaged his wall. In the circumstances, I do not see how the Municipal Committee are entitled under any law to keep open as a channel or as a pit passing through another persons's land something which is not used by way of drainage or sewerage. These are the only relevant purposes which are mentioned in S. 132 and in the absence of these it seems to me that the plaintiff is entitled to an injunction against the Municipal Committee ordering them to close the opening passing under his house as claimed by him in the plaint.

I therefore accept the appeal and restore the decree of the trial Court. The question of damages has not been argued before me and no appeal as to it was taken from the order of the District Judge dismissing the plaintiff's appeal on the question of damages. The plaintiff is entitled to half costs throughout.

V.S. *Appeal allowed.*

A. I. R. 1933 Lahore 1004

TEK CHAND AND JAI LAL, JJ.

(Firm) Tullah Shah-Ram Saran Shah —Judgment-debtor.

v.

Ghulam Hussain and *others* — Decree-holders.

Civil Ref. No. 37 of 1931, Decided on 13th October 1933, from Deputy Commissioner, Mianwali, D/- 17th November 1931.

Stamp Act (1899), Art. 57—On appeal preferred stay under O. 41, R. 5. Civil P. C., refused but Court ordered decree-holder to furnish security bond of immovable property — Decree-holder filing security bond on stamp of Rs. 7-8-0—Held it was sufficient.

On an application made by the judgment-debtor under O. 41, R. 5, Civil P. C., for stay of execution of the decree pending the decision of appeal, the Court while declining to stay the execution directed the decree-holders to furnish security of urban immovable property for the refund of the money, which might be realized by them, with interest thereon, in the event of the success of the appeal. Whereupon the decree-holders filed a security bond, bearing a stamp of Rs. 7-8-0, the judgment-debtors objected that the bond was insufficiently stamped:

Held: that the bond in question was properly stamped under Art. 57, Stamp Act. [P 1005 C 1]

Order.—This is a reference by the Collector of Mianwali, under S. 61, Stamp Act, for orders of this Court as to whether a security bond, which was executed in accordance with the orders of the learned Chief Justice in certain execution proceedings, was properly stamped. The relevant facts are as follows:. The Senior Subordinate Judge of Mianwali having passed a decree for payment of a certain sum of money, the judgment-debtors preferred a first appeal to this Court, and at the same time made an application under O. 41, R. 5, Civil P. C., for stay of execution of the decree pending the decision of the appeal. The application came before the learned Chief Justice who declined to stay the execution, but directed the decree-holders:

"to furnish security of urban immovable property for the refund of the money, which might be realized by them, with interest thereon at

6 per cent per annum, in the event of the success of the appeal."

In accordance with this order the decree-holders filed a security-bond, bearing a stamp of Rs. 7-8-0. The judgment-debtors objected that the bond was insufficiently stamped. The learned Subordinate Judge overruled the objection and accepted the bond. Thereupon the judgment-debtors brought the matter to the notice of the Collector, who has made a reference to this Court under S. 61, Stamp Act. On the matter coming up before us neither party was represented, and as the question was of general importance, we directed the learned Government advocate to take instructions from the Chief Revenue Authority and place his point before us. The learned Government Advocate has accordingly appeared before us today and has stated that he has been instructed by the Financial Commissioners to state that the bond in question was properly stamped under Art. 57, Sch. 1, Stamp Act. With this view we agree and hold that the stamp duty of Rs. 7-8-0 on the bond was sufficient.

V.S. *Order accordingly.*

A. I. R. 1933 Lahore 1005 (1)

DALIP SINGH, J.

Gurdit Singh and *others*—Plaintiffs—Appellants.

v.

Baru and *others*—Defendants — Respondents.

Second Appeal No. 1981 of 1931, Decided on 9th October 1933, from decree of Dist. Judge, Ambala, D/- 22nd August 1931.

Custom (Punjab)—Rupar Tahsil — Ambala District—Sisters.

In Rupar Tahsil, District Ambala, sisters inherit in the absence of near collaterals, i. e. fifth decree collaterals. [P 1005 C 2]

Sardar Harnam Singh — for Appellants.

Tek Chand—for Respondents.

Judgment.—A preliminary objection has been raised that no appeal lies as the certificate was obtained after limitation. I find that only one appellant Gurdit Singh, applied for a certificate. The learned District Judge condoned the delay in applying for a certificate on the ground of illness. This justifies Gurdit Singh's appeal but it does not follow that the appeal of the other appellants is also good, although learned counsel argues that S. 41 only demands a certificate and each appellant need not obtain a certificate. I do not think this argument is correct but it is unneccessary to decide this point as it is clear that the Riwajiam of Rupar Tahsil shows that sisters inherit in the absence of near collaterals, i. e., 5th degree collaterals. I see nothing to rebut the presumption that arises from the Riwajiam. I therefore repel this contention. It is contended that the first judgment of the learned District Judge is res judicata as regards this point, but this is obviously not so. I therefore dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 1005 (2)

COLDSTREAM AND ABDUL QADIR, JJ.

Mohammad Araf and *another*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 844 of 1932, Decided on 13th October 1932, from order of Sess. Judge, Campbellpur, D/- 21st June 1932.

(a) Criminal Trial — First information report—Evidence of witness whose name is not mentioned in first information report cannot be rejected only on that reason.

There certainly may be cases where an omission to state some fact in a first information report may be proved and be a relevant matter of significance. But where the witness whose name was not mentioned in the first information report, was not herself present at the police station the mere omission of the reporter, who himself was not an eyewitness to a murder, in recounting what he had heard from another person who was an eyewitness could not possibly lessen the value of her evidence. [P 1006 C 1]

(b) Penal Code (1860), S. 302 — Murder proved—Motive is immaterial.

Where there is direct evidence of murder, absence of proved motive is immaterial. [P 1006 C 2]

Khalifa Shuja-ud-din — for Appellants.

Des Raj Sawhney—for the Crown.

Coldstream, J.—The appellants Mohammad Araf and his cousin Fateh Mohammad Awans, have been sentenced to death by the Sessions Judge of Attock for having together murdered Ghulam Mohammad on the night of 4th February 1932 in their village Dhullian. The crime was reported on the next morning at Tamman police station, 13 miles away, by Fateh Mohammad, the father of Ghulam Mahammad, the murdered man. Fateh Mohammad had been absent in his "dhok," three miles from Dullian, at the time of the murder and his report is merely a repetition of the story he had been told by Mt. Malkani, the dead man's widow. This story was that during the night when Ghulam Mohammad was asleep with his wife and two little children in his house, someone heaped a thorn hedge against the outside of his house door and set fire to it. Ghulam Mohammad and his wife ran out but Ghulam Mohammad was at once attacked by the two appellants. He attempted to escape but was overtaken. Fateh Mohammad held him down while Mohammad Araf killed him with a spear. Meanwhile attracted by the uproar made by Malkani who had followed her husband Mohammad Khan, Ghulam Mohammad's uncle and Hayat Mohammad, a cousin of Mohammad Khan, arrived upon the spot. Ghulam Mohammad's assailants then fled away leaving the spear behind.

Mt. Malkani died before her evidence could be recorded. Besides Mohammad Khan and Hayat Mohammad, the two witnesses mentioned in the first information report, the prosecution produced Mt. Ghulam Khatun as an eye-witness. Her evidence however has been rejected by the learned Sessions Judge, partly for the reason that the omission of her name from the first information report "is a fatal objection to her presence at the murder." There certainly may be cases where an omission to state some facts in a first information report may be proved and be a relevant matter of significance; but in this case there was no justification for the view expressed by the learned Sessions Judge. The witness was not herself present at the police station and the mere omission of the reporter, who himself was not an eye-witness, in recounting what he heard from Malkani could not possibly with any show of reason lessen the value of her evidence.

The evidence of the other two eye-witnesses Mohammad Khan and Hayat Mohammad has been believed by the learned Sessions Judge. They corroborate the report made to the police. Mohammad Khan, who is a poor man, was sleeping as a chaukidar at the shop of Gumani Ram in the lane in which the murder took place and close to the place where Ghulam Mohammad was killed. He saw Mohammad Araf stabbing repeatedly Ghulam Mohammad with a spear while Fateh Mohammad held him. He identified the accused by the light of the fire which they had lit at Ghulam Mohammad's door. Hayat Mohammad came to the scene from his house which is also quite near the scene of the murder. After the murderers had gone he and Mohammad Khan went to put out the fire and then informed the lambardars.

The medical evidence given by the Assistant Surgeon of Tallagang, who examined Ghulam Mohammad's body post mortem, proves that Ghulam Mohammad died of shock and bleeding, resulting from injuries inflicted with some weapon like a spear. He had no less than twelve incised wounds upon his body. His lungs were both pierced and the main vessel of the heart had been cut across. It is obvious that these injuries must have taken some time to inflict and their nature makes it probable that more than one man took part in the assault. The appellants when questioned denied their guilt. Mohammad Araf pleaded that he had been falsely accused because he had given evidence in a murder case against the sons of one Mahbub who is father-in-law of a cousin of the deceased Ghulam Mohammad. Fateh Mohammad declared that he had been accused simply because he was Mohammad Araf's cousin. No witnesses were called for the defence.

We have been taken through the whole of the record by Mr. Shujauddin who has argued that the evidence relied upon is discrepant and unreliable. The main discrepancy to which he has drawn our attention is on the point whether Malkani was or was not questioned by Fateh Mohammad, the deceased's father, when he arrived on the scene. Mohammad Khan says that he did not see Fateh Mohammad talking to Malkani while Fateh Mohammad states that he questioned Malkani and afterwards Mohammad Khan and Hayat Mohammad who confirmed her statement. There is also a very minor discrepancy regarding the manner in which Fateh Mohammad, the appellant, held Ghulam Mohammad while Mohammad Araf wounded him with the spear. Mohammad Khan says that Fateh Mohammad caught Ghulam Mohammad by the back hair while Hayat Mohammad says that Fateh Mohammad was holding him with one hand by the hair and with the other by the arm. After hearing what counsel has to say and considering the evidence I do not think that these discrepancies justify the rejection of the evidence which has been accepted by the learned Sessions Judge.

Dr. Shujauddin has also argued that no adequate motive for the murder has been proved. Where there is direct evidence, such as has been relied upon in this case, absence of proved motive is immaterial. There is however evidence proving that Ghulam Mohammad, the murdered man, had twice previously abducted one Mt. Khatun, a cousin of the mother-in-law of Mohammad Araf and that on the second occasion, which was shortly before the murder, both the appellants had recovered the woman from the house of Mt. Bhag Bhari (P. W. 10) where she had been taken by Ghulam Mohammad. It is also in evidence that Ghulam Mohammad had been suspected of burning down the house of the appellant Fateh Mohammad four days before the murder.

Finding the guilt of the appellants established I would dismiss the appeal and confirm the sentence of death passed upon them.

Abdul Qadir J.—I agree.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 1007 (1)

DALIP SINGH, J.

Sapt Textile Products Ltd. Bombay — Defendants—Appellants.

v.

(Firm) Raghbar-Das Beni Parshad — Plaintiffs—Respondents.

Misc. First Appeal No. 1178 of 1933, Decided on 9th October 1933, from order of Senior Sub Judge, Ambala, D/- 20th June 1933.

Civil P. C. (1908), S. 115 — Judge using discretion in refusing to refer matter to arbitration—High Court will not interfere—Arbitration.

A long delay by the defendants in referring the matter to arbitration justifies the Court in refusing to enforce the clauses of arbitration. And this being a matter of discretion, if no sufficient reason is made out, the High Court will not interfere with it. [P 1007 C 1, 2]

Badri Das—for Appellants.

J. N. Aggarwal and *C. L. Aggarwal* — for Respondents.

Judgment.—A preliminary objection is taken that no appeal lies. This is supported by the Division Bench ruling in *Punjab Marwari Chamber of Commerce, Delhi* v. *Ram Mal Lilu Sah* (1), and the learned counsel for the appellant has not seriously contested it. He however contends that the case should be treated as a revision and relied on *Punjab Marwari Chamber of Commerce, Delhi* v. *Ram Mal Lilu Sah* (1) which does not help him. The matter is one of discretion and no sufficient reason has been made out before me to interfere in the matter with the discretion exercised. It is unnecessary to decide whether these contracts are or are not forward contracts. It is enough to hold that the long delay by the defendants in referring the matter to arbitration does justify the Court refusing to enforce the clause now. I therefore dismiss the appeal with costs.

V.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 1007 (2)

AGHA HAIDAR AND ADDISON, JJ.

Ganun—Plaintiff—Appellant.

v.

Ram Ditta and *others*—Defendants—Respondents.

Second Appeal No. 2139 of 1927, Decided on 8th November 1932, from order of Dist. Judge, Gurdaspur, D/- 21st June 1927.

Custom (Punjab)—Suit for possession of village land—Admission of plaintiff's claim by some of proprietors—Plaintiff should be given decree for joint possession in respect of share of such defendants.

In a suit for possession of land situate in a village against the proprietors, some of the proprietors admitted the plaintiff's claim but the suit was dismissed:

Held: that the plaintiff should be granted a decree for joint possession in respect of the share of the defendants who had admitted his claim. [P 1008 C 1]

Fakir Chand—for Appellant.

Mehr Chand Mahajan—for Respondents.

Agha Haidar, J.—This is a plaintiff's appeal arising out of a suit for possession of a certain area of land and also of a dilapidated house situate in the village Hara Tikka Kawal. The trial Court decreed the suit, but in appeal the learned Judge of the lower appellate Court has dismissed the plaintiff's claim. The plaintiff has come up to this Court in second appeal, and the short point, on which the appeal was admitted and which has been argued before us, is that, having regard to the fact that some of the defendants had admitted the claim of the plaintiff, a decree ought to have been granted at least so far as the shares of those defendants are concerned.

The facts of the case may briefly be stated as follows: One Puran died on 10th February 1915, leaving him surviving Mt. Gangi, his widow, On Puran's death mutation was effected in the name of Mt. Gangi and she remained in possession for several years. On 8th August 1923, Mt. Gangi appeared before the Patwari of the village and asked him that the land standing in her name may be recorded in the name of Ganun, the present plaintiff, as her adopted son. This was done, Mt. Gangi died shortly afterwards. On 20th January 1925, the Assistant Collector

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1. A I R 1981 Lah 644=182 I C 860=13 Lah 59.

ordered mutation in the name of Ganun, but on appeal the Collector, on 3rd April 1925, set aside the Assistant Collector's order and ordered that the names of the proprietary body of the village be entered in the revenue papers. Thereupon, on 24th July 1925, Gunan instituted the present suit for possession as already mentioned. He impleaded 19 proprietors as defendants in the case. It is important to note that although Jagtu, defendant 16 and Kirlu, defendant 19, at first filed a written statement along with certain other defendants, contesting the plaintiff's claim, they ultimately, on 3rd March 1926, admitted his claim. Ex parte proceedings were ordered against Teku, defendant 6, and Bhodu, defendant 7, who had filed separate written statements admitting the plaintiff's claim. They also appeared as witnesses on his behalf supporting his claim. Munno, defendant 9, gave evidence as P. W. 12, in the case supporting the plaintiff's claim. Mr. Fakir Chand, counsel for the appellant, argued that the plaintiff's claim should have been decreed as against all these five defendants, including Munoo. So far as Munoo is concerned, there is no force in the appellant's contention. Munoo did not file any written statement. As already stated, he appeared simply as a witness for the plaintiff and supported his claim. But by giving evidence in support of the plaintiff's claim it cannot be said that he admitted the plaintiff's claim and gave up his rights and interests in the land which forms the subject-matter of the present suit. So far as the other four defendants are concerned, namely, Jagtu, Kirlu, Teku and Bhodu, the plaintiff ought to have been granted a decree in respect of their shares on their own admissions.

I would therefore allow the appeal to this extent that the decree of the lower appellate Court be modified and the plaintiff granted a decree for joint possession in respect of the share of the four confessing defendants. In other respects the appeal fails. Under the circumstances of the case the parties shall bear their own costs of this appeal.

Addison, J.—I agree.

K.S. *Decree modified.*

A. I. R. 1933 Lahore 1008

DALIP SINGH, J.

Asa Nand—Appellant.

v.

Jugal Kishore—Respondent.

Misc. First Appeal No. 838 of 1933, Decided on 5th October 1933, from order of Dist. Judge, Attock, D/- 6th March 1933.

(a) Provincial Insolvency Act (1920), S. 59 —Sale of mortgaged property of insolvent by Official Receiver without reference to mortgagee rights—Insolvent has no right to protest though mortgagee may or may not have such right.

Where the mortgaged property of the insolvent is sold by the Official Receiver without reference to the rights of the mortgagee, the mortgagee may or may not have a right to protest against the sale; but this does not give the insolvent a right to protest against the sale. [P 1008 C 2]

(b) Provincial Insolvency Act (1920), Ss. 28 and 59—Expiry of time for applying for discharge—Court is not bound to vest property in insolvent but may vest in receiver for benefit of creditors and sale by receiver cannot be questioned by insolvent.

Where the time for applying for discharge has expired, the Court is not bound to vest the property in the insolvent; but it may vest in the receiver for the benefit of the creditors; and even if the receiver sells the property or distributes it among creditors, the insolvent has no right to object to it, though the creditors may do so. [P 1008 C 2]

M. L. Puri—for Respondent.

Judgment.—This appeal has no force. The mortgagees may or may not have a right to protest against the sale of the property without reference to their mortgagee rights if this has happened, but this does not give the insolvent a right to protest against the sale of the mortgaged property. Next the insolvent urges that the time for applying for a discharge has expired and hence the receiver cannot sell the property. There does not appear to have been any order annulling the adjudication and even if there had been, the Court is not bound to make the property in hand vest in the insolvent, but may vest it in the receiver for the benefit of the creditors. The insolvent urges that the receiver has no right to sell the property or distribute it among the creditors, but even if this is so, it is for the creditors to object and not the insolvent. I therefore dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 1009

TEK CHAND, J.

Khuda Bakhsh and *another* — Accused —Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 635 of 1933, Decided on 7th September 1933, from order of Dist. Magistrate, Gurdaspur, D/- 8th March 1933.

(a) Penal Code (1860), Ss. 417 and 420—Obtaining money by cheating is offence under S. 420 and not under S. 417.

Where a person is alleged to have obtained money by cheating, the offence committed is one under S. 420 and not merely under S. 417: 10 *Lah* 513, *Ref.* [P 1010 C 1]

(b) Penal Code (1860), S. 420 — Trial of case under S. 420 by Second Class Magistrate—Defect is not cured by Criminal P. C. (1898), S. 537.

A Magistrate who holds only second class powers has no jurisdiction to try a case under S. 420, Penal Code; this is a matter which goes to the very root of the case, and is not an irregularity which is covered by S. 537, Criminal P. C.: *A I R* 1921 *Lah* 63; 11 *A L J* 95 and *A I R* 1925 *Mad* 367, *Ref.* [P 1010 C 1]

Mohsin Shah—for Petitioner.

Grounds.—The case against the petitioners is that they obtained a sum of Rs. 300 by cheating from Nur Mohammad, complainant. This is an offence under S. 420, Penal Code, and not merely under S. 417, Penal Code. The offence under S. 417 is cheating generally but the offence under S. 420 is an aggravated type of the offence involving delivery or destruction of valuable security as was laid down in *Rangayya* v. *Somappa*, cited as *A. I. R.* 1925 *Mad.* 367. It was also held in *Birendra Lal Bhaduri* v. *Emperor* (1) that the word "property" in S. 420, Penal Code, includes money. In *Sher Singh* v. *Emperor*, cited as *A. I. R.* 1928 *Lah.* 935 it was held that where a person, under false pretence intentionally deceives the complainant and dishonestly induces the complainant to let him have on credit certain articles for which he did not intend to pay, then he is guilty under S. 420 and not under S. 417. These three authorities make it abundantly clear that the offence of the petitioner falls under S. 420 and not under S. 417, Penal Code. The learned Public Prosecutor concedes that the trial Magistrate had no jurisdiction to try this offence. But he contends that the petitioners were not prejudiced in any way by being tried under S. 417, Penal Code, by a second class Magistrate. I am unable to accept this contention. An accused person. is certainly prejudiced in his defence if he is tried for an offence by a Magistrate having no jurisdiction in the case. I am therefore of opinion that the second class trial Magistrate who convicted the petitioners for an offence under S. 417, Penal Code, was not competent to try them for the offence which comes within the purview of S. 420, Penal Code.

The charge sheet framed against the petitioner mentions the fact that complainant was dishonestly induced to pay a sum of Rs. 300 to the petitioner who practised cheating on him. The mention of this fact would take the case out of the jurisdiction of a Second Class Magistrate. The charge sheet is defective because it does not specify the time when the cheating was practised and when complainant was induced to part with money under false pretences. The mandatory provisions of S. 342, Criminal P. C., were also ignored because the accused persons were not questioned after the further cross-examination of the prosecution witnesses. It is contended that this failure was not a mere irregularity which could be cured but that it went to the root of the trial which was vitiated. In support of this contention reliance is placed on the principle enunciated in *A. I. R.* 1931 *Mad.* 241 and *A. I. R.* 1922 *Lah.* 245.

A fourth objection taken by the petitioners' counsel is that the trial Magistrate convicted Khuda Bakhsh, petitioner without recording his defence evidence. It is true, as has also been pointed out by the learned District Magistrate, that the Trial Magistrate failed to record an order that he was not prepared to grant further time to Khuda Bakhsh for producing defence evidence and that no statement of Khuda Bakhsh was recorded as to whether he was or was not closing his defence. But this failure does not prejudice the trial against Khuda Bakhsh who had sufficient time for producing defence evidence. There is nothing on the record to show that Khuda Bakhsh may have asked for extension of time. This objection does not appear to me to carry any weight.

The first objection regarding jurisdiction however stands on a different footing. The trial Magistrate who is exercising only second class powers was not competent to try a case which admittedly comes within the purview of S. 420, Penal Code. A second class

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1. (1905) 32 Cal 22=8 C W N 784.

Magistrate is not competent to try an offence under S. 420, Penal Code, though he has jurisdiction to try an offence under S. 417, Penal Code: vide *A. I. R.* 1925 *Mad.* 367. In this Madras ruling, it was also laid down that the High Court will set aside the conviction of an accused where the accused himself objected to the jurisdiction of the lower Court, which by intentionaly ignoring facts of aggravation making the offence cognizable only by a superior Court has tried the accused under S. 417, Penal Code.

For reasons given above, I refer the case for the orders of the Hon'ble Judges of the High Court with the recomendation that the convictions and the sentences recorded against the petitioners may be set aside and that their re-trial under S. 420, Penal Code, may be ordered before a First Class Magistrate. Pending decision of this reference, the petitioners will be released on furnishing bail bonds of Rs. 1,000 each.

Order. — The facts are set out fully and clearly in the order of reference, passed by the learned Sessions Judge and it is not necessary to recapitulate them here. There can be no doubt that on the facts, alleged by the prosecution and found by the Trial Magistrate, the offence fell under S. 420 and not under S. 417, Penal Code, *Sher Singh* v. *Emperor* (2). This being so, the case was triable by a Magistrate of the First Class. The Trial Magistrate, who holds only second class powers, therefore had no jurisdiction to try it. This is a matter which goes to the very root of the case, and is not an irregularity which is covered by S. 537 of the Code, *Bakhtawar Singh* v. *Emperor* (3), *Jwala Prasad* v. *Emperor* (4) and *A. I. R.* 1925 *Mad.* 367.

I therefore accept the recommendation of the learned Sessions Judge, set aside the convictions and sentences passed against the petitioners by the trial Magistrate, and affirmed on appeal by the District Magistrate, and direct that they be retried under S. 420, Penal Code, by a Magistrate of the first class.

K.S. *Retrial ordered.*

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2. A I R 1928 Lah 935=115 I C 471=10 Lah 513.

3. A I R 1921 Lah 63=67 I C 588.

4. (1929) 11 L L J 95.

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* A. I. R. 1933 Lahore 1010

DALIP SINGH, J.

Rahiman—Appellant.

v.

Nagar Mal and *another*—Respondents.

Misc. First Appeal No. 77 of 1933, Decided on 16th October 1933.

*** (a) Provincial Insolvency Act (1920), Ss. 28 and 59—House of agriculturist insolvent does not vest in Official Receiver—He cannot therefore sell it—Civil P. C. (1908), S. 60.**

No doubt ordinarily an Official Receiver can sell the equity of redemption, but that is because all property of the insolvent vests in him. But in the case of an agriculturist insolvent, according to the provisions of S. 60, Civil P. C., the house of an agriculturist does not vest in the Official Receiver and therefore he cannot sell property which does not vest in him. This is so even with respect to a house wherein the agriculturist insolvent is residing not as an owner but as a lessee; for the word used in S. 60 is "occupied" which seems to be a physical fact and not "possessed." [P 1010 C 2]

(b) Provincial Insolvency Act (1920), Ss. 47 and 59—Mortgagee cannot authorize Official Receiver to sell property not vested in him.

Section 47 does not empower the mortgagee to authorize the Official Receiver to sell property not vested in him. [P 1010 C 2]

Malak Mohammad Amin—for Appellant.

C. L. Aggarwal for *Nagar Mal*—for Respondents.

Judgment.—The only question in this case is whether the Official Receiver can sell the mortgaged property. No doubt ordinarily he can sell the equity of redemption, but that is because all property of the insolvent vests in him. But in this case according to the provisions of S. 60, Civil P. C., the house of an agriculturist does not vest in the Official Receiver and I do not see how he can sell property which does not vest in him. S. 47 does not empower the mortgagee to authorise the Official Receiver to sell property not vested in him. It is next contended that the house is now occupied by the agriculturist not as owner but as lessee and hence the property does vest in the Official Receiver. The word used however is "occupied" which seems to be a physical fact and not "possessed" which might introduce difficulties. I do not decide the question whether the mortgagee has other remedies against the property by way of a regular suit or otherwise. I accept the appeal and hold that the house cannot be sold by the Official Receiver.

V.S. *Appeal allowed.*

S. N. DAR, B. A. LL. B.
Vakil High Court.
SRINAGAR (Kashmir)

A. I. R. 1933 Lahore 1011

TEK CHAND AND MONROE, JJ.

Municipal Committee, Simla — Defendant—Appellant.

v.

Beli Ram & *Co.*—Plaintiffs — Respondents.

First Appeal No. 905 of 1930, Decided on 16th June 1933, from decree of Senior Sub Judge, Simla, D/- 1st February 1930.

(a) Deed — Construction — Conditions of work contained in book of specification — Special contract executed by contractor for execution of a particular work — In case of conflict between specifications and contract, terms in contract should prevail.

The book of specifications issued by a Municipal Committee contained an offer of the conditions on which work was intended to be done by the Committee. One of the conditions therein mentioned was that no alteration or variation in the work was to be done by the contractor without the written order of the President where the value of such alteration exceeded Rs. 1000. The plaintiff undertook a contract and the rights and obligations were embodied in a deed. One of the terms was that the Engineer-in-chief was the sole judge as regards the quality, soundness and nature of the work and that the contractor was to obey and satisfy to the minutest detail the instructions given by the Engineer-in-chief. Under instructions from the engineer, the plaintiff changed the construction from uncoursed to coursed masonry the value for which exceeded over Rs. 1,000 without the written order of the President:

Held: that the deed executed for the particular work prevailed over the specifications and that as the contractor had executed the work in accordance with the orders of the engineer the committee could not escape liability on the ground that there was no written order of the President. [P 1013 C 1]

(b) Interest — Future interest at 12 per cent is excessive in absence of special reasons—Civil P. C. (1908), S 34

Future interest at 12 per cent per annum from the date of decree till realization is excessive. In the absence of special reasons, Courts usually allow future interest at 6 per cent per annum. [P 1013 C 2]

Badri Das and *Shankar Nath* — for Appellant.

J. N. Aggarwal and *Achhru Ram*—for Respondents.

Tek Chand, J.—The plaintiffs are the surviving partners and successors of a firm of contractors which had constructed for the defendant, the Municipal Committee of Simla, certain buildings in connection with the Simla Water Supply Scheme (Guma Project), under a written contract (Ex. P. W. 13-19) dated 17th July 1922. The work was completed some time in June 1924, and on 22nd September the plaintiffs submitted their final bill for the amount due to them. The Committee disputed some of the items and paid to the plaintiffs a certain sum of money in account. The parties made several attempts to arrive at an amicable settlement, but these were unsuccessful, and the plaintiffs, on 27th September 1927, brought a suit against the Committee for recovery of Rupees 19,000, made up of the following items: (a) Rs. 12,758-6-9 alleged to have been wrongly disallowed by the defendant for the masonry work done on the coagulating and settling tanks. The plaintiffs contended that this was done in coursed stone masonry in lime, under orders of the engineer-in-charge of the project, and should have been paid for at Rs. 73 per 100 cubic feet, and not at Rs. 60 per 100 cubic feet which was the rate fixed for uncoursed stone masonry lime. (b) Rs. 1,048-9-6 wrongly deducted by the defendant on account of "dressing" done departmentally which, the plaintiffs alleged did not form part of the work included in the contract; (c) Rs. 1,406-4-0 wrongly disallowed by the defendant on account of "ramming" done in layers of 6 inches each. (d) Rs. 3,803-5-3, interest at 12 per cent per annum on the amount due on (a), (b) and (c) above from 26th August 1925 when the plaintiffs had served a notice on the defendant claiming interest on the amount withheld by the Committee, to the date of the suit. The total of these items was Rupees 19,016-9-6, but the plaintiff remitted Rs. 16-9-6 and asked for a decree for Rs. 19,000.

The defendant Committee denied the claim in its entirety and pleaded that as a matter of fact the coagulating and setting tanks had been constucted in uncoursed stone masonry in lime, and that even if it were found that the work had been done in coursed masonry under the orders of the engineer-in-charge, the Committee was not liable as the change from uncoursed to coursed masonry was unauthorised and not binding on the Committee. It was averred that items (b) and (c) had been rightly disallowed and that the plaintiffs were not entitled to charge interest either under the terms of the contract or in accordance with the provisions of the Interest Act. Lastly, it was urged that the plaintiffs, not having completed the work within the stipulated time, were liable to pay a penalty of Rs. 600, which should be set off against the amount, if any, which might be found due to them. After a lengthy trial, the learned Subordinate Judge passed a decree in favour of the plaintiffs for Rs. 5,568 with simple interest on that sum at 12 per cent per annum from the date of the notice (26th August 1925) to the date of the decree, and future interest at the same rate from the date of the decree till realization in full. From this decree two appeals have been lodged in this Court: Civil Appeal No. 931 of 1930 by the plaintiffs praying that the claim be decreed in full; and Civil Appeal No. 905 of 1930 by the defendant asking for a dismissal of the claim except for the sum of Rupees 1,048-9-6 which, it is now admitted, had been wrongly deducted on account of the "dressing" done departmentally, item (b) above.

The principal point in controversy is whether the settling and coagulating tanks were built in coursed stone masonry in lime, and if so, whether the defendant Committee is bound to pay at a rate higher than that fixed for uncoursed stone masonry. The measurements of the work done are not disputed both parties being agreed that the defendant constructed 98,142.65 cubic feet of stone masonry in lime. The plaintiffs claim payment for it at Rs. 73 per 100 cubic feet; ; the defendant admits liability to pay at Rs. 60 per 100 cubic feet; while the lower Court has allowed Rs. 64 per 100 cubic feet.

On the question of fact there can be no doubt that the finding must be in favour of the plaintiffs. The evidence on the record is all one way and establishes beyond doubt that both the coagulating and settling tanks were constructed in coursed stone masonry in lime, under the orders of Mr. Henderson, the engineer-in-charge. (Then his Lordship examined the evidence on this point, and the judgment proceeded). It is however urged that the engineer-in-charge had no power to order the contractors to construct the tanks in coursed masonry, and in this connection reliance is placed on a printed book (Ex. P. W. 13-20) issued by the Committee on 14th February 1921 containing specifications to the work to be executed, materials to be supplied, and conditions to be observed in the construction of several buildings connected with the Simla Water Works (Guma Project). On these "specifications" tenders were invited and eventually the plaintiffs' tender was accepted. The conditions on which the contract was given to the plaintiffs were reduced to writing in a deed (Ex. P. W. 13-19) dated the 17th July 1922 which was duly signed by the plaintiffs and the President (Mr. Abraham), the Secretary (Mr. Lister) and a member (Mr. Cotton) of the Committee and also by Mr. Henderson, the engineer-in-charge, The terms of this deed are different in several material particulars from the "conditions" given in the printed book of specifications (Exs. P. Wi 13-20) which had been issued about a year and a half earlier, and on which tenders had been invited from bidders.

According to the book of specifications (Ex. P. W. 13-20) the settling and coagulating tanks were to be constructed in uncoursed stone masonry in lime, and in para. 38 it was provided that no alterations or variations in the work, which was likely to exceed Rs. 500 in value, were to be carried out by the contractor without first obtaining the approval in writing of the engineer-in-charge, and if the alterations or variations were likely to exceed Rs. 100 without the written orders of the President. In the contract (Ex. P. W. 13-19), however it was specifically stated that in this transaction the Municipal Committee was "represented by the engineer-in-charge, Guma Scheme," that the contractor agreed and bound himself to:

> "execute the work in the most substantial and workman like manner and with materials of the best quality to the complete satisfaction of the Engineer-in-charge,"

that he would "conform minutely to the instructions and drawings issued by the said engineer," and that if at any time it should appear to the engineer-in-charge that any work had not been properly or skillfully performed he, after making a demand for rectification, was authorised to "forthwith determine and end the contract without further notice." In para. 16 it was expressly laid down that the:

> "Engineer-in-charge shall be the sole judge of the quality of the materials and the soundness or nature and sufficiency of the work provided, done, and executed in pursuance of this agreement".

Mr. Badri Das for the defendant Committee relied on para. 38 of the printed specifications (Ex.P. W. 13-20) and argued that as the change from uncoursed to coursed masonry was admittedly more than Rs. 1,000 in value and the sanction in writing of the President had not been obtained, the Committee was not liable to pay for it, even though the work had been executed under the express orders of the engineer-in-charge. In my opinion this argument is without force and I have no hesitation in overruling it. As stated already, the conditions of the contract between the parties were embodied in the deed, Ex. P. W. 13-19, and their respective rights and obligations were to be regulated by its terms. The book of specifications, issued by the Committee a year and a half earlier, merely contained an offer of the conditions on which the Committee intended at that time to have the work done. These "conditions" were modified in several important particulars in the course of the negotiations, and the terms ultimately agreed upon between the Committee and the contractors were entered in the written contract, Ex. P. W. 13-19. There can therefore be no manner of doubt that if on any point there is a conflict between Ex. P. W. 13-20 and Ex. P. W. 13-19, the latter must prevail. A comparison of the terms of the two documents makes it abundantly clear that Ex. P. W. 13-19 superseded para. 38 of the printed book of specifications; and the engineer-in-charge was invested with very wide powers in connection with the construction of these buildings, and the contractors were required to execute the work in strict accordance with his directions. The class of masonry in which the walls of the tanks were to be constructed was clearly a matter on which the contractors were bound to follow the instructions given by him. It is not contended that the plaintiffs disobeyed these instructions. Indeed, the very basis of their claim is that they had executed the work in strict accordance with the orders issued by Mr. Henderson. The class of masonry in which the walls were to be built is not a matter to which para. 12 of Ex. P. W. 13-19 applied and I have no doubt that the Committee cannot escape liability on the highly technical ground urged by Mr. Badri Das.

The next question for determination is the rate at which the plaintiffs are to be paid for this work. (After considering the evidence, his Lordship allowed the rate of Rs. 70 per 100 cubic feet, and proceeded). The next item in dispute is the cost for "ramming" which the plaintiffs claimed to have done in layers of 6 inches and for which they asked to be paid at Re. 1 per 100 cubic feet. The defendant denied the claim in toto but the lower Court has allowed 8 annas per 100 cubic feet. Neither party is satisfied with this decision, and the plaintiffs in the appeal want this amount to be enhanced to Re. 1 per 100 cubic feet, while the defendant prays that the item be disallowed altogether. After hearing counsel at length and going through the evidence, I am of opinion that the contention of both parties are unsound and the finding of the lower Court should be upheld.

The next question raised in the defendant's appeal is whether the plaintiffs were entitled to charge interest on the amount withheld by the Committee. In the contract there is no provision for the payment of interest. But the plaintiffs submitted their final bill in September 1924 claiming a certain sum as due to them. A part of this sum was disallowed by the Committee and on 26th August 1925, the plaintiffs served a notice on the Committee demanding the amount and saying that on the failure of the Committee to pay, interest at 12 per cent per annum would be charged. On these facts the case is clearly governed by the Interest Act and the lower Court held quite rightly that interest is payable on the amount found due. The plaintiffs, claimed, and the lower Court allowed, interest at 12 per cent per annum, and having regard to all the circumstances I do not consider this to be excessive. I therefore affirm the finding of the lower Court that the plaintiffs are entitled to interest at 12 per cent per annum on the amount found due by it from the date of the notice up to the date of its decree. I also hold that on the amount, by which we have enhanced the decreetal amount, the plaintiffs shall be allowed interest at the same rate from the date of notice to the date of our decree.

The lower Court has given the plaintiffs future interest at 12 per cent per annum from the date of its decree till realization. This, in my opinion, is excessive. In the absence of special reasons, Courts usually allow future interest at 6 per cent per annum. No special reasons have been shown to exist in this case, and I do not see why a higher rate should be allowed. The Committee in their appeal claimed to set off Rs. 600 as compensation for the delay on the part of the plaintiffs in completing the contract. The lower Court has however given good reasons for holding that the delay had been condoned by the Committee, and that it is not entitled to any compensation. As I am in complete agreement with the conclusion of the lower Court, and the reasonings on which it is based, I do not think it necessary to discuss the evidence bearing on the point. I would, therefore, disallow the defendent's claim on this point. There is however a clear mistake in the decree sheet to which our attention has been drawn by Mr. Badri Das. In the judgment the lower Court gave the plaintiffs proportionate costs on the amount decreed, but in the decree-sheet the amounts payable on account of court-fee stamp and pleader's fee have been calculated on the sum originally sued for. This is clearly a clerical mistake and should be corrected. The result therefore is that in addition to the amount decreed by the lower Court the plaintiffs are entitled to the following items:

Due for the Coagulating and Settling Tanks in excess of the amount allowed by the lower Court	Rs. 3,688-11-4
Interest on Rs.3,688-11-4 from 25th August 1925 to 16th June 1933 at 12 per cent per annum	Rs. 3,456- 5-6
Total	Rs. 7,145-0-10

I would accordingly accept the plaintiffs' appeal (Civil Appeal No. 931 of 1930) and enhance the amount decreed by the lower Court by Rupees 7,145-0-10 with proportionate costs in both Courts, and future interest at 6 per cent per annum from the date of this judgment till realization. The defendant's appeal (Civil Appeal No. 905 of 1930) is dismissed with costs, except that in the lower Court's decree the plaintiffs' memo of costs shall be corrected as stated above, and the plaintiffs shall be allowed future interest on the amount decreed by the lower Court at 6 per cent per annum from the date of that decree till realization.

Monroe, J.—I agree.

K S. *Order accordingly.*

A. I. R. 1933 Lahore 1014 (1)

DALIP SINGH, J,

Parma Nand and *others* — Defendants —Appellants.

v.

Sidhu and *others* — Plaintiff and Defendants—Respondents.

Second Appeal No. 1432 of 1932, Decided on 12th October 1933, from decree of Dist. Judge, Hoshiarpur, D/- 25th April 1932.

Civil P. C. (1908), O. 41, R. 28 and S. 100 —Appellate Court has discretion to decide case with or without taking additional evidence.

It is within the discretion of the appellate Court, whether it can decide case with or without taking additional evidence; and the High Court cannot interfere in second appeal with the exercise of such discretion. [P 1014 C 1]

H. J. Rustomji—for Appellants.

Fakir Chand—for Respondents.

Judgment.—The matter is one of discretion or rather for the decision of the lower appellate Court whether it can decide a case with or without taking additional evidence. I do not see that I can interfere in second appeal. I make no order as to costs of this appeal in the circumstances of the case. The appeal is dismissed.

K.S. *Appeal dismissed.*

* A. I. R. 1933 Lahore 1014 (2)

DALIP SINGH, J.

Rang Lal—Defendant—Appellant.

v.

(*Firm*) *Amolak Chand Mewa Ram* and *another*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1688 of 1930, Decided on 3rd October 1933, from decree of Dist. Judge, Delhi, D/ 22.5-1930.

*** Negotiable Instruments Act (1881), S. 50 —Transferee of Hundi without consideration has rights of transferor though not of holder in due course.**

A transferee of a hundi for no consideration has got the rights of the transferor and can sue the maker, but he cannot have rights of a holder in due course. [P 1014 C 3]

Kishan Dyal—for Appellant.

Faquir Chand—for Respondents.

Judgment.—The two points raised in this appeal are that: (1) The transfer being without consideration, the transferee cannot sue the original drawer of the hundi as S. 50 assumes consideration. I cannot agree with this proposition. It seems to me that the transferee has the rights of the transferor, though he may not have the rights of a holder in due course. (2) That the learned District Judge has erred in his finding of fact that the hundi in favour of Madan Lal was with consideration as he has omitted to notice that no sum of Rs. 1,300 was shown as received by Madan Lal in his pocket book but all this is a question of fact and though the circumstances may raise suspicion, they cannot shift the onus having regard to the equally unsatisfactory character of the appellant, Rang Lal's statements. The appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 1015

DALIP SINGH, J.

Jit Singh and *another* — Plaintiffs — Appellants.

v.

Labh Singh and *another* — Defendants — Respondents.

Second Appeal No. 1555 of 1932, Decided on 16th May 1933, from decree of Dist. Judge, Lahore, D/- 6th June 1932.

Custom (Punjab)—Father — Father having minor sons entering into speculative transaction—It is for Court to decide whether he acted bona fide and whether it was reasonable venture.

Where a father with minor sons governed by Customary law enters into a speculative transaction, it is for the Court to decide whether he acted bona fide and whether the venture was a reasonable one. [P 1016 C 1]

Lala Tirath Ram—for Appellants.

J. N. Aggarwal—for Respondents.

Judgment.—This is the usual suit by the sons of one Angrez Singh for possession of certain ancestral land on the ground that certain alienations effected by Angrez Singh are not for necessity and are not binding on his sons. Various pleas were taken by the mortgagees which do not now concern us. But the trial Court decreed the suit of the minors without any charge whatsoever. On appeal, the learned District Judge upheld the charge created by the three mortgages and passed a decree in favour of the plaintiffs holding that they would be entitled to possession on payment of Rs. 5,100 to the defendant. The three alienations in question are:

(1) Dated 28th February 1927 for Rs. 1,500. The learned District Judge found that Rs. 126 and Rs. 37, a total of Rs. 163, was not proved to be for necessity.

So far as the other items are concerned, the main ground of attack in the grounds of appeal is that Angrez Singh had no business to take certain land on lease from the mortgagees when he had already mortgaged his own to those mortgagees and taken it back again on rent. It seems to me however that the learned District Judge has come to the right conclusion on the point though he has used in his judgment words which are much too wide and cannot be supported. For instance, he says, in dealing with the question of the lease taken by Angrez Singh, that it is not for the Court to say whether or not Angrez Singh was wise to take land on lease from Labh Singh: he was a free agent and the best Judge of his own actions, and, even if he did make a mistake in taking land from Labh Singh on rent when he had land of his own that is not a sufficient ground for refusing to regard the payment of rent for this land as a necessary purpose. He has also stated that it may be assumed that the Revenue Court before awarding the decree (for rent) satisfied himself that the sum was in fact due on account of a tenancy of land, and this furnishes additional proof in support of the genuineness of other items relating to rent for land. I do not think this statement of the law is correct as it stands but, on the facts actually found, it seems to me clear that there is nothing whatsoever to show that Angrez Singh was acting to the detriment of his own children or that he was not justified in the circumstances in taking the lease of the land, I would therefore hold that the appellants minors who are the minor sons of Angrez Singh, are entitled to possession of this land upon payment of Rs. 1,500 minus Rs. 163, i. e., Rs. 1,337 in all.

(2) The next mortgage is that of 3rd March 1928 for Rs. 2,100. Here again, the learned District Judge's judgment contains sentences which are much widely stated but, on the whole, after hearing the learned counsel for the appellants I am of opinion that the learned Judge has come to the right conclusion, and I would hold that, apart from the item of Rs. 131, the other items are duly proved to have been for necessity. I would therefore accept the appeal of the appellants, so far as to vary the decree, and declare that these minors are entitled to possession of the land under this mortgage, on payment of Rs. 2,100 less Rs. 131, namely, Rs. 1,969 in all.

(3) The third mortgage is for Rs. 1,500 and dated 15th March 1928. Angrez Singh took Rs. 1,450 from the mortgagees and mortgaged 30 kanals of his ancestral land for this purpose. With this sum of Rs. 1,450 he took a mortgage of 228 kanals along with one Narain Singh, who is a relative of the appellants. The share of Angrez Singh thus amounted to 114 kanals or thereabouts and, as pointed out by the learned District Judge, at least 32 kanals of this land was chahi land. There is further evidence to show that it was expected at the time that the barani land would shortly become nahri as the new canal was passing somewhere near this area. There is some evidence that a portion of the land of the vil-

lage has actually become canal irrigated though it is not shown that the land under mortgage has become canal irrigated. Taking all the circumstances into consideration I am of opinion that the learned District Judge was correct in his conclusion that Angrez Singh entered into this transaction bona fide and that it was a reasonable adventure on his part. Here again, the learned District Judge's judgment contains a sentence which cannot be justified where he holds that it is not for a Court to decide that is or what is not a good speculation for a male proprietor with children under the Customary law, but the result is not affected by this over-broad statement of the Law and, so far as this item is concerned, I would give the plaintiff a decree for possession on payment of Rupees 1,500.

The respondent is entitled to his costs as in the main the appeal has failed except for the small sums of Rupees 163 and Rs. 131.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 1016 (1)

DALIP SINGH, J.

Sultan Mahmud and *another* — Plaintiffs—Appellants.

v.

Ahmad Khan—Defendant — Respondent.

Second Appeal No. 1531 of 1932, Decided on 10th October 1933, from decree of Addl. Dist. Judge, Mianwali, D/- 4th July 1932.

Civil P. C. (1908), S. 11 — Rejection of claim to be occupancy tenant by revenue Court — Declaratory suit that plaintiff is owner of land is not barred.

Rejection of plaintiff's claim to be an occupancy tenant by the Revenue Court does not operate as bar by the doctrine of res judicata to a subsequent civil suit for a declaration that plaintiff is owner of the land. [P 1016 C 1]

M. C. Sud for *R. C. Manchanda*—for Appellants.

M. L. Batra—for Respondent.

Order.—The learned District Judge is, in my opinion, not correct in holding either that the suit does not lie or that the matter is res judicata. The claim to be an occupancy tenant has been rejected by the Revenue Court and that point is perhaps res judicata. The question whether the plaintiff is an owner or not has never been decided and this is the only way in which it can be decided. I do not see the bearing of S. 50-A, as this is not a suit of the class contemplated by that section. I therefore accept the appeal and remand the case to the District Judge for decision. The remand is under O. 41, R. 23. Court-fee will be refunded. The parties directed to appear before the District Judge on 10th November to have a date fixed for the hearing of the appeal. The appellant will have his costs of this appeal.

K.S. *Case remanded.*

A. I. R. 1933 Lahore 1016 (2)

DALIP SINGH, J.

Bakhshish Singh — Objector — Appellant.

v.

Khalsa Bank Ltd., Gujranwala—Respondent.

Misc. First Appeal No. 370 of 1932, Decided on 27th October 1932, from order of Dist. Judge, Gujranwala, D/- 27th January 1932.

Companies Act (1913), S. 40 — Person whose name is entered in register of members is presumed to be member.

A person whose name is entered in the register of members is presumed to be a member and the onus of proving that he is not a member is shifted on him by such entry. [P 1016 C 2]

Badri Das—for Appellant.

Shamair Chand—for Respondent.

Judgment.—In this case the appellant Sardar Bakhshish Singh, has been placed on the list of contributories of the Khalsa Bank Limited, Gujranwala, in liquidation, by the learned District Judge. The appellant objects, but the learned counsel in appeal has not been able to satisfy me that the judgment of the learned District Judge is wrong. The appellant's name is admittedly entered in the register of members and under S. 40, Companies Act, the onus shifts on him to show that he was not a member. No reference need be made to his pleas, for as pointed out by the learned District Judge, they are inconsistent and contradictory. The learned counsel had endeavoured to argue that the record was in great confusion and that this shows that presumption should attach to the register of membership.

He also contends that there is no proof that the allotment letter was duly despatched or communicated to the appellant. In this connection there is a despatch register which shows that one of two letters bore a postal certificate. The learned District Judge concludes that the one which bore a postal certificate was the allotment letter; but in any event shortly afterwards reminders were sent to the appellant and the appellant has denied receipt of all these numerous letters. In the circumstances I think the learned District Judge was right in holding that the story that he received none of these letters cannot be accepted and I would therefore accept the evidence showing that the allotment letter was presumably duly despatched to him.

The result is that the appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 1017

BROADWAY, C. J. AND ABDUL QADIR, J.

Sundar Singh and *another* — Defendants—Appellants.

v.

Kehr Singh and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 402 of 1927, Decided on 10th November 1932, from decree of Dist. Judge, Ferozepore, D/- 10th November 1928.

Civil P. C. (1908), S. 11 and O. 2, R. 2—Suit for declaration of title to property purchased by plaintiff allowed to be dismissed—Subsequent suit for refund of purchase money is not barred either by S. 11 or O. 2, R. 2.

Defendants purchased certain property and sold a portion of it to the plaintiff. There was a pre-emption suit in respect of the sale to the defendants and pre-emption was allowed, conditional on paying certain amount which was deposited in Court. Defendants took the money from Court. Plaintiffs filed a suit for a declaration of title to the property purchased by him but allowed it to be dismissed and subsequently brought a suit for refund of the purchase money:

Held: that even though plaintiff could have asked for refund in the earlier suit itself as an alternative claim, the subsequent suit was not barred by S. 11 and that O. 2, R. 2 did not apply to the case as causes of action in the two suits were different. [P 1077 C 2]

J. L Kapur—for Appellants.

Parkash Chandra—for Respondents.

Broadway, C. J.—The appellants in his case Sundar Singh and Sohna Singh purchased certain land from one Allah Din for the sum of Rs. 12,735. This sale was effected by the registered deed, dated 30th May 1917. On 3rd March 1918 they sold a small portion (about 2 biswas) of the land so purchased by them to Waryam Singh and Bachan Singh by an oral sale for Rs. 2,652-8-0,. mutation being sanctioned on 14th June 1918. On 27th May 1918 two persons, named Sujan Singh and Harnam Singh, sued for possession of the land sold by Allah Din to the appellants on the ground that they were entitled to pre-empt the sale. Their suit was finally decided on 12th June 1920, when they were granted a decree by the appellate Court for possession on payment of Rs. 12,735 This money was duly paid into Court and was taken out by the appellant on 1st September 1919, and 6th August 1920. In the meantime Waryam Singh and Bachan Singh had died and Waryam Singh's son Kehr Singh, claiming to represent them, applied in the Court where the pre-emption suit was pending for his share of any money that might be paid in. No orders were passed on this application and on 14th July 1919 a similar application was put in on which the order was that the application should remain attached to the record. Kehr Singh then instituted a suit on 20th January 1920 for a declaration that the land purchased by him from the appellants was his property. Later he sought to be allowed to amend his plaint, but on being ordered to pay costs he allowed his suit to be dismissed. Subsequent to this on 5th May 1925, Kehr Singh instituted the present suit against the present appellants Sundar Singh and Sohna Singh, claiming a refund of ¾ths of Rupees 2,652-8-0 together with interest which made the total claim upto Rs. 3,000. The appellants raised various pleas urging that the claim was barred by limitation, and that the suit was barred by S. 11 as well as O. 2, R. 2, Civil P. C. It was found by the Courts below that the suit was within limitation and that it was not barred either by S. 11, or O. 2, R. 2, Civil P. C. It is against this decision that Sundar Singh and Sohna Singh have preferred this second appeal, which has been argued before us by Mr. Jiwan Lal Kapur.

As pointed out by the learned District Judge the provisions of S. 11, Civil P. C., do not form a bar to the present suit. All that Kehr Singh was doing in the former suit was to fortify his title to the land which he had purchased from the appellants. It may be that he could in the alternative have sued for a refund of the purchase price, but I agree with the learned District Judge in holding that he was not bound to advance that alternative claim. S. 11 therefore is no bar to the present suit. Similarly, in my judgment, O. 2, R. 2, has no application. The cause of action in the former suit and the cause of action in the present suit are different. In the present suit the cause of action is the fact that the appellants have taken from the Court money which was payable in equity to the plaintiff—a claim that did not arise out of the original cause of action. Mr. Kapur has very properly not pressed the question of limitation, as the suit is obviously not barred by time.

Finally he urged that the interest allowed at 12 per cent was excessive. After hearing what he had to say and bearing in mind the fact that his clients have had the use of this money for some time and also that they had received the original price of the land which was sold as far back as 3rd March 1918, I. cannot regard the rate of interest as being exorbitant. I would therefore dismiss this appeal with costs.

Abdul Qadir, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 1018 (1)

DALIP SINGH, J.

Murari Lal and *another*—Defendants Appellants.

v.

Ghudhumal and *another* — Plaintiff and Defendant—Respondents.

Second Appeal No. 1573 of 1932, Decided on 11th October 1933, from decree of Addl Dist. Judge, Ludhiana, D/-25th May 1932.

(a) Partnership — Partnership arising out of contract and out of law.

The law is different in the case of a partnership arising out of contract and a partnership arising out of law. [P 1018 C 1]

(b) Hindu Law—Joint family—Partnership — For debts contracted by manager of partnership, other members are liable only to extent of their share in joint family property but not personally.

In a Hindu joint family partnership, if debts are contracted by the manager of the partnership, other members are liable only to the extent of their share in the joint property but not personally. [P 1018 C 1, 2]

Ram Lal Anand I—for Appellants.

Har Gopal for *Sundar Das* — for Respondents.

Judgment.—The only question argued before me is that Charanjiv Lal and Murari Lal are not personally liable but only to the extent of their share in the joint Hindu family property. This contention apears to me to be correct. The learned counsel for respondents contends that the case of members who are taking an active part in the business is different from the case of partners who are not taking an active part in the business and that in the former case the ordinary law of contract applies. I do not agree with this contention for the law is different in the case of a partnership arising out of contract and a partnership arising out of law. The next point taken by the learned counsel is that qua Charanjiv Lal the point does not arise because he pleaded that his father had acted as his agent. In the circumstances his pleadings must be taken as a whole and on the findings Girdhari Lal is found to be the manager of the partnership business. I therefore accept the appeal and modify the decree of the learned appellate Court as against Charanji Lal and Murari Lal so as to make them liable only to the extent of their share in the joint family property. No order as to costs.

K.S. *Decree modified.*

A. I. R. 1933 Lahore 1018 (2)

ADDISON, J.

Chhajju and *others* — Accused—Petitioners.

v.

Behari—Complainant—Respondent.

Criminal Revn. Petn. No. 713 of 1933, Decided on 6th October 1933, from order of Dist. Magistrate, Gurgaon, D/-25th April 1933.

Criminal P. C. (1898), S. 436 — Before order under S. 436 is made notice must issue against person discharged.

The proviso to S. 436 makes it obligatory on a Court not to pass an order under the section until the person discharged has had an opportunity of showing cause. [P 1018 C 2]

Nanak Chand Pandit—for Petitioner.

Mohammad Amin—for Respondent.

Judgment.—A criminal case of theft was pending against Bihari lambardar and certain others and Chhajju chaukidar was to appear as a witness for the prosecution in that case. Bihari complained to the police that Chhajju and two others came to his nauhra to steal. The police took no action. Thereupon a private complaint was made by Bihari against Chhajju and two others. The Magistrate, First Class, discharged the accused. The District Magistrate however under the provisions of S. 436, Criminal P. C., set aside that order and directed that the case should be further enquired into. Against this order of the District Magistrate Chhajju, Gahar and Har Narain have preferred this revision petition. The proviso to S. 436, Criminal P. C., makes it obligatory on a Court not to pass an order under the section until the person discharged has had an opportunity of showing cause. The District Magistrate issued no notice to the persons discharged. His order is therefore illegal. I was told by Mr. Nanak Chand Pandit that Bihari has been convicted in the case of theft which was pending against him and that his appeal is before the Sessions Judge of Hissar. That being so, I think the petition of Bihari, illegally disposed of by the District Magistrate in the way already described, should go to the Sessions Judge, Hissar, for disposal in accordance with law.

I accept the petition set aside the order of the District Magistrate, Gurgaon, dated 25th April 1933, and send the petition in question to the Sessions Judge of Hissar for disposal in accordance with law.

V.B. *Order set aside.*

A. I. R. 1933 Lahore 1019

DALIP SINGH, J.

W. G. Christy — Accused—Petitioner.

v.

Mrs. Doris Christy — Complainant—Respondent.

Criminal Revn. Petn. No. 1406 of 1933, Decided on 9th October 1933, from order of Addl. Dist. Magistrate, Lahore, D/- 27th July 1933.

(a) Criminal P. C. (1898), S. 443—Order accepting claim under S. 443—Revision is open.

Although no appeal is provided against an order accepting a claim under S. 443, a revision is always open. [P 1020 C 1]

(b) Criminal Trial — Revision — Appeal against order incompetent—Revision is always open.

In the absence of an appeal, revision is always open unless there is something special barring revision. Even where there is something barring revision the High Court can always hold whether an order had or had not been passed without jurisdiction, for if an order is without jurisdiction it is a mere nullity and this Court would not be revising that order but declaring that the order was a nullity. [P 1020 C 1]

(c) Criminal P. C. (1898), Ss. 107 and 443—S. 443 does not apply to proceedings under S. 107.

The provisions of S. 443 are not applicable to proceedings under S. 107. The wording of S. 443 obviously refers to an accused person charged with an offence punishable with imprisonment and the time during which he can make a claim before his commission for trial under S. 213 or showing cause under S. 242 or entering on his defence under S. 256. In other words, it contemplates a case of an offence triable by a Sessions Court, as a warrant case and an offence triable as a summons case. It does not contemplate anything like proceedings under S. 107 to which S. 242 does not apply at all. [P 1020 C 1, 2]

Chiranjiva Lal—for Petitioner.

Ram Lal, Government Advocate and *Sardar Partap Singh*—for Complainant.

Judgment.—These two petitions for revision and transfer may be disposed of in one judgment.

The facts are that on a complaint by Mrs. Christy against her husband Mr. Chirsty notice was issued to the latter to show cause why he should not be bound down under S. 107 to keep the peace, the allegation being that he was likely to commit assault on his wife. Objection was taken before the learned Magistrate trying the case that Mrs. Christy was an European British subject and presumably, though there is nothing on the record to substantiate this, that Mr. Christy was an Indian British subject, and therefore the provisions of S. 443, Criminal P. C., applied to the case. The learned Magistrate recorded a finding saying tha he was satisfied that Mrs. Christy was an European British subject and thereupon sent the case to the District Magistrate for constitution of a Special Tribunal under the provisions of S. 445. The case got before the Additional District Magistrate and he was not satisfied that the provisions of S. 443 applied to the case at all, first, presumably because he was not satisfied that both the parties were not European British subjects and secondly because he was of opinion that S. 443 did not cover cases under S. 107. He therefore returned the case back to the Magistrate for disposal. Before the learned Magistrate the matter seems to have been re-argued and it is asserted that the Magistrate pronounced an order supporting the contention for a Special Tribunal and actually had it typed it is not stated whether he signed and dated that order, but that subsequently he consulted some police officers and changed his mind and held that the provisions of S. 443 did not apply.

Mr. Christy, the petitioner, has therefore come up in revision to this Court and his learned counsel contends that Mr. Christy is not an European British subject though he is an European. On this point there is no sufficient material before the Court to decide and, in view of my opinion on the second point, it is unnecessary to decide this question.

The question really is, whether the order of the Magistrate was without jurisdiction. The learned Government Advocate contends that the learned Magistrate seems to have thought that any European British subject had a right to be tried by a Special Tribunal in a summons case, whether he was complainant or accused, and without reference to the question whether the opposite side, whether complainant or accused, was, or was not, an European British subject. But, I do not think this was the position of the learned Magistrate at all. I think he presumably thought that Mr. Christy, who did not claim to be an European British subject, was not an European British subject and that Mrs. Christy who claimed to be an European British subject, was an European subject, and therefore he was of opinion that the provisions of S. 443 applied. On the other point, as to whether S. 107 is within the terms of S. 443 the matter presumably was not originally brought to the notice of the learned Magistrate. At any rate, there is nothing in his order to show this. If the provisions of S. 443 did not apply however to a charge under S. 107 then the order of the Magistrate was without jurisdiction and therefore might be treated as a nullity. It is only in such a case that the Additional District Magistrate could be justified in setting aside or treating as of no effect the order of the learned Magistrate. It is important to notice that, while the legislature has provided an appeal from an order rejecting a claim under S. 443, it has provided no appeal from an order accepting such a claim. The learned counsel for the petitioner has contended that this Court has therefore no jurisdiction even to revise such an order. But, I do not think that any such result follows. In the absence of an appeal revision is always open unless there is something special barring revision, and I find nothing special barring revision. Moreover even if there was any such barring of revision, this Court could always hold whether an order had or had not been passed without jurisdiction for if an order is without jurisdiction it is a mere nullity and this Court would not be revising an order but merely declaring that the order was a nullity. The question therefore remains whether the order was a nullity because the provisions of S. 443 are not applicable to proceedings under S. 107.

Now considering both the sections and the relevant sections up to 107 it seems to me clear that the provisions of S. 443 are not applicable to proceedings under S. 107. The wording of S. 443 obviously refers to an accused person charged with an offence punishable with imprisonment and the time during which he can make a claim before his commission for trial under S. 213 or showing cause under S. 242 or entering on his defence under S. 256. In other words, it contemplates a case of an offence triable by a Sessions Court, as a warrant case and an offence triable as a summons case. It does not contemplate anything like proceedings under S. 107 to which S. 242 does not seem to me to apply at all. The analogy, on which the learned counsel for the petitioner bases an argument between proceedings under S. 107 and proceedings in a summons case as given in S. 117 appears to me to apply only to the position contemplated by S. 244 onwards. I therefore consider that the order of the learned Magistrate holding that S. 443 applied, was wrong and was without jurisdiction. The matter might have been otherwise if he had considered the question and wrongly come to a decision, for, of course, a Court has jurisdiction to try both rightly and wrongly. But, in this case, it appears that the matter was never present to his mind at all and he himself changed his opinion subsequently. I therefore reject the first petition for revision. The order of the Magistrate sending the case to the District Magistrate is hereby set aside.

As regards the question of transfer, it is stated at the bar by the learned counsel for the petitioner that the Magistrate actually wrote out an order in his favour and changed it subsequently after consulting some police officers. There is no denial by the complainant. Unfortunately the learned Magistrate was not asked for an explanation at the time of the admission. I must not therefore be taken to accept the statement of counsel as regards the conduct of the learned Magistrate at all. But I find on the record that the complainant had also applied for transfer of the case and in the circumstances I think the ends of justice would be served, especially when no evidence has been recorded, by transferring the case from the present Magistrate. It must be clearly understood that I am taking no exception to his conduct at all. The learned District Magistrate will now appoint another Magistrate, other than Mr. Kanwal Nain or Mr. Ghulam Mohamad, to deal with this case, which should be disposed of according to law.

V.B. *Order accordingly.*

A. I. R. 1933 Lahore 1020

ABDUL QADIR, J.

Bakhsha—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 493 of 1933, Decided on 6th October 1933, from order of First Class Magistrate, Multan, D/- 24th January 1933.

Criminal P. C. (1898), S. 257 — Order refusing to summon witness can be justified for reasons in Cl. 1 provided order states them.

An order under S. 257, refusing to summon witnesses for the defence, can only be justified for reasons specified in Cl. 1, which reasons must be given in the order. [P 1021 C 1]

Nain Sukh Gauba—for Appellant.

Mohammad Din Jan for *Govt. Advocate*—for Opposite Party.

Order.—Bakhsha, a previous convict, has been convicted of an offence under S. 411/75, Penal Code, and has been sentenced to five years' rigorous imprisonment by a Magistrate, First Class, exercising enhanced powers under S. 30, Criminal P. C. He has appealed to this Court, through Mr. N. S. Gauba, who urges that his client has been prejudiced in his trial because some defence witnesses, whom he wanted to summon, to prove his alibi, were ordered by the Court below to be summoned at his expense and as he could not do so, the witnesses have not been summoned or heard. Counsel relies on an application, dated 25th November 1932, filed by his client, through Mr. Ahmad Hussain, advocate, asking the Court to summon thirteen witnesses in this defence. There is a duly attested affidavit by his client, which states that the Court ordered one of those witnesses to be summoned at the expense of the Crown and the remaining witnesses to be summoned by the accused himself at his own expense. It is urged that this order was not justified under S. 257, Criminal P. C., because the learned Magistrate in refusing to summon the witnesses, did not give any of the reasons specified in Cl. 1 of that section, which alone could have justified him in making this refusal. I think this contention is correct and the learned Magistrate should not have refused to summon the witnesses, except on the grounds mentioned in S. 257, Criminal P. C. Even if he had in his mind that the application to summon witnesses was for purposes of vexation or delay or defeating the ends of justice, he has not said so and this omission on his part necessitates my sending back this case to the Court below to give the appellant an opportunity of producing his defence evidence. It is ordered that all or any of the witnesses mentioned in the list submitted on 25th November 1932, whom Bakhsha wants to summon in his defence may be summoned at the expense of the Crown and their evidence may be recorded in Court and in the presence of the accused and the Crown may be given an opportunity of cross-examining them, if it desires to do so. That evidence may be submitted to this Court, without any expression of opinion by the Court below, within a month from the date of this order. The appeal will then be considered on the merits along with the further evidence so recorded and will be disposed of according to law.

V.B. *Case remanded.*

A. I. R. 1933 Lahore 1021

COLDSTREAM AND JAI LAL, JJ.

Ghulam Mohammad—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1113 of 1932, Decided on 15th November 1932, from order of Addl Sess. Judge, Shahpur, D/- 16th December 1931.

Criminal P. C. (1898), S. 401 — *G*, a boy of fifteen, brother *A*, and maternal uncle *S*, mercilessly beating *Z*—*Z* dying from effect of beating— Conviction of three under S. 302 and sentence of transportation—*G's* case was considered fit for action under S. 401

One *G*, took part along with his brother *A*, and maternal uncle *S*, in mercilessly beating one *Z* from the effects of which *Z* died. All the three were convicted under S. 302 and sentenced to transportation for life. *G* was a boy of fifteen when he was convicted:

Held: on appeal by *G* that the presumption was that *G* acted under the influence of his maternal uncle *S* and his case was one which called for intervention of Government in exercise of their powers under S. 401. [P 1022 C 1]

Des Raj Sawhney—for the Crown.

Coldstream, J.—The petitioner Ghulam Mohammad alias Gaman an Awan of Chak No. 98 M. B. of Shapur district, was tried, along with his brother Ata Mohammad and his maternal uncle Shahra, by the Sessions Judge of Shahpur, for the murder of Zaman on the 24th July, 1931. All three were convicted on the 16th December, 1931, and sentenced to transportation for life. Shahra's appeal was dismissed by this Court on the 9th June 1932 (Criminal Appeal No, 525 of 1932), Ata Mohammad does not appear to have appealed and Gaman has preferred through the Jail authorities the appeal now before us.

We have read the record and find it established by the evidence of Mt. Sardaran which is corroborated by that of Qaim, Rehana and Gullu that the appellant took part in a merciless beating given to Zaman from the effects of which Zaman died. As remarked in the judgment of the Court already referred to, in view of the nature and number of the injuries the conviction under S. 302, Penal Code, seems to be amply justified. The appellant was a boy of fifteen when he was convicted. The presumption is that he acted under the influence of his maternal uncle Shahra and his case is one which appears to me to call for the intervention of Government in exercise of their powers under S. 401, Criminal P. C.

V.B. *Order accordingly.*

A. I. R. 1933 Lahore 1022

TEK CHAND AND MONROE, JJ.

(Chaudhri) Hira Nand — Plaintiff — Appellant.

v.

Dula Ram and *others*—Defendants—Respondents.

First Appeal No. 1370 of 1931, Decided on 25th May 1933, from decree of First Class Sub-Judge, Jhang, D/- 30th June 1931.

Partnership—Suit for dissolutoin and rendition of accounts—Shares of parties declared by preliminary decree—Joint decree against partners for debt due by partnership cannot be passed but only proportionate to their shares.

In a suit for dissolution and rendition of accounts, the shares of the plaintiffs and defendants were declared by the preliminary decree; but a joint decree for the full amount of the debts due by partnership was passed against the partners :

Held : that they were liable only proportionate to their shares. [P 1022 C 2]

Badri Das Vishnu Datta—for Appellant.

J. N. Aggarwal and *M. L. Puri*—for Respondents.

Tek Chand, J.—This appeal arises out of a suit for dissolution of partnership and rendition of accounts of the firm "Atma Ram Dula Ram" which carried on business to Chak 243, Tehsil Chiniot, District Jhang. The parties are related to each other; the plaintiff Hira Nand, defendant 3, Sahib Ditta Mal and defendant 4 Raja Ram are brothers, while defendant 1, Dula Ram and defendant 2 Ram Rakha are their sister's sons. It is common ground between the parties that the capital of the firm was subscribed by the plaintiff and defendants 3 and 4, and that defendants 1 and 2 were the working partners. It appears that in the beginning, the plaintiff and his brothers, defendants 3 and 4, acted jointly in their dealings with the partnership, but subsequently differences arose among them and there has been criminal litigation between defendant 4 and the plaintiff.

On the 29th May, 1929, a preliminary decree was passed declaring the shares of the parties as follows:

Plaintiff 1/6; defendants 1-2, 1/2: defendants, 3-4' 1/3. The decree also declared that the plaintiff and defendants 3 and 4 had jointly contributed Rs. 3,000 towards the capital of the partnership and that they were entitled to interest at six per cent per annum on any additional amount which they might have advanced to the partnership. A local Commissioner was appointed to examine the accounts and submit a report. The Commissioner reported that the account books of the partnership from Sambat 1971 to Sambat 1981 were not forthcoming, and the Subordinate Judge by his order dated the 19th March 1931 held that they were in the possession of the working partners (defendants 1 and 2), who were wilfully withholding them. The Local Commissioner was therefore directed to examine the books prior to 1971, and the other evidence on the record. After considering his report Rs. 2,633-3-0 was found due to defendants 1 and 2 (working partners), and for this sum a decree was passed in their favour against the plaintiff and defendants 3 and 4 (capitalist partners) jointly.

From this decree the plaintiff Hira Nandan has appealed. He urges that the finding of the Court below holding Rs. 2,633-3-0, to be due to defendants 1 and 2 is wrong and as a matter of fact, these defendants owe Rupees 2,366-3-0 to the capatalist partners. He also complains that the lower Court could not pass a decree jointly against him and defendants 3 and 4 for the full amount found due, as the share of the plaintiff in the partnership had been fixed at one-sixth, as distinct from the two-sixths of defendants 3 and 4.

Mr. Jagan Nath Aggarwal, the learned counsel for defendants 1 and 2 has frankly conceded that this last contention of the plaintiff-appellant is correct and that if the finding of the lower Court as to the amount due by the capitalist partners to his clients is upheld, the plaintiff can be held liable to pay one-third of that amount only. As has been stated already the preliminary decree expressly fixed the plaintiff's share in the partnership at one-sixth. His share in the profits and loss must therefore be determined accordingly, defendants 3 and 4 being entitled to, or liable for, the remaining two-sixths.

It has been found by the lower Court and this finding has been accepted by both sides, that in addition to Rupees 3,000 contributed by the plaintiff and defendants 3 and 4 towards the capital of the firm, they had advanced Rupees 518-2-6, as a loan, and on this amount Rs. 443-5-9 is due as interest. In other words, the capitalist partners are admittedly due Rs. 3,961-8-3. Besides this, Mr. Badri Das claims a sum of Rs. 4,311-8-9 which had been subsequently invested by the capitalists in the firm, and in support of this claim he relies on the entries in the khata (Exh. P. 1), of the joint family business of the plaintiff and defendants 3 and 4. This item has been disallowed by the learned Senior Subordinate Judge on the ground that the suhar bahi of the joint family business, for the corresponding period, has not been produced at the trial, and that in all probability it was being withheld by the plaintiff. In my opinion there is no warrant on the record for this assumption. It is conclusively established by the evidence that some yeiars ago disputes arose butween the plaintiff and defendants 3 and 4 inter se and an arbitrator was appointed to divide the family assets among them. The lists of the properties allotted to each brother show that the suhar bahi in question was made over to Sahib Ditta Mal, defendant 3, and he has failed to prove, that subsequently he gave the bahi to the plaintiff. In this litigation defendants 3 and 4 appear to be siding with defendants 1 and 2, and are against the plaintiff. The suhar bahi has, therefore, been suppressed by one or other of the defendants, and the plaintiff cannot be held responsible for its non-production. As stated already the khata of the family business (Exh. P. 1), is on the record and no reason has been shown why the credit and debit entries in it relating to the dealings of the capitalist partners with the firm in question should not be accepted as correct. According to these entries, the capitalists had advanced Rs. 4,311-8-9, in addition to Rs. 3,961-8-3, admittedly due to them. The total sum at their credit, therefore amounts to Rs. 8,273-1-0. As against this, they have admittedly withdrawn Rs. 3,290-10-6. In addition to this, two other sums aggregating Rs. 2,300 have been found by the lower Court to have been withdrawn by them, which Mr. Badri Das has admitted before us to be correct. The total drawings, therefore, amount to Rs. 5,590-10-6.

Mr. Badri Das contends that from 1915, when the account was last made up between th epartners to 1925, when the business stopped, the partnership made a profit of Rs. 30,000 and he claims a one-sixth share in it. This contention is, however, not supported by any evidence on the record and I have no hesitation in disallowing it. The lower Court has debited the plaintiff with Rs. 3,637-4-0 as interest on the amounts which had been withdrawn by them, but in my opinion no interest is chargeable in the circumstances of the case. At the time of making the amount in 1915 the capitalists had left a large sum in partnership business out of their shares in the profits and the working partners have failed to show how this amount was disposed of. In my opinion both these items must be taken to balance each other. The result, therefore, is that the account of the capitalists partners in the partnership stood as follows on the date of the institution of the suit:

CREDIT

(a) Capital	Rs. 3,000-0-0
(b) Loan	Rs. 518-2-6
(c) Interest on (b)	Rs. 443-5-9
(d) Amount advanced by the capitalists after April 1915	Rs. 4,311-8-9
Total ...	8,273-1-0

DEBIT

Amount admittedly drawn by the capitalists of the firm	Rs. 3,290-10-6
Additional amount found by the lower Court to have been drawn by them ...	Rs. 2,300-0-0
Total ...	5,590-10-6

This leaves a sum of Rs. 2,682-6-6, as due by the partnership to the capitallists. Out of this sum the plaintiff's share is admittedly one-third. He is, therefore, entitled to a decree for Rs. 894-2-2 against defendants 1 and 2. As the defendants 3 and 4 have not filed an appeal to this Court against the decree of the lower Court, nor were they present at the hearing though they had been properly served, I do not think it proper to disturb the decree of the lower Court so far as they are concerned.

I would accordingly accept this appeal, and in modification of the decree of the lower Court, pass a decree for Rs. 894-2-2, in favour of the plaintiff against defendants 1 and 2. The order of the lower Court as to costs in that Court shall stand, and in this Court the plaintiff will get from defendants 1 and 2 his costs on Rupees 3,527-5-2.

Monroe, J.—I agree.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 1024

SHADI LAL, C. J. AND ABDUL RASHID, J.

Punjab National Bank, Ltd., Lahore—Plaintiff—Appellant.

v.

Dr. A. B. Arora and *others*—Defendants—Respondents.

First Appeal No. 493 of 1927, Decided on 11th October 1933, from preliminary decree of Senior Sub-Judge, Ambala, D/- 29th November 1926.

(a) Practice—Pleadings — Person charging another with fraud or misrepresentation should substantiate allegation by statement on oath and submitting himself for cross-examination by opposite party—Fraud.

If a person charges another with fraud or misrepresentation, it is incumbent on him to substantiate his allegations by making a statement on oath and by giving the other party an opportunity of cross-examining him. [P 1025 C 2]

(b) Evidence Act (1872), S. 92—Contract embodied in mortgage-deed—Letters between parties several months before completion of mortgage are not admissible to contradict, vary or add to terms.

Where the contract between the parties has been embodied in a mortgage-deed, letters between the parties written several months before the completion of the mortgage are inadmissible in evidence to contradict, vary or add to the terms. They constitute only evidence of negotiation between the parties. [P 1026 C 1]

(c) Civil P. C. (1908), O. 41, R. 27—Power under O. 41, R. 27 should be exercised very sparingly.

The power given to an appellate Court under O. 41, R. 27 must be exercised very sparingly and the appellate Court must record its reasons for the admission of additional evidence. [P1026 C1,2]

Hargopal and *Shambu Lal Puri*—for Appellant.

Jaigopal Sethi—for Respondent.

Abdul Rashid, J.—This appeal arises out of a suit instituted by the Punjab National Bank, Limited, Lahore, against three defendants, namely, Alakh Dhari, Pritam Singh and Dr. Arora for the recovery of Rs. 42,862-15-6 due to the plaintiff on the basis of a registered mortgage deed executed by Alakh Dhari and Pritam Singh as principal debtors and by Dr. Arora as a surety. The learned Senior Subordinate Judge has passed a preliminary decree in favour of the plaintiff under O. 34, R. 4, Civil P. C., in the following terms:

> "1. That if the defendant pays into Court the amount so declared due on or before the said 29th May 1927, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him. 2. That if such payment is not paid on or before the said 29th day of May 1927, the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest and subsequent costs, and that the balance, if any, be paid to defendants 1 and 2. 3. That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the decree will first be made personal against defendants 1 and 2 and the shortage will be realized from the other property of defendants 1 and 2 and from their persons, first from the person of Alakh Dhari and then from the person of Pritam Singh. 4. After exhausting their remedies against the principal debtors, defendants 1 and 2, the balance, if any, will be realized from the property and person of defendant 3, Dr. A. B. Arora the surety."

The plaintiff has come up in appeal to this Court and the only point urged on his behalf is that the liability of the surety being co-extensive with that of the principal debtors the creditor is not bound to exhaust all his remedies against the principal debtors before proceeding against the surety, and that the lower Court has erred in granting immunity to defendant 3 till all remedies against the person and other property of defendants 1 and 2 have been exhausted. Now, the contract between the parties is embodied in the registered mortgage deed dated 30th January, 1924, printed at p. 21 of the paper book. Condition No. 15 of the deed refers to the liability of Dr. Arora and runs as follows:

> "Besides the hypothecation of the aforesaid mortgaged property, I, Dr. A. B. Arora, surety, third party, do hereby declare as follows: 'If the mortgaged property be insufficient to satisfy the money due by Lala Alakh Dhari and Sardar Pritam Singh to the Bank, it will be competent to recover the arrears together with interest and costs from my (A. B. Dr. Arora's) person and property. I, Dr. A. B. Arora, will have no objection therein'."

This mortgage deed is signed by Dr. Arora on every page and the endorsement of the Registrar shows that Alakh Dhari and Dr. Arora were present at the time of the registration and read the contents of the deed before signing it. In his written statement Dr. Arora, defendant 3 has raised the following pleas:

> (b) " Defendant 3 expressed his willingness to stand as surety only on the condition that his liability would arise after all the remedies against the property and person of the principal mortgagees (sic) had been exhausted. The draft, as originally framed by Lala Dharam Chand, the Legal Advisor of the Bank, did not provide for the above condition. Defendant 3 took exception to it, whereupon the Bank agreed to amend and did amend the original draft making his liability contingent upon the above proviso. After approval of this fresh draft, the deed was formally drawn up and signatures of defendant 3 were obtained in his office when he was busy, on the assurance that the deed was an exact copy of the draft approved by him whereupon he signed the deed without reading the same. It is now after the suit has been filed that defendant 3 has come to know that the draft was subsequently changed without his knowledge and that that fact was kept a secret from him. (c) Defendant 3 urges that the remedy against him should be postponed till all the property of the principal mortgagees (?) has been exhausted as originally contained in Cl. 15 of the approved draft. This addition without the knowledge and consent of defendant 3 is a fraud upon defendant 3 and has the effect of releasing him from all liabilities under the deed and the suit is liable to be dismissed with costs against him."

Taking into consideration the terms of the mortgage deed and the pleadings of defendant 3 the lower Court framed the following issue on the point involved in this appeal:

> 3. (a) " Did defendant 3 agree to stand surety on the condition that his liability will be enforced only after the hypothecated property and the persons and other properties of the principal mortgagors had failed to satisfy the mortgage-debt or decree? (b) If so, were his signatures on the mortgage-deed obtained by fraud or misrepresentation that this condition was entered in the deed and is he entitled, for this reason, to repudiate his liability?"

The burden of this issue was rightly placed on defendant 3 as he alleged that his signatures on the mortgage-deed had been obtained by means of fraud and misrepresentation. There is not an iota of evidence on the record whereby defendant 3 may have endeavoured to discharge the burden that lay heavily on him. The manner in which he was defrauded is particularly within his knowledge but in spite of this he has refrained from appearing as a witness in the case. It has been repeatedly laid down that if a person charges another with fraud or misrepresentation it is incumbent on him to substantiate his allegations by making a statement on oath and by giving the other party an opportunity of cross-examining him. In his pleadings Dr. Arora does not mention even the name of the person who informed him that the mortgage deed was an exact copy of an amended draft wherein his responsibility as a surety had been curtailed by inserting a clause to the effect that his liability would arise after all the remedies against the property and persons of the mortgagors had been exhausted. Counsel for the respondent has placed his chief reliance on three documents that is, Exs. D-4, D-5 and D-1. Ex. D-4 is a copy of a letter dated 7th August 1923, addressed by Alakh Dhari to the Manager of the Punjab National Bank. In this letter Alakh Dhari takes objection to three of the conditions embodied in the draft of the deed supplied to him and urges that it should be explicitly stated in the mortgage deed that the position of Dr. Arora is that of a surety and that his person and property are only liable only if the Bank is unable to realise its debt from the mortgaged property and other property and persons of the mortgagors. Ex. D-5 is the reply sent by the Manager of the Punjab National Bank to Ex. D-4. In this letter the Manager agrees to the suggestion of Alakh Dhari in respect of the liability of Dr. Arora as a surety. It has been contended that these two letters constitute a completed contract between the parties and fully support the allegations of Dr. Arora. It is however important to remember that these letters were written in August 1923 while the mortgage deed was executed on 31st January 1924. These letters therefore merely constitute evidence of the negotiations that were proceeding between the parties some six months before the completion of the mortgage deed. Ex. D-1 is a draft of the mortgage-deed which was shown to Dr. Arora by Mr. Dharam Chand, the legal adviser of the Bank. There is a note by the legal advisor at the end of the draft addressed to the Secretary saying that Dr. Arora insists that his liability should come after the whole property of the mortgagors and the remedies against them have been exhausted. He therefore sent the draft of the Manager asking him to go carefully through it and to pay special attention to Cls. 10, 11 and 15 and to make any changes if he considered them necessary. The note to the Secretary is not of much assistance to Dr. Arora as this merely shows that on the 25th January 1924, he was insisting that condition No. 15 should be altered in such a manner as to curtail his liability in the manner indicated in the note of the legal advisor. The mortgage was completed on 31st January 1924, and was registered on 1st February. Condition No. 15 of the mortgage deed is identical with condition No. 15 of Ex. D-1. No evidence has been tendered to show whether Dr. Arora's request was acceded to by the Bank. In fact in view of the terms of the mortgage deed it seems clear that the Bank was not prepared to advance any loan to the respondents unless Dr. Arora took full responsibility for the repayment of the loan. The contract between the parties having been embodied in the mortgage deed, Ex. P-1, no evidence can be tendered for the purpose of contradicting, varying, adding to or subtracting from its terms under S. 92, Evidence Act. Under proviso (1) to S. 92 Dr. Arora was entitled to prove any fact which would have the effect of invalidating the mortgage deed such as fraud, misrepresentation or mistake in law or fact. No fraud misrepresentation or mistake in fact or law having been established in this case Exs. D-4, D-5 and D-1 are inadmissible in evidence. At the conclusion of his arguments the counsel for the respondents requested the Court to exercise its powers under O. 41, R. 27, Civil P. C., and to allow Dr. Arora to be produced as a witness in the case. The appellant's counsel objected to the production of additional evidence in appeal and pointed out that Dr. Arora was represented by counsel in the trial Court and that on 26th November 1926 he closed his case after definitely stating that he did not wish to produce any evidence. The power given to an appellate Court under O. 41, R. 27, must be exercised very sparingly and the appellate Court must record its reasons for the admission of additional evidence. In the present case no valid reason has been advanced as to why this indulgence should be shown to respondent 1 at this late stage.

For the foregoing reasons I am of the opinion that the mortgage deed Ex. P-1 represents the final and the the only contract between the parties and that full effect must be given to its terms. Under S. 128, Contract Act, the liability of a surety is co-extensive with that of the principal debtor and the lower Court therefore erred in adding a proviso to its decree that the liability of Dr. Arora will come into force only after all the remedies against the principal-debtors have been availed of by the decree-holder. I would therefore delete para. 4 of the decree sheet of the lower Court and alter para. 3 as follows:

> "That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full the decree will be made personal against defendants 1, 2 and 3 and the shortage will be realised from the other property of the defendants and from their persons."

The result is that I would accept the appeal of the plaintiff to the extent indicated above with costs against respondent 1.

Shadi Lal, J.—I concur.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 1026

ADDISON, J.

Mt. Shanno Devi and *another* — Petitioners.

v.

Daya Ram—Opposite Party.

Criminal Revn. Petn. No. 189 of 1933, Decided on 13th July 1933.

(a) Criminal P. C. (1898), S. 489—Change of circumstances — Order for maintenance can only be altered but not cancelled.

On a change of circumstancss of the husband an order for maintenance passed against him, cannot be cancelled; it can only be altered. (*Semble*). [P 1028 C 1]

(b) Criminal P. C. (1898), S. 488 — Boy aged 16 is child.

A boy below 18 can be considered to be a child under S. 488, so long as he is not able to maintain himself. (*Semble*). [P 1028 C 1]

(c) Criminal P. C. (1898), S. 488—Boy not able to earn his own living being under educational course—He is entitled to maintenance.

A boy can ask for maintenance from his parent so long as he is unable to earn his own living, even though that inability results from his taking an educational course, provided the said educational course is not being undergone with the object of inflicting upon the parent the burden of maintenance. (*Semble*). [P 1028 C 2]

(d) Criminal P. C. (1898), S. 488—Maintenance does not include college education.

In criminal law maintenance would not include the cost of college education. (*Semble*). [P 1028 C 2]

J. N. Aggarwal—for Petitioners.

Har Gopal—for Opposite Party.

Report.—On 18th October 1930, Sardar Sewa Singh, Magistrate, First Class, Simla, passed an order under S. 490, Criminal P. C., granting maintenance to Mt. Shanno Devi wife of Daya Ram Sehgal at Rs. 75 per mensem and Abnsh Chandar, the son of that couple at the rate of Rs. 35 per mensem. A sum of Rs. 175 was paid to the son and nothing was paid to Mt. Shanno Devi in pursuance of that order.

On 3rd May 1932, Daya Ram applied to Mr. Webb, Magistrate, First Class, Simla, the successor of S. Sewa Singh that the said order of S. Sewa Singh be cancelled and the applicant absolved from all liability thereunder.

The grounds taken by Daya Ram were that he had been retrenched on 1st February 1932, that he had to maintain another wife, four minor children, one widowed mother and a school going brother, that his pension was Rs. 48 per mensem only, that Mt. Shanno Devi was working as a Principal of the Kanya Maha Vidyala Jullundur, and quite able to maintain herself, that the son Abnash Chandar was being educated by her (his mother) that he had completed his 16th year and that he could not come within the term of a child as mentioned in S. 488, Criminal P. C. He further pointed out that Mr. Malan, District Judge, in his judgment dated 14th April 1925 in a suit between the parties had held that the parties were living apart by mutual consent, that Mt. Shanno Devi had been persistently refusing to return to the applicant's house, and that she was not therefore entitled to any maintenance. He also pointed out that he was an undischarged insolvent.

Mr. Webb held that S. Sewa Singh's order was passed in ignorance of the judgment of Mr. Malan, District Judge, where it was held that the parties had been living apart by mutual agreement, and that the order was not therefore good in law. He then found that apart from this aspect of the case, the change in the circumstances of the applicant in consequence of his retrenchment from service justified the reduction of the maintenance grant to zero, or in other words to a cancellation of the order of S. Sewa Singh.

Mt. Shanno and her son have now come up with a petition for revision from the order of Mr. Webb. The grounds are that S. Sewa Singh was fully aware of Mr. Malan's order, that Mr. Malan's order should not have been taken into consideration by Mr. Webb, because the plea of separate living by mutual agreement had been duly disposed of by S. Sewa Singh against the husband, that the husband had himself pleaded that the first agreement which was referred to by Mr. Malan had been superseded by the subsequent agreement to live jointly and that he took his stand on a subsequent agreement of a date three years previous to the proceedings before S. Sewa Singh and that that plea too had been overruled by S. Sewa Singh as unproved. I am distinctly of opinion that Mr. Webb had no business to find fault with and revise the order of S. Sewa Singh on any grounds which could have been taken by the husband before that officer in the proceedings then pending. S. Sewa Singh's order must be respected as a final order and Mr. Webb would be competent only to make such changes as would be justified by the subsequent acts and conduct of the parties. It is therefore unnecessary for me to go into the circumstances of the parties before the date of S. Sewa Singh's order.

The real point is whether the retrenchment of the husband from service justified a cancellation of the order. I would take the facts as they existed at the time of the proceedings before Mr. Webb and would not allow my mind to be influenced by any change for the better that has since happened in his circumstances although it is admitted before me that Daya Ram has been re-employed by the Government on a temporary job carrying a salary of Rs. 75 p. m., in addition to the pension of Rs. 24 a month. At the time of the proceedings before Mr. Webb, Daya Ram had a pension of Rs. 24, a months, Rs. 1,500, gratuity money Rs. 4,000, commutation money of half of his pension. Daya Ram however, explained in the witness box that he had spent the last two items on paying off his creditors. But he never realised that it was his duty not to rely merely upon his own oath, but to establish to the satisfaction of the Court that genuine creditors had been genuinely paid. His learned counsel has no doubt pointed out that the oath of Daya Ram stands unrebutted, but a wife who is apparently not in the house cannot be supposed to know the fate of that money and could not be blamed for not producing any rebuttal of the husband's own oath. The fact that the husband did not muster up courage to summon the creditors to swear to the genuineness of debts and to the genuineness of the payments must certainly go against him. It is urged that those payments were made during the pendency of those proceedings and those payments must be presumed to be genuine. I cannot understand this reasoning. The payments were made either before or after the evidence. If before the evidence, witnesses should have been examined in Court. If after the evidence, that would rather throw upon the husband the still more important duty of making such payments to the satisfaction of or in the very presence of the Court. In any case, it was up to the husband to have applied for an opportunity to prove these payments by independent evidence.

Now we know that Daya Ram has one wife Mt. Shanno Devi and one child Abnash Chandar aged about 16, another wife and four children who are still living with him. These children are a son aged 7, another son aged 2, a daughter aged 5 and another daughter aged 3½. A mother and a brother are also living with him. The brother is 17 years old and he is now independent because he is admitted to be working in a shop at a salary of Rs. 25 per mensem. In any case the brother cannot legally count in these proceedings as he is not entitled to maintenance from his brother. Mt. Shanno Devi is getting a salary of Rs. 50 per mensem. She is the Principal of the Kanya Maha Vidyala and her expenses incidental to her office are bound to be considerable. She, it is admitted, is educating her son in College. We can very easily realize her claims against her husband under such circumstances. The low finances of the husband may require alteration of the order, but not its cancellation. I would reduce her maintenance grant to Rs. 5 per mensem only under the present circumstances, this with the object of keeping alive the distinction between the cancellation of the order and the alteration of the order. This husband does appear to have chances of getting better service (he has in fact got better service since Mr. Webb's order was passed) and his wife must be placed in a position to share his later prosperity.

The dispute about the son's right to get maintenance involves certain legal points. It is first urged that the boy who is about 16 years old is not a child. In *Bhagat Singh* v. *Emperor* (1) it was held that the word "child" in S. 488, Criminal P. C., simply means son or daughter without reference to age, so long as he or she is not able to maintain himself or herself. In *Krishnaswamy Iyer* v. *Chandravadana* (2) the word was defined as one who has not attained the age of majority. The boy is admittedly below 18 and he could be considered a child so long as he is not able to maintain himself. Daya Ram's counsel refers me to *A. I. R.* 1923 *Rangoon* 45, where it was held that a father is not bound to keep a boy in school and that the maintenance asked for under S. 488, Cr. P. C., would not confer upon the child the right to better his prospects by staying in the school at the expense of his father. This ruling is a very brief one and does not throw light on the position of parties and the suitability of the education to the position in life of the parent. There is no authority cited on the other side, but it is stressed that a Khatri boy son of a Government servant who has once held a very respectable position in a Government office cannot be expected to go out into the world and start as a coolie simply because he can work as a coolie, that he should be held entitled to educate himself to a standard which would give him the same chances of honourable work as his father himself had got.

The true legal position seems to me to be that a boy can ask for maintenance from his parent so long as he is unable to earn his own living, even though that inability results from his taking an educational course provided the said educational course is not being undergone with the object of inflicting upon the parent the burden of maintenance. The education which the boy is receiving is the ordinary College education such as a boy of these parents would every time receive as the minimum. It is urged that the father cannot afford that. But this is certainly a disingenuous position taken up by the father. He has a fund of Rs. 5,500; such a fund would be in the ordinary course of things utilized by the father for his son's education. The boy need not be ostracised by the father on account of his mother's unpleasantness with the father. I will therefore hold that the boy is unable to earn his own living.

It is true that in Criminal law maintenance would not include the cost of College Education. I will not grant him therefore any portion of such cost, I will give the boy only diet and clothes. This would certainly justify Rs. 20 per mensem considering the current income and the fund of Rs. 5500 that the father is possessing. I therefore forward the case to the High Court with the recommendation that the petitioner Mt. Shanno Devi should get Rs. 5 per mensem till further order and Abnash Chand Rs. 20 per mensem till he gets the age of 18 or gives up education whichever happens earlier.

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1. (1910) 11 Cr L J 427=6 I C 960.
2. A I R 1914 Mad 594=20 I C 1005=37 Mad 565.

Order.—I set aside the order of the Magistrate First Class and substitute the order recommended by the learned Sessions Judge. The parties can always move the Magistrate again when there is a change of circumstances.

K.S. *Reference accepted.*

A. I. R. 1933 Lahore 1029

ADDISON AND AGHA HAIDAR, JJ.

Bishambar Das—Plaintiff—Appellant.

v.

Ismail and *others*—Defendants—Respondents.

First Appeal No. 1709 of 1927, Decided on 14th November 1932, from decree of Dist. Judge, Gurdaspur, D/- 2nd April 1927.

(a) Promissory Note — Promissory note thumb marked by deceased executant — Suit against minor sons—Plaintiff must prove by clear cogent and reliable evidence that thumb impression on document is that of deceased executant.

Where in a suit on a promissory note alleged to be thumb marked by the deceased executant, the minor sons deny the execution of it by their father, it is necessary that the plaintiff should prove by clear, cogent and reliable evidence that the thumb impression on the document is really that of the deceased executant. A high standard of proof would be exacted from the plaintiff before the execution of the document, which is sued upon under the circumstances indicated above, can be held to have been duly proved. [P 1030 C 2]

(b) Promissory Note — Suit on promissory note—Plea of want of consideration—Defendant can discharge onus of proving his plea by relying on fact and circumstances of case and also flaws in plaintiff's evidence—Negotiable Instruments Act (1881), S. 118 (a).

Where defendants plead want of consideration in a suit on a promissory note, in discharging the burden of proof, it is not always necessary for them to prove want of consideration by producing definite evidence on their own behalf. It is open to them to rely upon the facts and circumstances of the case and also to refer to the flaws in the evidence of the plaintiff himself and then to argue that, on the record of the case as it stands, the burden has been discharged by them. Whether a party had discharged the burden of proof laid upon him is a question for the Court to decide and each case depends upon its own peculiar facts, and circumstances. [P 1031 C 2]

Fakir Chand and *Chandra Gupta*—for Appellant.

J. L. Kapur—for Respondents.

Agha Haidar, J.—This appeal arises out of a suit instituted on the 24th August 1926, by the plaintiff against defendant 1, major, and defendants 2 and 3, minors, for the recovery of Rs. 6,500 on the basis of a promissory note alleged to have been executed by Muhammad Bakhsh, father of the three aforesaid defendants, on the 25th August 1923, in his favour. The trial Judge had dismissed the plaintiff's suit. The plaintiff has come up to this Court in appeal.

Muhammad Bakhsh Gujar was an illiterate agriculturist who died some nine or ten months before the institution of the present suit on the 24th August 1926, leaving him surviving his three sons, namely, Ismail, defendant 1, and Nazir and Sharif, defendants 2 and 3. Ismail refused to act as guardian ad litem of his two minor brothers so the trial Judge, by his order dated the 9th December 1926, appointed an official of his Court to act as their guardian ad litem. Ismail filed a written statement and Nazir and Sharif also filed a separate written statement through their guardian. The purport, however, of these two documents is the same. The defendants in both these written statements plead that they have no knowledge of the debt and that the previous account may be examined. They raised certain other pleas in defence with which we are not concerned in the present appeal.

The plaintiff relies upon the promissory note, Exh. P. A., which is printed at p. 24 of the paper book and also upon his bahi account, Exh. P-2, where there is an entry in respect of this promissory note of Rs. 6,000. Against this entry are to be found two other entries which are intended to show the items which, together with interest, go to make up the main consideration of the promissory note. The first entry relating to Rs. 1,360, is dated the 10th March 1920, and mentions that the amount was taken by Muhammad Bakhsh for ornaments, clothes and other marriage expenses of one Munshi. The second entry of Rs. 1,800, is dated the 22nd March 1920, and recites that the money had been advanced to Muhammad Bakhsh for the purchase of land. The sum of Rs. 6,000, has been arrived at by adding these two items of Rs. 1,360 and Rs. 1,800 and Rupees 2,765, interest calculated on them up to the date of the promissory note in suit and a sum of Rs. 100, made up of the principal and interest of some other minor items. The total sum in fact comes to Rs. 6,025, but, after remitting a sum of Rs. 25, the amount claimed by the plaintiff comes to Rs. 6,000 plus interest Rs. 500 total Rs. 6,500.

The plaintiff produced Rura Mal, P. W. 1, who is the scribe of the promissory note in suit. He says that he personally knew Muhammad Bakhsh who put his thumb impression on the promissory note in his presence, and that the document was read over to him before obtaining his thumb-mark. He further says that the transaction had been entered in his own register also at No. 164 and that Muhammad Bakhsh's thumb-mark had been taken on it. The witness has not produced this register because, according to him, it was deposited in the Record Room of Gurdaspur. Rura Mal has further given evidence as to the entry dated the 22nd March 1920, for Rupees 1,800, in the bahi of the plaintiff. He says that this sum was advanced to Muhammad Bakhsh for buying some land. The first item of Rs. 1,360 has been sought to be proved by the evidence of Ghulam Muhammad, P. W. 3. This witness did not sign the document and he frankly admits that he is a robkari witness to the entry, and that, on two or three occasions he has acted as "robkari gwah" on behalf of the plaintiff. In the course of his cross-examination this witness has admitted that the uncle of Ismail, defendant 1, had taken proceedings against him under S. 110 of the Criminal P. C., though the matter was dropped by the police later on.

The plaintiff, Bishamber Das, has given evidence in the case on his behalf and has tried to prove the thumb-impression on the promissory note in dispute and also the items of Rs. 1,360 and Rs. 1,800. He has also given details as to how Rs. 6,000 was made up. There are no admitted thumb-impressions of Muhammad Bakhsh on the record. In rebuttal the defendants produced Munshi, D. W. 1. He is also a Gujar like the defendants and has stated on oath that Muhammad Bakhsh had no full nephew of the name of Munshi, and that he never paid for the marriage of anyone bearing that name. In answer to a question put to him by the Court the witness stated that Muhammad Bakhsh never purchased any land.

In cross-examination he stated that Muhammad Bakhsh had received a square of land from the Government ten or eleven years ago and that the sum of Rs. 2,500, which he had to pay to Government, remains unpaid. Nur Bakhsh, D. W. 2, has stated that Muhammad Bakhsh never purchased any land, that he got a square from the Government the price of which had not yet been paid, and that Muhammad Bakhsh never paid for the marriage expenses of anyone called Munshi.

Hussaina, D. W. 3, has stated that he had known Muhammad Bakhsh for 10 or 15 years and that his village was at a distance of about a mile from that of Muhammad Bakhsh. He is quite definite that Muhammad Bakhsh never purchased any land nor spent any money on the marriage of one Munshi. To the same effect is the evidence of Ghulam Qadir, D. W. 4.

In rebuttal the plaintiff produced Mahesh Das, P. W. 5, who belongs to the same caste and got as the plaintiff. He says that he had been invited by Muhammad Bakhsh and a number of other villagers to open a shop in the Montgomery District where they had been granted squares of land, and that, as a result of this invitation, he shifted to Chak No. 12 in order to carry on his business. He says that Muhammad Bakhsh and Munshi used to live together and to cultivate the land jointly and that his shop was in the same house in which Muhammad Bakhsh and Munshi lived. He finishes off by saying that he returned to his original home and stopped the business in the Montgomery district. This is all the evidence in the case. Having regard to the pleas raised in defence, there cannot be any doubt that the defendants did not in any way admit the execution of the promissory note in suit by their father Muhammad Bakhsh. In fact they distinctly put the plaintiff on proof that the promissory note was thumb-marked by Muhammad Bakhsh. In a case of this kind when the alleged executant of a document is dead and his minor sons are being sued subsequent to his death, it is necessary that the plaintiff should prove by clear, cogent and reliable evidence that the thumb-impression on the document is really that of the deceased executant. In other words, a high standard of proof would be exacted from the plaintiff before the execution of the document, which is sued upon under the circumstances indicated above, can be held to have been duly proved. In my judgment the evidence, which has been produced on behalf of the plaintiff to establish that the thumb-impression on the promissory note is really that of Muhammad Bakhsh, falls considerably short of that high standard of proof which is required by law. The best evidence in the case which was available to the plaintiff has not been produced. He could have easily summoned some of the records of the Colonization Office at Montgomery where undoubtedly Muhammad Bakhsh's genuine thumb-impressions are sure to have been preserved. The plaintiff himself is an interested party and his evidence has to be read with a great deal of caution and certainly, standing by itself, it is not sufficient to prove the genuineness of the thumb-impression on the promissory note and other entries on which he relies. Rura Mal, P. W. 1, is a man who purports to be the scribe of the document and it is significant that he has tried to keep himself out of the affair as much as possible by stating that his own register, which bore the thumb-impression of Muhammad Bakhsh, was not with him and was in fact in the Record Room of Gurdaspur. Furthermore, the transaction of Rs. 1,360, has been sought to be proved by Ghulam Muhammad, P. W. 3. It need hardly be said that the evidence of this witness is not calculated to inspire confidence in a Court of justice. I attach great importance to the observations made by the learned trial Judge in his judgment at p. 20 of the paper book where he says that

> "if the plaintiff had produced account books which showed that on the dates when he says that he advanced Rs. 1,360 and Rs. 1,800 in cash he had really paid out such sums, I would regard his case more favourably."

These account books are not forthcoming and we have got only entries of these amounts purporting to have been made on the debit side while the entry about the promissory note in suit is on the credit side. It would have greatly strengthened the case for the plaintiff if he had produced the account book dealing with the period when these two items of Rs. 1,360 and Rs. 1,800, had, according to him, been advanced to Muhammad Bakhsh. I may also note here that the entries about Rs. 1,360 and Rs. 1,800 are silent about interest.

Having regard, therefore, to the evidence on the record it is extremely doubtful whether a Court of Justice can hold that the plaintiff has proved satisfactorily that the thumb-impression on the promissory note in suit was a genuine thumb-impression of Muhammad Bakhsh and, even assuming for the sake of argument that the learned trial Judge was right in holding that Muhammad Bakhsh had been somehow tricked to put his thumb impression on the promissory note in question, the burden of proving want of consideration has been amply discharged by the defendants. In discharging the burden of proof, it is not always necessary for the defendants to prove want of consideration by producing definite evidence on their own behalf. It is open to them to rely upon the facts and circumstances of the case and also to refer to the flaws in the evidence of the plaintiff himself and then to argue that on the record of the case as it stands, the burden has been discharged by them. There are a number of authorities on this point and it is not necessary to consider them for the purposes of this appeal. Whether a party had discharged the burden of proof laid upon him is a question for the Court to decide and each case depends upon its own peculiar facts and circumstances.

In my judgment, the defendants, on the record before us, have been able to prove that no consideration had passed. The conclusion arrived at by the learned trial Judge seems to me to be correct and I do not think that anything has been brought to my notice which would justify me in reversing his finding on a question of evidence. I would, therefore, affirm the judgment and decree of the trial Judge and dismiss this appeal with costs to defendants 1 only, the minor defendants not being represented in this Court.

Addison, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 1031

DALIP SINGH, J.

Abdul Salam—Judgment-debtor—Petitioner.

v.

Joti Parshad and *another*—Decree-holder and Auction-purchaser—Opposite Party.

Civil Revn. Petn. No. 722 of 1932, Decided on 23rd October 1933, from order of Dist. Judge, Delhi, D/- 30th May 1932.

Civil P. C. (1908), O. 21, R. 90—Boundaries not correctly given in sale proclamation —But everybody recognizing property to be sold from Municipal number—Held sale could not be set aside.

In a sale of a house, the boundaries were not correctly given in the sale proclamation. But it was found that from the Municipal number of the house, everybody recognized the house to be sold :

Held : that the sale could not be set aside. [P 1032 C 2]

Muhammad Tufail—for Petitioner.

Judgment.—The only point urged by the learned counsel is that the boundaries were not correctly given in the sale proclamation. The learned District Judge considers that this fact made no difference to the bidding and that every body could recognise the house from the Municipal Number and that there is evidence to this effect. I therefore see no ground for revision and dismiss the application. No order as to costs.

K.S. *Application dismissed.*

A. I. R. 1933 Lahore 1032

DALIP SINGH, J.

Shib Ram—Defendant—Appellant.

v.

Chinta Har—Plaintiff—Respondent.

Second Appeal No. 1880 of 1932, Decided on 23rd October 1933, from decree of Dist. Judge, Hoshiarpur, D/- 29th August 1932.

(a) Partnership—Partner can, under certain circumstances bring suit for accounts without suing for dissolution.

A partner can under certain circumstances bring a suit for accounts without suing for dissolution. [P 1033 C 1]

(b) Partnership—Dissolution.

The ordinary rule is that partnerships are dissoluble at will. [P 1033 C 1]

(c) Partnership—Dissolution can be claimed by either side in alternative to any other plea

In a partnership suit like a partition suit, either side may claim a dissolution in the alternative to any other pleas that he may raise. In a suit for accounts of partnership, defendant denied the partnership, but prayed in the alternative that it may be dissolved in case it was proved to be existing:

Held: that a decree for dissolution could be granted dating from the time when the defendant put in his written statement and asked for dissolution. [P 1033 C 2]

J. N. Aggarwal and *M. C. Mahajan* — for Appellant.

Achhru Ram—for Respondent.

Judgment.—The facts of this case are that Shiv Ram, the defendant-appellant, Chinta Har, plaintiff-respondent, and one Mt. Bimla Devi were partners in a firm known as Shiv Ram and Company. This firm was itself a partner in a bigger firm known as the Kangra Jowalaji Motor Service Company and the share of Shiv Ram and Company in the larger firm was 4 annas, 11 pies in the rupee. Shiv Ram was the manager of Shiv Ram and Company. He was also general manager of the Kangra Jowalaji Motor Service Company.

On 26th June 1930, Mt. Bimla Devi, Chinta Har and Shiv Ram dissolved the partnership of Shiv Ram and Company. Shiv Ram, defendant, gave Mt. Bimla Devi a promissory note for Rs. 7,924. He promised to pay Chinta Har, plaintiff, Rs. 181. He also undertook to pay a debt due by the partnership to Shankar Nath Bhola Nath. On 28th June 1930, Chinta Har and Shiv Ram executed a new agreement by which Chinta Har became owner of half a share in the Kangra Jowalaji Motor Service Company of the 4 annas, 11 pies share which had been left with Shiv Ram after the dissolution of the firm of Shiv Ram and Company. He also became liable to discharge half the debts due by Shiv Ram to Mt. Bimla Devi and to Shankar Nath Bhola Nath. It is stated that Chinta Har would not interfere with the management of the Company by Shiv Ram and Chinta Har was to act as an accountant of the joint share of Shiv Ram & Chinta Har. It appears that out of the profits or perhaps from his own pocket, Shiv Ram alone paid off the sums due to Mt. Bimla Devi and to Shankar Nath Bhola Nath. No accounts were ever furnished by Shiv Ram to Chinta Har nor did Chinta Har ever act as an accountant. Chinta Har brought the present suit for accounts claiming that the defendant Shiv Ram was bound to give his accounts, that he was a sub-partner in the firm of Shiv Ram and Company and as such entitled to accounts and that Shiv Ram had received various profits from the Kangra Jowalaji Motor Service Company which he had unlawfully diverted to his own use. No claim was made for dissolution of the partnership of Shiv Ram and Company. The defendant took various pleas but his main plea was that the partnership embodred in the deed of the 28th June 1930 had never come into existence as there was a condition precedent that the plaintiff Chinta Har would pay up the sums due from him within three days and as he has never done so, the partnership never came into existence.

The trial Court framfed four issues. It held that the defendant had failed to prove that the partnership had never come into existence by the failure of the defendants to pay the money as no such condition precedent was proved. It held that the plaintiff was a sub-partner along with the defendant in the Kangra Jowalaji Motor Service Company, that the plaintiff was not estopped from maintaining the suit, that the plaintiff had not asked for dissolution of the partnership and that the defendant had asked for dissolution of the partnership in case it was found that one had ever existed and, therefore it granted the plaintiff a preliminary decree for dissolution of the partnership and for accounts from the 28th of June, 1930 up to the 23rd of June 1931, the date of which the plaintiff had finally paid off Mt. Bimla Devi.

The defendant appealed to the learned District Judge and the plaintiff put in cross-objections. He held that the relationship between the parties was not that of sub-partner but was that of assignee of a half share and that, therefore, the plaintiff was not entitled to any accounts nor any dissolution. He modified the decree, dissolving the partnership, and gave a declaration to the effect that the plaintiff was an assignee of half the interests of the defendant in the Kangra Jowalaji Motor Service Company. The defendant has come in appeal to this Court and the plaintiff has cross-objected.

The important question arising in this case is what is the relationship between the parties as evidenced by the deed of the 28th of June 1930 and by the surrounding circumstances. It has been strongly contended by the learned counsel for the appellant defendant that the relationship was one of partnership and that the pleading of the plaintiff was to that effect. On the other hand, the learned counsel for the respondent plaintiff contends that the relationship was one of assignor and assignee. I do not think it necessary to go into any lengthy discussion of the legal aspects. It is sufficient to say that the question is one of mixed fact and law and the pleading of the plaintiff especially in the statement of his counsel before issues and on reading the plaint as a whole and reading the deed clearly shows that the relationship was one of partnership.

The next point that arises for decision is whether a partner could bring a suit for accounts without suing for dissolution. It has been contended on the one side by the learned counsel for the defendant-appellant that he could not do so. It has been contended on the other that in the particular circumstances of this case he could. I consider that in the circumstances of this case the plaintiff was entitled to bring a suit for accounts without a suit for dissolution. (See Singhal on Partnership at p. 359 and Lindley on Partnership at p. 604).

The next point that arises is whether the partnership was indissoluble. The learned counsel for the respondent claims that it was. The ordinary rule is that partnerships are dissoluble at will and I see nothing in the circumstances of this case to show that the present partnership was indissoluble. The question remains to what date the account, if any, should be taken and whether dissolution should be granted on the prayer of the defendant. It must be remembered that in a partnership suit like a partition suit either side may claim a dissolution in the alternative to any other pleas that he may raise and I therefore consider that a decree for dissolution should be granted dating from 14th October 1931, the date when the defendant put in his written statement and asked for dissolution in case the suit was decided against him on the question of the absence of any partnership at all.

I therefore accept the appeal and give a decree for dissolution of the partnership. The plaintiff's share and the defendant's share shall be half and half. The partnership commenced on 28th June 1930, and will have to be dissolved on 14th October 1931. The defendant will render accounts between these dates: the date by which to render the accounts and the costs, etc., of the suit and appeal will be dealt with by the trial Court and in the final decree. The cross-objections are accepted as shown above.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 1033

CURRIE, J.

Tirath Ram—Petitioner.

v.

Harbhajan Singh—Opposite Party.

Civil Revn. Petn. No. 379 of 1933, Decided on 6th October 1933, from order of Dist. Judge, Amritsar.

Civil P. C. (1908), S. 24—Two appeals involving same question pending, one in District Court and another in High Court—High Court can transfer appeal in District Court to High Court.

Where two appeals involving the same question are pending, one in District Court and another in the High Court, the High Court can transfer the appeal pending in the District Court to the High Court to avoid two contrary decisions. [P 1033 C 2]

Dev Raj Sawhney—for Petitioner.

M. C. Mahajan—for Opposite Party.

Order.—After hearing counsel it appears to me that it would be more convenient if this appeal were transferred to this Court where the question of whether there was or was not a settlement between the parties is already under consideration. Mr. Mahajan's contention is that the two matters are separate and the inquiry cannot take into consideration anything elicited or decided in the suit. However it would be absurd if two contrary decisions were arrived at. I therefore transfer this appeal from the Court of the District Judge Amritsar to this Court. Parties to bear their own costs in this application.

K.S. *Application allowed.*

A. I. R. 1933 Lahore 1034

DALIP SINGH, J.

Girdhari Lal and *others* — Defendants —Appellants.

v.

Banwari Lal and *others*—Plaintiffs—Respondents.

Misc. First Appeal No. 1907 of 1932, Decided on 12th July 1933, from order of First Class Sub-Judge, Gurgaon, D/-27th October 1932.

(a) Punjab Land Revenue Act (17 of 1887), S. 111—Filing of award.

Where an award does not partition any properties in the shape of agricultural land, the Court has jurisdiction to order filing of it: *A I R* 1930 *Lah* 418, *Dist.* [P 1034 C 1]

(b) Arbitration—Award — Partition — Unequal distribution by arbitrator—Arbitrator not asked to explain unequal distribution—Court cannot refuse to file the award.

Courts of law cannot sit in judgment on the arbitrator. Hence where an arbitrator in a partition suit has not been asked to explain the unequal distribution effected by him, it is impossible for the Court to know whether the reasons that moved him to do so were just or unjust and it cannot refuse to file the award on that ground. [P 1035 C 1]

J. N. Aggarwal, *Charanjiva Lal Aggarwal*, *Ganesh Datta* and *Achhru Ram* —for Appellants.

M. C. Mahajan, *Dev Raj Sawhney* and *Partab Singh*—for Respondents.

Judgment.—This is an appeal from an order filing a certain award and rejecting the objections offered to that award. The facts of the case are stated at length in the judgments of the learned Subordinate Judge, 1st Class. One of these judgments, dated the 10th January 1931, disposes of the question of the jurisdiction of the Court. This question has been somewhat feebly urged here again, but I see no reason to differ from the conclusion arrived at by the learned Judge. The award clearly does not partition any properties in the shape of agricultural land and it cannot therefore be said that the principle of *A. I. R.* 1930 *Lah* 418 applies to this case. I, therefore, repel this contention of the appellants.

The pedigree-table of the parties is given in the judgment of the learned Judge. The only point to notice about that is that in the copy before me Banwari Lal is wrongly shown in place of Binodi Lal among the sons of Khushwaqt Rai. It may also be added to the pedigree-table that Mt. Savitri Bibi was the daughter of Khushwaqt Rai, the common ancestor of the parties. The sons of Khushwaqt Rai referred their disputes to the arbitration of two persons, one, Binodi Lal, son of Khushwaqt Rai, who had been adopted out of the family of Khushwaqt Rai and the other Ganeshi Lal, sister's son of Khushwaqt Rai. The dispute was to partition the property alleged to belong to the joint Hindu family formed by the sons of Khushwaqt Rai and also to decide disputes as to whether particular properties were separate property or belonged to the joint family property. The arbitrators proceeded first to Rewari and then, when Binodi Lal one of the arbitrators fell ill, they proceeded to Oudh and there the final award was delivered on the 20th September 1929. An application was made to make the award rule of the Court on the 27th February 1930. A tremendous list of objections was filed on behalf of Girdhari Lal and Janki Prasad. Some of these objections have not been pressed before me very rightly by the learned counsel for the appellants. I have already noted the objection as to jurisdiction. There was further an objection to the award and the reference not being co-extensive in the sense that the award had decided matters which were not included in the reference and had not decided matters which were included in the reference. This objection was practically given up by the learned counsel for the appellants and there is no force in it that I can see.

There is also an objection that the award was vague and indefinite. The main point that emerged from the argument of the learned counsel was that the trustees mentioned in list No. 6 and the Managers of the Hindu Hotel mentioned there were not determinable, but the trustees are the trustees appointed under the Waqfnama mentioned in the said list, dated the 1st February 1928, and the Managers of the Hindu Hotel are mentioned in the award itself. Hence there is no force in this contention.

The real points taken and pressed are as regards the conduct of the arbitrators and they may be divided into two heads: (1) legal misconduct and (2) moral misconduct. (After discussing the evidence His Lordship held that no misconduct on the part of the arbitrators was proved and proceeded) The next point urged was that the distribution of the assets was obviously unfair. The explanation given by the learned counsel for the respondents is that in order to save stamp the items which had been debited to each person in the books of the firm were not taken into account and if the items allotted were to be taken along with the items debited to each person in the books of the firm the distribution would be shown to be equal. I am inclined to accept this explanation for the reason that no question was put to the arbitrators to explain the obviously unequal distribution. After all Courts of law cannot sit in judgment on the arbitrator, and if the arbitrators were not asked to explain the unequal distribution it is impossible for this Court to know whether the reasons that moved them were just or unjust. I therefore repel this contentioon also. These were the only points that were contended before me. The appeal is, therefore, dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 1035 (1)

DALIP SINGH, J.

Mt. Mahan Kaur and *another*—Defendants—Appellants.

v.

Bhakthawar Singh — Plaintiff — Respondent.

Second Appeal No. 289 of 1932, Decided on 11th October 1933.

Custom (Punjab) — Jats — Succession—Ancestral property—Customary law excludes daughters against nephew.

Among the Jats the ordinary Customary law would exclude daughters against a nephew in succession to ancestral property. [P 1025 C 1]

J. L. Kapur—for Appellant.

B. P. Khosla—for Respondents.

Judgment.—The question whether the property was ancestral was admitted before the trial Court, not even raised in the grounds of appeal before the learned District Judge and cannot be raised now. The question as to the custom applicable has been decided and the parties held to be Jats. The ordinary Customary law would exclude daughters against a nephew in succession to ancestral property. There is no force in this appeal which fails and is dismissed with costs.

V.S. *Appeal dismissed.*

S. N. DAR. B. A. LL. B.,
Vakil High Court,
SRINAGAR (K

A. I. R. 1933 Lahore 1035 (2)

COLDSTREAM AND ABDUL QADIR, JJ.

Ahmad and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 868 of 1932, Decided on 1st November 1932, from order of Addl. Sess. Judge, Gujranwala, D/- 24th June 1932.

Penal Code (1860), Ss. 149, 302 and 364—All accused in Court proved to have taken part in abduction of deceased—Person by whom subsequent murder was committed not known—Ingredients necessary under S. 149 not proved—Accused are entitled to benefit of doubt on charge of murder.

All the accused before the Court were proved to have taken part in the abduction of the deceased, but it was doubtful who, if any, of them had committed the subsequent murder and there was possibility of some others having joined in the offence of murder. Further none of the ingredients under S. 149 were proved:

Held: that the accused could be convicted of murder, but should be given benefit of doubt. [P 10[illegible]7 C 2]

Abdul Aziz and *Asad Ullah Khan*—for Appellants.

D. R. Sawhney—for Opposite Party.

Abdul Qadir, J.—In this case fourteen persons were accused of having committed offences under Ss. 364 and 452, Indian Penal Code and S. 302, Indian Penal Code, with regard to the disappearance of one Behlu. It was alleged that they took him forcibly away from the house of Taja (P. W. 18), of village Treruanwali in Gujrat District, on the night of the 14th February 1932, with the intention of murdering him or so disposing of him as to put him in danger of being murdered and subsequently murdered him. Three of the fourteen accused persons are absconding and eleven were brought to trial. Of them three, namely Karam Din, Muhammada and Khawaja have been given the benefit of doubt and acquitted, while eight have been convicted under both the sections mentioned above, read with S. 149, I. P. C. Ahmad and Maulu were sentenced to death under S. 302, Indian Penal Code/S. 149, Indian Penal Code and to transportation for life under Ss. 364/149, Indian Penal Code. Daulu, Sheru, Hayat, Dulla, Fateh Ali and Fazal Ahmad were sentenced to transportation for life, under each of the two counts, no punishment having been awarded under S. 452, Indian Penal Code. They have all appealed and their case has been argued before us by Mr. Abdul Aziz and the Crown has been represented by Mr. Dev Raj Sawhney.

According to the prosecution, the parties, who are Gujjars by caste, had been at enmity with one another for a long time. In June 1931 Mulkhu, a brother of Maulu and Daulu, and a cousin of Ahmad and Sheru, disappeared and has not been heard of since.

It was suspected that he had been taken away and done to death by some members of the opposite party and Behlu deceased was one of the men who were accused of that murder. No offence was brought home to any one in connection with Mulkhu's disappearance or his alleged death, for want of sufficient proof, and it is said that the present abduction and murder was an act of revenge for the disappearance of Mulkhu. Subsequent to the incident relating to Mulkhu, both the parties had been bound down to keep the peace. Behlu, of the complainant's party, was among those from whom security was taken and all the appellants, except Sheru, were bound down on the side of the accused. The factions are said to have been led by Ahmad on the one side and by Behlu deceased on the other, and admittedly the period of securities so taken by the police had not yet expired when the present occurrence took place.

Behlu belonged to a village called Raju Bhand, also known as Nur Jamal. The distance between that village and the scene of this occurrence is about five or six kos. Taja (P. W. 18), states that he went to Dinga one day accompanied by Fazal Ilahi, who was going to Raju Bhand. He first pawned some ear-rings at Dinga and got Rupees 20, which he required and then went with Fazal Ilahi to Raju Bhand, Behlu met them there and he said he was going to village Tibbi Chand and would like to accompany them when they go back to Treruanwali. He brought his mare and rode on it. When he and his companions had gone a little distance from Raju Bhand, Ahmad accused met them and noticed that Behlu was going with them. When the three men arrived at Treruanwali in the evening Taja went to his own house and Behlu and Fazal Ilahi to the house of Lal and had their evening meal there. After they came to the place of Taja, accompanied by Lal and Sardara P. Ws. Raja (P .W. 20), brother of Taja, was also there. There were no females in that house and all these men kept awake till late at night, singing and chatting Behlu sang and the others listened to him and chatted. A lantern was hanging by a wall in the premises. The barking of dogs was heard at midnight and Lal and Raja went out to see what was the matter. When the door was opened it is said that fourteen men including the appellants, the three acquitted men and the absconders, rushed in. They were armed with chhavis and sticks and Ahmad appellant was in front of them carrying a lantern. On seeing them Behlu rushed into a kothri but the accused forced open the door and brought him out and took him away. Raja and Lal raised an alarm which brought Raja lambardar (P. W. 21) and Behlu (P. W. 22). The culprits, however, ran away to the east of the village. Some of the witnesses tried to pursue them, but were threatened and came back.

A report of the occurrence was made to the police by Sardara (P. W. 16), as an eye-witness of this abduction, on the morning of the 18th at 5 p.m., the distance between the village and the thana being six miles. After the arrival of the police a search for the missing man or his body was instituted and about evening time on the 15th February, a part of a body without head, arms or legs was found in a canal about three miles from the house of Taja. There were cuts on the body caused by sharp-edged instruments. There was a mole on the nipple and another mole at the back of the trunk on the-shoulder. There was no hair on the chest. Trackers had been sent for by the police and two of them found tracks of several men going in the direction in which the body was eventually found, but they did not find any distinct tracks, nor could they determine the number of men. The body was first noticed by a witness, named Bahadur (P. W. 7), who came and informed the Sub-Inspector. He professes to have known Behlu deceased and states that he identified the trunk by the existence of the moles on it and the want of hair on the chest. The trunk was later on shown to Mt. Bhage (P. W. 4), widow of Behlu deceased, Raja, son of Qutab Din, (P. W. 3), Sharfu, son of Kadu, (P. W. 10), and Taja, son of Ditta (P. W. 11). They all identified the trunk as that of Behlu and said that they knew it by the mole on the nipple and the mole on the shoulder

Nine of the accused persons were arrested on their arrival in their own village Raju Bhand, on 16th. Khawaja, who has been acquitted and Fazal, who

[illegible]

forth above, I would give the appellants the benefit of doubt so far as the offence under S. 302, I. P. C., is concerned and would acquit them of that charge.

The result is that the sentences of death passed against Ahmad and Maulu are not confirmed and are altered to sentences of transportation for life against each under S. 364, I. P. C., while the sentences of the other appellants who have already got transportatioon for life, are upheld, but only under S. 364, I. P. C. To the above extent the appeals are accepted.

Coldstream, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1933 Lahore 1038 (1)

ADDISON AND CURRIE, JJ.

Lal Singh—Petitioner—Appellant.

v.

Mangal Singh and *others*—Objectors—Respondents.

First Appeal No. 286 of 1932, Decided on 30th October 1933, from order of Second Sikh Gurdwaras Tribunal, Lahore, D/- 12th November 1931.

Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 7 and 15—Person not party to prior proceedings and whose right is barred by time cannot apply to review order passed.

Where the tribunal passes an order, it cannot review it on the application of a person who was not party to the proceedings in which such order was passed and whose right to object has been barred by limitation under S. 8; and the case having ended, the provisions of S. 15 cannot be utilised. [P 1038 C 2]

Din Dayal Kapur—for Appellant.

Bhagat Singh—for Respondents.

Currie, J.—A number of persons preferred a petition under S. 7, Sikh Gurdwaras Act, asking that the institution known as Dera or Gurdwara Kutti, situate in village Raqba Tahsil Jagron should be declared a Sikh Gurdwara. The usual notification was published under S. 7 (3) of the Act and in reply one Mangal Singh presented a petition under S. 8, objecting to the notification of the institution as a Sikh Gurdwara. On the day fixed for the hearing of the petition, Mangal Singh stated before the Sikh Gurdwaras Tribunal that the institution was a Sikh Gurdwara and that he had no objection if it was so declared. One of the original petitioners accepted this statement and agreed that Mangal Singh should be retained as a hereditary office holder. Accordingly the Tribunal granted a decree on the 27th July 1931, declaring that the Gurdwara "Kutti" Mauza Raqba was a Sikh Gurdwara. Subsequently the present appellant, Lal Singh on the 24th of October 1931, presented a petition before the Tribunal, claiming that he was the real office holder of the institution and had been in ignorance of the claim preferred to it and that Mangal Singh, the original petitioner, was merely a servant of the institution. He urged that the institution was a Dera of Nirmala Mehaman Shahi and not a Sikh Gurdwara. He asked that the case should be restored and previous proceedings cancelled as they were based on fraud practised on the Court. This petition was dismissed by an order of the Tribunal, dated the 12th of November 1931. Against that order the present appeal has been preferred.

Now, it is clear that the claim on behalf of Lal Singh could have been entertained by the Tribunal only if it had been preferred within ninety days of the publication of the notification under S. 7 (3). It was obviously impossible for the Tribunal to review their order on the application of a person who was not a party to the original proceedings and whose right to object was barred by limitation under S. 8 of the Act. Mr. Din Dayal Kapur has been unable to explain under what provisions of law the appellant's application could have been entertained by the Sikh Gurdwaras Tribunal. Obviously, the case having ended the provisions of S. 15 of the Act could not be utilised. In my judgment, therefore the application was rightly dismissed and I would dismiss the appeal with costs.

Addison, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 1038 (2)

DALIP SINGH, J.

Ganda Mal—Plaintiff—Appellant.

v.

Uttam Chand and *others*—Defendants—Respondents.

Second Appeal No. 1606 of 1932, Decided on 12th October 1933, from decree of Dist. Judge, Rawalpindi, D/- 19th July 1932.

Registration Act (1908), S. 49—Admissibility of document is governed by law as it exists when suit is brought.

The law laid down in S. 49 is really one of procedure, and the admissibility of a document in a suit is governed by the law as it exists when the suit is brought. [P 1039 C 1]

Pran Nath Bhardwaj—for Appellant.

Bishen Narain—for Respondents.

Judgment. — The law has been amended and the first part of the proviso to S. 49 does away with the necessity of registration. The learned counsel for respondents contends only that the amendment does not apply to the present case as the compromise was entered into before the coming into force of the amending Act. But I do not see how this affects the case. The law is really one of procedure, and the admissibility of a document in this suit is governed by the law as it exists when the suit is brought. I therefore accept the appeal and decree the plaintiff's suit with costs throughout.

V.S. *Appeal allowed.*

A. I. R. 1933 Lahore 1039

TEK CHAND AND MONROE, JJ.

(Firm) Gurditta Ram Chand — Plaintiffs—Appellants.

v.

Mt. Bhag Wanti and *others* — Defendants—Respondents.

First Appeal No. 492 of 1932, Decided on 21st November 1932, from decree of First Class Sub-Judge, Jhang, D/- 23rd December 1931.

Interest—Balance struck but no mention of interest—Course of dealing between parties raising implied agreement to pay interest—It should be allowed—Accounts.

A balance was struck between the parties but no mention was made about interest. But it was found that the course of dealings between the parties was such as to raise clear inference of an implied agreement to pay interest:

Held: interest should be allowed. [P 1039 C 2]

J. L. Kapur and *M. C. Sud* — for Appellants.

Tek Chand J.—This appeal arises out of a suit for recovery of Rs. 6,945-8-6, alleged to be due to the plaintiff by one Devi Dayal on bahi account. According to the plaint the account began on the 18th January 1914, and continued till 11th August 1927. When Devi Dayal struck a balance for Rs. 4,700-1-0. Devi Dayal died in March 1930, and in August 1930, the plaintiff brought an action for the principal sum secured by the balance and interest at 12 per cent per annum, against his widow, Mt. Bhagwanti, and his nephews, Bogha Ram and Vishan Das. The trial Judge has disallowed the claim for interest and has passed a decree against Mt. Bhag Wanti alone for Rs. 4,700, with proportionate costs, recoverable from the estate of Devi Dayal deceased. He has dismissed the suit against Bogha Ram and Vishan Das, defendants 2 and 3, and has ordered the plaintiff to pay their costs.

The plaintiff has preferred a first appeal to this Court praying that the decretal amount should be enhanced by Rs. 2,245-8-6, and that the order of the lower Court allowing costs to defendants 2 and 3 should be reversed.

The first question for consideration is whether the plaintiff is entitled to charge interest on Rs. 4,700, for which the last balance had been struck. The entry is silent about the rate of interest, and there is no evidence that there was any express agreement on this point. The previous course of dealings between the parties, however, clearly shows that interest had been charged from the very beginning and that it was charged at 12 per cent per annum on the balance struck by Devi Dayal on the 28th July 1920, and the 7th September 1924. The account was made up on the 11th August 1927, when Rs. 4,700, was found due after calculating interest at 12 per cent and excluding a small sum, which had been remitted by the creditor. The defendant attempted to prove that on that date it was expressly agreed between the plaintiff and Devi Dayal that thenceforward interest would not be charged, but the evidence is of a highly unsatisfactory character and cannot be accepted as true. On the other hand the course of dealings between the parties has been such as to raise a clear inference of an implied agreement that the principal sum secured by this balance was to bear interest as before. The plaintiff is a banker by profession and admittedly his dealings with the defendant were as between a banker and a customer. There is no reason to suppose that he allowed his money to remain with the defendant without interest. I accordingly hold that the plaintiff is entitled to interest at 12 per cent per annum, which comes to Rupees 1,692.

The plaintiff-appellant further claimed the sum of Rs. 392, which had been remitted by him to the debtor at the time when the last balance was struck. It has not been shown that this was done by mistake, and there is no reason why the plaintiff should be allowed to go behind the entry in his book. The learned Subordinate Judge has given good reasons for disallowing this part of the claim and I agree with him.

The last point urged is that defendants 2 and 3 should not have been allowed their costs of the suit against the plaintiff. But they had been impleaded in the suit and a decree was claimed against them as the legal representatives of Devi Dayal deceased. They had to disprove their liability and suceeded in doing so. They were, therefore, clearly entitled to costs from the plaintiff. For the foregoing reasons I would accept the appeal and enhance the amount decreed by the lower Court by Rs. 1,692. The entire decretal amount shall bear interest at 6 per cent from the date of the institution of the suit till realisation, and shall be recoverable from the estate of Devi Dayal deceased. Having regard to the fact that neither party has been wholly successfal in this Court, I would leave the parties to bear their own costs here.

Monroe, J.— I agree.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 1040

ADDISON AND CURRIE, JJ.

Ram Singh and *others*—Appellants.

v.

Chatar Singh and *others*—Respondents.

First Appeal No. 1755 of 1931, Decided on 30th October 1933, from decree of Second Sikh Gurdwara Tribunal, Lahore, D/- 10th July 1931.

Punjab Sikh Gurdwaras Act (8 of 1925), S. 7 — Holding of dewans and reading of Guru Granth Sahib in Gurudwara — Such Gurudwara is established for use of Sikhs even though there is no property attached to Gurudwara.

In a Gurudwara, it was found that dewans were held and that the Guru Granth Sahib was read from time to time:

Held: that the Gurudwara was one established for use by Sikhs for the purpose of public worship, even though there was no property attached to the Gurudwara. [P 1040 C 2]

Din Dayal Kapur—for Appellants.

Addison, J.—A petition was forwarded to the Local Government under the provisions of S. 7 (1), Sikh Gurdwaras Act, praying to have the Panchaiti Gurdwara in village Shahna, Tahsil and District Ludhiana declared to be a Sikh Gurdwara. This resulted in the usual notification and publication under S. 7 (3). Thereupon the present petition was put in under the provisions of S. 8 of the Act, claiming that the Gurdwara was not a Sikh Gurdwara. The petition was sent for trial to the Sikh Gurdwaras Tribunal which has found that the Gurdwara in question is a Sikh Gurdwara. This appeal is against that decision.

It was admitted in para. 3 of the petition under S. 8 that the Gurdwara had been built by the people of the village to install the Guru Granth Sahib. It was further said that the petitioners did not want the Gurdwara to be affiliated to the Shromani Gurdwara Parbandhak Committee. The opposite party did not appear and the Tribunal heard evidence ex parte. Two witnesses were examined. The 1st, Mit Singh, was one of the petitioners. He admitted that the dharamsala was built for the convenience of travellers and for the reading of the Guru Granth Sahib by the people of the village though no regular Granthi had yet been appointed. He admitted that the room shown in the plan published with the Government Notification. as the place where the Guru Granth Sahib was read had a Guru Granth Sahib there for four years before the date on which he gave evidence. In these circumstances there can be no doubt that the Guru Granth Sahib was already in the building before the petition under S. 7 (1) of the Act was forwarded to the Local Government. This witness further stated that there was no public worship in the Gurdwara but he had to admit that two youths and another person named Sundar Singh did read the Guru Granth Sahib there. According to him the building has not yet been completed, there being no room built for a langar so far and other portions being incomplete.

Another witness, Amir Singh, also admitted that the Guru Granth Sahib was read there from time to time and that dewans met there though he said there was no regular worship and offerings were not made. Holding of dewans and the reading of the Guru Granth Sahib shows that the Gurdwara was established for use by Sikhs for the purpose of public worships and it is used for such worship by Sikhs. In my judgment therefore the decree of the Tribunal is correct. It does not matter that there is no property attached to this Gurdwara. This is not necessary under the provisions of the Act. For the reasons given I would dismiss the appeal.

Currie, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 1041

ADDISON AND CURRIE, JJ.

Committee of Management of Gurdwaras, Amritsar, and *others*—Appellants.

v.

Indar Singh and *others*—Respondents.

First Appeal No. 1029 of 1930, Decided on 23rd October 1933, from decree of Second Sikh Gurdwaras Tribunal, Lahore, D/- 12th March 1930.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), S. 5 (1)—Publication of consolidated list—Person coming forward under S. 5 (1) must prove that he has right, title or interest in property included in list.

When a consolidated list is published, a person who comes forward under S. 5 (1) must prove that he has a right, title or interest in the property included in the list. If no such claim is made, the Shromani Gurdwara Parbandhak Committee has right under S. 28 to bring suit for possession which must be automatically decreed. [P 1042 C 1]

(b) Words and Phrases—Bungas are partly religious and partly charitable institutions.

Bungas are hostels where pilgrims coming from various parts of India to pay a visit to the Golden Temple stay. These hostels were founded by rich men, especially by the Rajas and were dedicated to the public as wakf property. There was appointed in each bunga a custodian called bungai whose duty was to read Granth Sahib and arrange for the comfort of the pilgrims staying in the bunga and keep the bunga in a proper order. This shows that the bungas are partly religious and partly charitable institutions and the office of Manager may therefore be said to partake of the nature of a religious office. The Manager, if he has any powers at all, may himself be the bungai or he may appoint some one else to perform the duties of the bungai who has to read the Granth Sahib. His other duties are to look after the visitors and to take proper care of the building: 9 *P R* 1917, *Foll*; *A I R* 1920 *Lah* 271, *Ref*. [P 1042 C 2]

Charan Singh—for Appellants.

Din Dayal—for Respondents.

Addison, J.—The property in suit consists of a bunga, called Bunga Man Khaira, along with three shops attached thereto. It was claimed on behalf of the Sri Harmandir Sahib, that is, the Golden Temple, in the usual consolidated list published under the provisions of S. 3 (2) of the Sikh Gurdwaras Act with Government Notification No. 269-G dated the 13th of December 1927. This notification resulted in two petitions, namely, the one which is before us and the other No. 1341, lodged by certain Jagirdars of village Sarhali, Tahsil Phillaur, District Jullundur. These Jagirdars claimed that the bunga had been built by their ancestor Sardar Nahar Singh who originally lived in Man Khaira. As the descendants of the founder of the bunga these Jagirdars claimed that it belonged to them. The Shromani Gurdwara Parbandhak Committee came to terms with these Jagirdars and a declaration was given by the Sikh Gurdwaras Tribunal in terms of the compromise. According to it, the bunga and attached shops were recognised as waqf property under the management of the Sardars of Sarhali who were to let the shops and maintain the bunga out of the rent. The appointment of a bungai or custodian was left in the hands of the Sardars who had power to change these custodians at any time and appoint a new one. It was also agreed that pilgrims could stay in the bunga when visiting the Golden Temple.

The present petition was put in by three persons, Indar Singh and Sundar Singh, sons of Hari Singh, and their cousin Sant Singh. They claimed the property as their own. They said that the main property was a stable known as Bunga Jiwan Singhwala, the three shops being part of that stable. They claimed the property as an inheritance derived from their ancestors who had constructed the building at their own cost. They further stated that they had been exerçising full proprietary rights for sixty years and that the property had no connection with the Golden Temple and was not dedicated to its service. In this petition the issues framed at first were the two following:- (1) Is the Harmandir Sahib the owner of the property in dispute? (2) Is the claim of the Harmandir Sahib within time? An application was then made by the Shromani Gurdwara Parbandhak Committee to amend the issues. It was claimed that the proper issue was: "Are the petitioners the owners of the property in dispute?" This application was rejected by a majority of the Tribunal, the President and one member holding that the persons who were in the position of plaintiffs were the Shromani Gurdwara Parbandhak Committee and that the petition of Indar Singh and the two others was merely in the nature of a counter-petition or counter-claim. The third member of the Tribunal, Sardar Kartar Singh, held that it was for the petitioners to establish their right, title or interest in the property in accordance with the provisions of S. 5 (1) of the Act and that the proper issue in view of the fact that the petitioners were in possession should be as follows:-

"Are the petitioners not the owners of the property in dispute?" Later, however, the Tribunal added the issue: (3) "Are the petitioners in possession of the Bunga as bungais and on behalf of Sri Harmandir Sahib?"

On the merits, all the members of the Tribunal held that the petitioners were mere bungais or custodians of the bunga. A majority of the Tribunal further held that it had not been proved that the Golden Temple was owner of this bunga by dedication. This majority, therefore, granted a decree to the effect that the Durbar Sahib had no proprietary rights in the property in dispute of which the petitioners were the bungais. Against this decision, this appeal has been preferred.

I have no hesitation in holding that the decision of the majority of the Tribunal to the effect that the petition of Indar Singh and the two others was in the nature of a counter-petition and that it was the duty of the Shromani Gurdwara Parbandhak Committee, at whose instance the property was included in the consolidated list, to prove their ownership, is wrong. After the consolidated list is published, the person who can come forward under S. 5 (1) of the Act is one who claims a right, title or interest in the property included in such consolidated list. If such a person does not come forward, the Local Government must under the provisions of S. 5 (3) of the Act publish a notification specifying the right, title or interest of any properties in respect of which no such claim has been made. Thereupon the Shromani Gurdwara Parbandhak Committee has the right under S. 28 of the Act to bring a suit for possession of that property which in the ordinary course of events must be automatically decreed. There is no doubt, therefore, that it was for Indar Singh, his brother and cousin to prove that they had a right, title or interest in the property.

The decree, as already stated, was to the effect that the Golden Temple had no proprietary rights in the property in dispute of which the petitioners were the bungais. Indar Singh and the two others have not appealed against that portion of the decree which gives them the position of mere bungais or custodians, and it was not seriously urged before us that they were owners and not bungais or custodians. In any case, the evidence on the record is ample to establish that they are mere bungais or custodians. Bungas are defined in *Mehr Singh v. Sochet Singh* (1) as follows:-

> "Bungas are hostels where pilgrims coming from various parts of India to pay a visit to the Golden Temple stay. These hostels were founded by rich men, especially by the Rajas and were dedicated to the public as wakf property. There was appointed in each bunga a custodian called bungai whose duty was to read Granth Sahib and arrange for the comfort of the pilgrims staying in the bunga and keep the bunga in a proper order. This shows that the bungas are partly religious and partly charitable institutions and the office of Manager may therefore be said to partake of the nature of a religious office. The Manager, if he has any powers at all, may himself be the bungai or he may appoint some one else to perform the duties of the bungai who has to read the Granth Sahib. His other duties are to look after the visitors and to take proper care of the building."

It may be noticed here that the manager mentioned was a descendant of the founder and not the bungai, who is a mere custodian appointed usually by a descendant of the founder. The waqf nature of the property was also recognized in a Division Bench judgment in *Gahl Singh v. Surjan Singh* (2). It seems to me therefore that the finding of the tribunal that the three petitioners were mere bungais, a finding which is incorporated in the decree and which has not been appealed against, should have resulted in the dismissal of the petition in which the three petitioners claimed that they were full owners of the property in question. They have not only failed to prove the position taken by them but it was established that they were not owners but mere bungais. Further it seems to me that the question whether the property is dedicated to the Golden Temple does not arise in this petition. That question has already been settled by compromise in the other petition in which the rights of the Shromani Gurdwara Parbandhak Committee and the local committee of management and the rights of the descendants of the founder have been settled. This question therefore no longer remains to be decided and need not be discussed by me except to note that the learned President and one member of the tribunal held that it had not been proved that the property was dedicated to the Golden Temple while the third member held that there was sufficient proof of this. In my opinion the question does not arise as it is settled by the compromise in the other petition, that compromise decree providing amongst other things as to who has the right of removing a bungai or custodian and otherwise controlling him. Of course the

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1 (1917) 9 P R 1917=35 I C 620.

2. A I R 1920 Lah 271=54 I C 955=146 P R 1919.

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Kashmir)

bungais are never removed, it will be open to them to raise whatever defences are open to them as bungais.

In the result, I would accept the appeal and dismiss the petition of Indar Singh, Sundar Singh and Sant Singh, claiming the property as owners as they have been properly held to be mere bungais or custodians. They will pay to the appellants the costs of this appeal.

Currie, J.—I agree.

K.S. *Appeal accepted.*

A. I. R. 1933 Lahore 1043 (1)

BROADWAY, C. J. AND AGHA HAIDAR, J.

Qadar Bakhsh — Defendant — Petitioner.

v.

Hakam—Plaintiff—Respondent.

Misc. Petn. No. 398 of 1932, and Appeal No. 3186 of 1927, Decided on 18th November 1932.

Civil P. C. (1908), O. 41, R. 19—Failure of counsel to enquire what cases he has on particular day is not sufficient excuse for setting aside dismissal of appeal.

It is the duty of the counsel to enquire what cases he has on a particular day and his failure to do so is not sufficient excuse for setting aside a dismissal for default. [P 1043 C 1]

L. Saunders—for Petitioner.

Order.—This is an application for the restoration of the appeal which was dismissed by us in default on 21st June 1932. It is urged that the case was set down in the weekly cause list as coming before the Second Bench but that it was taken up by the First Bench (ours) on 21st June 1932. Admittedly a daily cause list was issueed on the evening of 20th June, in which this case is set down for hearing before the First Bench. The learned counsel urges that the clerk did not look at the 1st Bench daily list as it was not expected that the case would come before that Bench as it was on the weekly cause list for the Second Bench. As a matter of fact it was known that, owing to the illness of one of the Judges sitting on the Second Bench, that Bench was not functioning on 20th and 21st June. In the circumstances I consider that the failure to ascertain where the case was to be heard was due to negligence. It was the duty of the counsel to ascertain what cases he had in the High Court for the 21st and his failure to carry out that duty is not sufficient excuse. We therefore dismiss this petition.

K.S. *Petition dismissed.*

S. N. DAR, B.A., LL.B.,
Vakil High Court

A. I. R. 1933 Lahore 1043 (2)

TEK CHAND AND AGHA HAIDAR, JJ.

Mt. Sattan and *another* — Plaintiffs—Petitioners.

v.

Mt. Saban and *another*—Defendants—Respondents.

Civil Misc. Petn. No. 194 of 1933, Decided on 2nd October 1933, from decree of First Class Sub-Judge, Lyallpur, D/- 1st February 1933.

Hindn Law—Re-marriage by widow in possession of husband's property — Cause of action for getting property from widow is date of re-marriage — Subsequent denial of reversioner's right by widow will not give rise to fresh cause of action.

A widow, who was in possession of her husband's property, re-married in 1913. The reversioners brought a suit for recovery of possession in 1931 alleging that she had denied their rights to the property in 1925 and that the denial gave them a fresh cause of action:

Held: that the cause of action arose in 1913 when she forfeited her interest, that the denial did not give a fresh cause of action and that the suit was barred by time. [P 1043 C 2; P 1044 C 1]

Muhammad Amin—for Petitioners.

Order.—This is an application to file an appeal in forma pauperis. One Mirdad died many years ago leaving him surviving his two daughters, namely, plaintiffs 1 and 2, and his widow, Mt. Saban, defendant 1. Shortly after the death of Mirdad Mt. Saban, his widow, began some kind of intimate relations with one Alawal. In 1897, under a registered document, she sold the property, which she had received on the death of her husband, Mirdad, to Alawal. The property is said to have been the self-acquired property of Mirdad. In 1913 Mt. Saban, the widow, actually married Alawal. Alawal is dead and the name of Mt. Saban, his widow had been entered against half the share of the property which Alawal had purchased from her in 1897 as the widow of Mirdad. The other half of the property has been entered in the name of defendant 2.

The case for the plaintiffs is that, in 1925, Mt. Saban had denied their right to the property in suit and therefore they had a fresh cause of action and therefore their suit, which was instituted in 1931, was within time. The trial Judge has gone into this question and has found that the cause of action of the plaintiffs arose in 1913 when Mt. Saban forfeited her interest in the property left by her husband by her remarriage with Alawal. This reasoning of the learned Subordinate Judge is on the face of it correct and, even assuming that after the lapse of a twelve years' period of limitation Mt. Saban denied the rights of the plaintiffs, this would not give the plaintiffs a fresh cause of action. The result therefore is that on the findings of the learned Judge of the Trial Court the suit has been rightly thrown out. It should also be remembered that it is not an ordinary appeal but a pauper appeal the scope of which is limited by the provisions of O. 44, R. 1 (proviso) Civil P. C. According to that proviso before an appeal can be admitted in forma pauperis the Court should have reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

We have given the judgment our full consideration but find nothing in it which would justify us in holding that the decree is contrary to law or to some usage or is otherwise erroneous or unjust. Under these circumstances this application to prefer an appeal in forma pauperis must fail. We accordingly dismiss this application. No order as to costs as the respondent is not represented in this Court.

K.S. *Application dismissed.*

A. I. R. 1933 Lahore 1044 (1)

DALIP SINGH, J.

Ram Chand — Decree-holder — Petitioner.

v.

Dewan Chand and *another*—Judgment-debtors—Opposite Parties.

Civil Revn. Petn. No. 646 of 1932, Decided on 25th October 1933, from order of Senior Sub-Judge, Campbellpur, D/- 30th April 1932.

Limitation—Plea of limitation apparent on face of record can be taken in appeal — Appeal.

A plea of limitation which is apparent on face of record can be taken in appeal, though not taken in trial Court, where such plea has not been waived. [P C]

Shamair Chand—for Petitioner.

Govind Ram Khanna — for Opposite Parties.

Judgment.—The learned counsel for respondent has urged that the plea of limitation could not have been taken in 1st appeal as the judgment-debtor might have pleaded fraud. I referred him to Mullas Commentary at p. 641 of the Civil Procedure Code. He then stated that this was not his contention but that this Court should not interfere in revision. But the point was taken before the Appellate Court which held that the plea had been waived. The learned counsel has not contended that the plea was waived and as the point of limitation is apparent on the record and indeed is apparent on the judgment-debtor's own statement of his case, the appellate Court did not exercise its jurisdiction when it refused to go into this question. However reluctantly I must give effect to the definite provision of the law as laid down in O. 21 rule 2 and therefore accept the petition, hold that the adjustment pleaded cannot be pleaded as being barred by limitation and direct the Court to proceed with the execution according to law. No order as to costs throughout.

K S. *Petition accepted.*

A. I. R. 1933 Lahore 1044 (2)

ADDISON AND BHIDE, JJ.

Chain Singh—Plaintiff—Petitioner.

v.

Maghar Singh and *another* — Defendants—Respondents.

Civil Misc. Petn. No. 385 of 1933, Decided on 20th October 1933, for leave to appeal to His Majesty in Privy Council, against decree of Division Bench, D/- 13th February 1933, reported in *A I R* 1933 *Lah* 900.

Civil P. C. (1908), S. 110 — Held there was no "substantial question of law."

A person was given a certain piece of land as a yoeman tenant under certain conditions. After his death his widow acquired the status of proprietor by paying the necessary instalments:

Held: that the question whether the widow became a full proprietor of the land or whether it was to be considered a mere accretion to the husband's estate was not a substantial question of law within the meaning of S. 110: 8 *P R* 1915; 129 *P R* 1916; *A I R* 1921 *Lah* 315 and *A I R* 1932 *Lah* 444, *Ref.* [P 1045 C 1]

Fakir Chand—for Petitioner.

Bhide, J.—These are two connected —petitions for leave to appeal to His Majesty-in-Council from our judgment in Civil Appeals Nos. 1133 and 2625 by which the decision of the trial Court, dismissing the plaintiff's suits was affirmed. The petitions are based on the ground that the appeals involve a substantial question of law within the meaning of S. 110, Civil P. C. The relevant facts briefly are that one Budha Singh, husband of Mt. Bisso was given some land in the Lyallpur District as a yoeman tenant on certain conditions in the year 1900. His status admittedly remained that of a tenant till his death. Subsequently his widow, Mt. Bisso acquired the status of a proprietor by payment of the necessary instalments. One of the main points for decision in the appeals was whether the property so acquired by Mt. Bisso was to be considered "self-acquired" in her hands or was a mere accretion to her husband's estate. The plaintiff's contention in both the suits was that the widow had paid the instalments out of the income of her husband's property and, therefore, the land should be considered to be an accretion to the husband's estate. The allegation of the plaintiff that the instalments were paid out of the income of the husband's property was, however, not proved, and it was held, in the circumstances, that Mt. Bisso was a full proprietor of the land in question and had an unrestricted power to alienate it.

The learned counsel for the plaintiff who has filed these petitions has urged that the question whether Mt. Bisso became a full proprietor of the land in question or whether it was to be considered a mere accretion to the husband's estate is a "substantial" question of law. He, however, conceded that there were several decisions of the Punjab Chief Court as well as of this Court which were against him, while there was no case on all four in his favour cf. *Malap Koer* v. *Hakim Singh* (1), *Sada Singh* v. *Mt. Bholi* (2), *Bisukha Singh* v. *Ishar Singh* (3) and *Uttam Singh* v. *Mt. Datar Koer* (4). There is no evidence on the record to justify a contrary view in the present suits. In the circumstances I am unable to see that there is any "substantial" question of law involved in these appeals justifying the grant of a certificate. I would, therefore, dismiss the petitions.

K S. *Petition dismissed.*

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1. (1915) 8 P R 1915=28 I C 441.
2. (1916) 129 P R 1916=36 I C 382.
3. A I R 1921 Lah 315.
4. A I R 1932 Lah 444=142 I C 680=13 Lah 820.

A. I. R. 1933 Lahore 1045

HARRISON AND ADDISON, JJ.

Sodhi Lal Singh — Plaintiff — Appellant.

v.

Fazal Din and *another*—Defendants—Respondents.

First Appeal No. 2913 of 1926, Decided on 27th October 1932, from decree of First Class Sub-Judge, Lahore, D/- 27th August 1926.

Pleadings — Allegation on which suit is based admitted to be untrue — Alternative prayer put forth after several years in appeal on facts contradictory to allegation in plaint should not be allowed.

Plaintiff's allegation on which his suit was based was admitted to be untrue and the suit was dismissed. In appeal he sought to put forth an alternative prayer based on facts which were quite contradictory to the allegation previously made and wanted the case to be remanded to lower Court:

Held: that it could not be allowed and that the appeal should be dismissed. [P 1046 C 1]

Achhru Ram and *Vishnu Dat*—for Appellant.

Mohammad Tufail and *Mallik Mohammad Amin*—for Respondents.

Judgment.—The plaintiffs in this case are the owners of a Rakh and it is admitted that they sold a certain number of standing trees of certain kinds and girth in 1919 and the defendants undertook to cut and remove them within 2½ years. They have instituted this suit, claiming Rs. 10,000 as the balance of the price. In their written statement the defendants contended that they had not cut the number of trees stated by the plaintiffs to have been cut and removed but that they cut and paid for all that there were. On this the plaintiffs applied for permission to amend their plaint and put in a second plaint bearing the same date as the first. In this they stated in the third paragraph: "According to their agreement, the defendants have cut and removed all the trees sold". The suit was dismissed and now on appeal the plaintiffs realising that they have no chance of success on the straightforward allegation made by them claim that they are entitled to have the case remanded for the decision of a plea or rather an issue arising out of a plea adumbrated by them as a possible alternative claim in the amended plaint. They do not ask for permission to amend the plaint even at this stage and it is now eight years since the suit was instituted. They were in possession and must have known the facts both when the original and the amended plaints were presented, but they did not disclose the basis of the alternative claim which they wish to put forward. This claim is wholly contradictory to the main prayer. In the original plaint the following sentence occurs in the translation made in this Court:-

> "According to their agreement the defendants have cut and removed all the 'trees sold up to May 1921, they paid Rs. 33,000 in all etc.' There should be a full stop at sold, or rather the sentence should run 'and up to May 1921, etc.' "

Counsel points out that the Subordinate Judge has relied on the sentence as now shown in the present translation and has taken the date May 1921 to be that on which the cutting ceased and that he should have taken the amended plaint. He should, but the mistake is of no consequence. In the amended plaint the paragraph runs:

"According to their agreement the defendants have cut and removed all the trees sold."

Then follows the contradictory alternative; details are not given. The plaintiffs knew precisely what were the facts. They stated categorically that all the trees had been cut and removed and based their claim on this fact. Now eight years later they disclose on appeal that they knew all the time that 7000 trees or more had not been cut and wish to recover the price of these. When the defendants pleaded that they had not cut all the trees but only 3,300 out of the 4,100, they (the plaintiffs) knowing that this was approximately correct and that 700 were still standing in 1924 pleaded:

"According to their agreement (i. e. before May 1922) the 'defendants have cut and removed all the trees sold.' "

They now disclose that this was a deliberate falsehood and on the strength of having added "And even if any trees have not been cut," leading one to suppose that possibly one or two might be still there, they are entitled to drop the claim for trees cut and to disclose this stage eight years later the true facts which they knew throughout and on this contradictory plea to recover price of 700 trees. Apart from the fact that it would be well nigh impossible to ascertain the exact girth in 1919 of trees now standing the plaintiffs must fail on the grounds that they admit that the allegation on which they based their suit is untrue, and that the alternative prayer based on facts even now only partially disclosed is wholly and utterly contradictory to that allegation.

The appeal is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 1046

JAI LAL AND AGHA HAIDAR, JJ.

Hari Chand Anand & Co. — Defendant —Petitioner.

v.

The Singer Manufacturing Co.—Plaintiffs—Respondents.

Civil Revn. Petn. No. 234 of 1933, Decided on 10th April 1933, from order of Addl. Dist. Judge, Lahore, D/- 29th March 1933.

(a) Civil P. C. (1908), S. 115—Proceedings for temporary injunction are "a case" and revisable.

The proceedings for a temporary injunction ar taken under O. 39 and must be deemed to by "a case" and therefore open to revision as they do not directly affect the ultimate decision of the suit one way or the other: *A I R* 1924 *Lah* 425, *Ref.* [P 1047 C 2]

(b) Civil P. C. (1908), O. 39, R. 2—Suit for injunction for infringement of trade mark—Balance of convenience decides if temporary injunction should be granted.

Where in a suit for injunction and other reliefs for infringement of trade mark by the defendants the plaintiff prays for a temporary injunction the Court has to see on which side the balance of convenience lies assuming that the infringement exists. Where the loss to the defendants by the grant of injunction cannot be remedied if plaintiff fails, but the plaintiff's interests can be otherwise safeguarded, the injunction should be refused. [P 1047 C 2]

Nawal Kishore and *Noratan Singh*—for Petitioner.

Norman Edmunds and *C. H. Carden Noad*—for Respondents.

Judgment.—The respondents, the Singer Manufacturing Company, have instituted a suit against the petitioner, Hari Chand Anand & Company for an injunction, delivery of articles, accounts of sales and payment of profits made by them in respect of certain articles which, it is alleged, the defendants are selling by infringing the trade-marks of the plaintiffs and thus passing them off as manufactured by the plaintiffs. The case for the plaintiffs in short is that the articles sold by the defendants are colourable imitations of the articles manufactured and sold by the plaintiffs in respect of which they have a trade-mark which trade-mark has been infringed by the defendants. On the institution of the suit the plaintiffs presented an application under O. 39 R. 2 of the Civil P. C., for the issue of a temporary injunction against the defendants preventing them, till the disposal of the suit, from selling any of the articles which were the subject matter of the suit. Affidavits and counter-affidavits were filed in support of and in opposition to this application and on consideration of these the trial Court came to the conclusion which is summed up as follows:-

"If an injunction is issued, defendants' whole trade is likely to come to a stand-still, and if not issued, the plaintiff's field of sale is covered up by the defendants and there is liklihood of the plaintiffs' corporation, in which millions of people are employed, falling to the ground."

On a consideration of these grounds the trial Court granted an injunction with regard to certain articles but refused to grant it in respect of the others. Both parties presented appeals against this order to the District Judge.

who is of opinion that the view of the trial Court that the defendants' whole trade is likely to come to a stand-still is erroneous. He apparently is of opinion that the effect of the refusal of the temporary injunction as surmised by the trial Court is also exaggerated. The learned Judge however considered that this was a fit case in which a temporary injunction should be granted and not only in respect of the articles comprised in the temporary injunction granted by the trial Court but also in respect of others also with the exception of three, the oilers, the sign-board and the price list. He, therefore, modified the order of the trial Court and included the other articles except the three specified above in the scope of the injunction. The defendants have presented this petition for revision against the order of the District Judge.

A preliminary objection is taken by Mr. Carden Noad, Advocate, for the respondents, that a petition for revision is not competent in this case on two grounds, first, that it is covered by a judgment of a Full Bench of this Court reported in *Lal Chand Mangal Sen* v. *Behari Lal Mehr Chand* (1) because proceedings relating to a temporary injunction are not "a case" separate from the suit in which they are taken and must, therefore, be considered to end in an interlocutory order against which no petition for revision is permissible; and accordingly, that on the merits no good ground for revision is disclosed by the petition.

In our opinion there is no force in either of these objections. The proceedings for a temporary injunction are taken under O. 39, of the Code of Civil Procedure and must be deemed to be "a case" as contemplated by the Full Bench judgment of this Court as they do not directly affect the ultimate decision of the suit one way or the other. With regard to the second objection an examination of the grounds for revision shows that the petitioner has alleged that the District Judge acted with material irregularity and also illegally in granting the injunction. Whether this is so is a matter which is to be considered on the merits of this petition. The preliminary objection therefore is overruled. On the merits of this petition, it seems to us that the main question that we are concerned with at this stage is the question of balance of convenience and this question would arise if we are satisfied that the plaintiffs have prima facie case. We do not consider that we are called upon at this stage to express a definite opinion on the merits of the respective cases of the two parties, as that would amount to prejudging the case and probably prejudicating the cases of both sides. Whatever order we must pass on this petition, therefore, must be considered to be confined to the question of the temporary injunction and should not be considered as an expression of opinion on the merits of the case in any way.

For the purposes of the proceedings we have assumed that there is reasonable grounds for the plaintiffs to say that there has been a colourable imitation of their goods by the defendants, a matter which we have not decided at all, and we proceed with that assumption to decide whether the balance of convenience in this case demands that a temporary injunction should be issued or whether the ends of justice would be met if the defendants are put on conditions so as to safeguard the interest of the plaintiffs if they ultimately succeed in the suit. We are of opinion that the issue of a temporary injunction in this case is likely to cause such loss to the defendants which it may not be possible afterwards to remedy if the plaintiffs ultimately fail in the suit. The injunction comprises several items of goods sold by the plaintiffs and the defendants which are apparently intensively sold. An order prohibiting the defendants form selling such articles is likely to seriously interfere with their trade: but the plaintiffs can be amply compensated by making the defendants to pay to them any profits that they might make by their illegal trade, if this is finally established. We have, therefore, reached the conclusion that the balance of convenience is on the side of the defendants and that the temporary injunction should not be granted and further that the interest of plaintiffs can be safeguarded by putting the defendants on conditions.

Consequently we accept this petition to the extent: that we discharge the temporary injunction granted by the Courts below and in its place we direct that the defendants should keep true, accurate and regular accounts of the articles in respect of which the plaintis have prayed for a temporary injunction and undertake to be accountable for and to pay to the plaintiffs it so ordered any profits that they might make by the sale of such articles. They shall

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1. **A I R 1924 Lah 425=84 I C 259=5 Lah 288 (F B).**

be required to give security for the due performance of this undertaking to the satisfaction of the trial Court. Their accounts shall be regularly scrutinised by the trial Court, and if necessary, that Court will give such directions as it may consider proper as to the form of accounts and their exhibition in Court. It will be open to the trial Court to entertain the services of a trained accountant or an auditor to check the accounts kept by the defendants and to report to it from time to time. The accounts and the reports so presented to the Court shall be open to inspection by both the parties. In the circumstances of the case we make no order as to costs of this petition.

M.N. *Revision accepted.*

A. I. R. 1933 Lahore 1048

BHIDE AND CURRIE, JJ.

Wazir Muhammad—Convict— Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 622 of 1933, Decided on 13th July 1933.

Penal Code (1860), S. 100 secondly, and 304, Part 1 — Deceased grappling with accused and throwing him down — Deceased unarmed — Accused stabbing him several times with knife — Accused exceeds right of private defence.

A was armed with a dang and *B* with a knife. *A* tried to strike at *B*, but missed. Thereupon they grappled with each other in which process *A* was unarmed but he managed to throw down *B*. *B* then struck *A* with his knife and inflicted several wounds. *A* collapsed and died under the shock:

Held: that though *B* had the right of private defence he exceeded such right and that he should be convicted under S. 304, Part 1, Penal Code. [P 1049 C 2]

Kesar Singh—for Appellant.

Des Raj Sawhney—for the Crown.

Currie, J.—The appellant Wazir Muhammad has been convicted of murdering one Gurdit Singh on 3rd January 1933, and sentenced to death. His wife Mt. Budhan, who was tried along with him, has been acquitted. According to the medical evidence Gurdit Singh received five incised wounds, one on the left side of the head which cut the outer and inner tables of the skull bone, an incised wound on the left side of the chest and two connecting wounds on the lower part of the left chest and a penetrating incised would which caused his death. This wound penetrated the right chest cavity and death was due to shock and internal haemorrhage. These wounds were admittedly inflicted by the appellant.

According to the prosecution, the appellant who is a money lender had a dispute with one Jhanda Singh, uncle of Hukam Singh, the father of the deceased and Hukam Singh took his uncle's part. On the day of the occurrence the appellant was grinding corn at the mill of P. W. 12, Muhammad Bakhsh. Muhammad Bakhsh is a carpenter and at the time was making some window frames for a mosque in a neighbouring village. The appellant asked him what he was doing and on being told commented abusively on the fact that in the village of Talwandi Logran, though the Lohars and Kashmiris had mosques, the Dogars had none, and in this connection made certain abusive remarks regarding Nabi Bakhsh lambardar. These remarks were overheard by Mt. Rahmon (P. W. 8) the wife of Nabi Bakhsh, who took exception to them and remonstrated with the appellant. An altercation ensued. Mt. Rahmon went home and informed her husband and about midday Nabi Bakhsh (P. W. 4) went to the mill and asked why the appellant was abusing him. On this the appellant abused him directly and Nabi Bakhsh replied in kind. Mehr Din, Gaman and Hukam Singh arrived and with Muhammad Bakhsh separated the parties. Nabi Bakhsh returned and Wazir Muhammad is said to have gone to his own house though he returned to the mill shortly afterwards. About 4 o'clock in the afternoon as Nabi Bakhsh was passing the mill, Wazir Muhammad again began to abuse him and he remonstrated with him. Hearing the uproar Gaman, Mehr Din and Hukam Singh and the latter's son, Gurdit Singh, appeared on the scene and Wazir Muhammed then started abusing Hukam Singh whereupon Gurdit Singh asked why he was abusing his father.

According to the story as now told in Court, Gurdit Singh and Wazir Muhammad advanced towards each other and Wazir Muhammad drew a large knife (chhuri) from the fold of his loin cloth and struck Gurdit Singh. They grappled and fell to the ground, Wazir Muhammad being underneath. He continued to strike at Gurdit Singh who finally collapsed. The onlookers then seized the knife from Wazir Muhammad, Nabi Bakhsh receiving certain injuries in the process. Mt. Budhan was alleged to have struck Gurdit Singh with another knife which was seized from her by Mehr Din. Nabi Bakhsh struck Wazir Muhammad with his dang but Wazir Muhammad snatched the dang and struck Nabi Bakhsh. Wazir Muhammad then took to his heels and took refuge in the house of Khaira mirasi. Hukam Singh purused him and finding the door chained from inside chained and padlocked it from outside. Wazir Muhammad however forced the door out of its socket and escaped over the roof to the house of Fazal Din Dogar where he was finally secured. Muhammad Bakhsh was then sent to the police station to make the first information report. The above is the story as presented in Court by Nabi Bakhsh, Gaman, Mehr Din and Hukam Singh, Muhammad Bakhsh (P. W.) states that Hukam Singh, Mehr Din, Gaman and Gurdit Singh came together all armed with dangs. Mt. Sudhan was standing at the door of the mill with a knife in her hand and Wazir Muhammad joined her and drew a knife from his loin cloth. Nabi Bakhsh, Gurdit Singh and Hukam Singh were abusing him and he returned the abuse, Gurdit Singh then struck a blow at Wazir Muhammad with his dang but failed to hit him as Wazir Muhammad stepped back and on raising his dang for another blow Wazir Muhammad grappled with him and in the struggle they fell to the ground, Wazir Muhammad being underneath. Wazir Muhammad then struck Gurdit Singh two or three blows with his knife.

Both these stories are an improvement on the first information report. There it was stated by Muhammad Bakhsh that Wazir Muhammad and his wife, Mt. Budhan, and Nabi Bakhsh were abusing each other when Gurdit Singh, Hukam Singh, Gaman and Mehr Din hearing the noise arrived. Gurdit Singh and Wazir Muhammad grappled and Gurdit Singh threw Wazir Muhammad who fell underneath and then stabbed Gurdit Singh in the abdomen. Nabi Bakhsh and Hukam Singh then beat Wazir Muhammad with their lathis and Wazir Muhammad picked up a dang which was lying there and struck Nabi Bakhsh on the head, felling him. The knife was then seized from him by Gaman and he made his escape.

The learned Sessions Judge has practically adopted the story as told in the first information report. Muhammad is now obviously trying to place the conduct of the appellant in the most favourable light by alleging that Gurdit Singh at first attempted to strike him. On the other hand, the prosecution witnesses are trying to exaggerate the case against the appellant by making out that he first struck at Gurdit Singh with a knife and was thus an aggressor a detail which none of them mentioned in the statement originally made before the police. Mt. Budhan was acquitted as there was no mention of her striking at Gurdit Singh in the first information report. (After discussing the evidence, the judgement proceeded). The learned counsel for the appellant has strenuously argued that Wazir Muhammad's action was justified and is covered by the right of private defence. He urges that Wazir Muhammad was attacked by Gurdit Singh and when he found Gurdit Singh sitting on his chest with a ring of enemies around him he would naturally have the apprehension that he would be likely to suffer grievous hurt. He would, therefore, be intitled to exercise the right of self defence even to the extent of causing death under section 100, Secondly, Indian Penal Code. This contention, however, cannot be accepted in full. Taking the view most favourable to the appellant, it may be held that Gurdit Singh grappled with him and threw him to the ground and that he would have a right of private defence. But that right, in my opinion, would not extend to causing the death of Gurdit Singh. Gurdit Singh had admittedly dropped his dang and was unarmed while grappling with the appellant. Though the appellant states that Gurdit Singh was attempting to throttle him, the medical evidence does not reveal the least trace of injury on the appellant's throat. In these circumstances it is impossible to hold that the appellant could be under any apprehension of receiving grievous hurt from Gurdit Singh.

As regards the presence of the other men, it appears to me that the prosecution story that they arrived on the scene on hearing the noise is the correct version and we have it in evidence that in the morning they had helped Muhammad Bakhsh to separate the appellant and Nabi Bakhsh. Incidentally, had Nabi Bakhsh after the morning episode any determination to take revenge, he and his supporters would have armed themselves at once and returned and attacked Wazir Muhammad and would not have waited three or four hours. In the circumstances therefore I am of opinion that the appellant in causing the death of Gurdit Singh ex-

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ceeded his right of private defence. The medical evidence shows that he repeatedly stabbed Gurdit Singh who was at the time unarmed. As he had a right of private defence, his case would fall under the Second Exception to S. 300, Penal Code. The conviction therefore should be altered to one under S. 304, Part. 1, Penal Code. I would alter the sentence to one of ten years' rigorous imprisonment.

Bhide, J.—I agree.

K.S. *Conviction altered.*

A. I. R. 1933 Lahore 1050

ADDISON AND AGHA HAIDAR, JJ.

Shiv Dev and *others*—Plaintiffs—Appellants.

v.

Dawarka Das and *others*—Defendants—Respondents.

Second Appeal No. 2519 of 1928, Decided on 12th July 1933.

(a) Hindu Law—Adoption—Kritrima form is not known in Punjab.

The Kritima form of adoption is not known in the Punjab and for all practical purposes is confined to Bebar and the West Coast of India: *A I R* 1924 *Lah* 457, *Ref.* [P 1050 C 2]

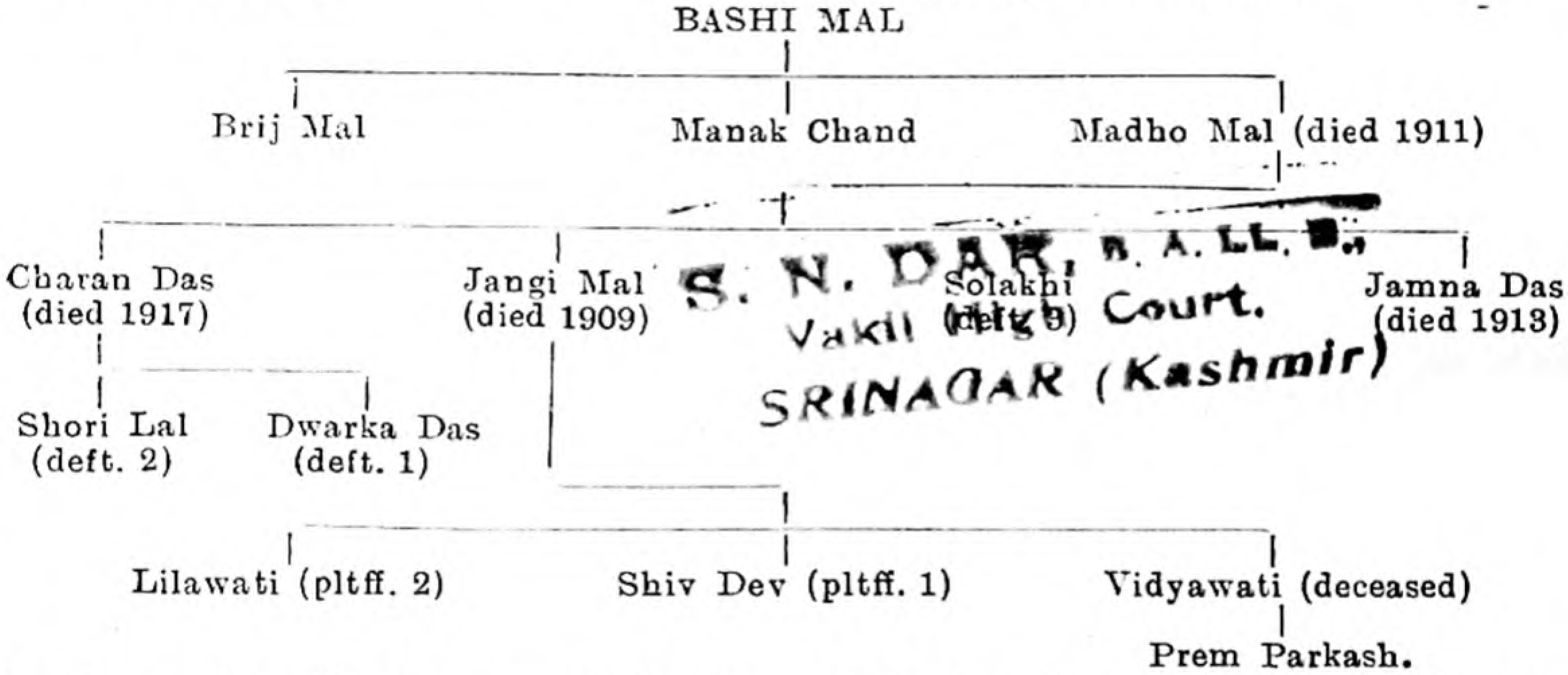
(b) Custom (Punjab) — Adoption—Khatris of Amritsar are governed by Mitakshara law varied by custom to the extent that daughter's son can be adopted—Adoptee cannot claim any share in natural father's family.

Among Khatris of Amritsar adoption is according to the Dattaka form as understood under the Mitakshara law, with the slight variation which enables a daughter's son to be adopted according to the local custom prevailing among them. Consequently the adopted boy is debarred from claiming any share in the family of his natural father: *A I R* 1921 *Lah* 147, *Ref.* [P 1051 C 1]

Badri Das—for Appellants.

Nawal Kishore—for Respondents.

Agha Haidar, J.—This appeal arises out of a suit for partition of a certain house in Amritsar city. Both the Courts below have dismissed the plaintiffs' claim and they have come up in second appeal to this Court. The following pedigree table may be subjoined here for facility of reference:



S. N. DAR, B. A. LL. B., Vakil High Court. SRINAGAR (Kashmir)

Shiv Dev, plaintiff 1, was admittedly adopted by his maternal grandfather Kesho Ram, some time in 1907. Kesho Ram educated him and performed his marriage ceremony. In the school and the college, which Shiv Dev attended, he was described as the son of Kesho Ram. When deaths occured in the natural family of Shiv Dev, he did not attend the usual ceremonies. We may therefore take it that his adoption, as the son of Kesho Ram, was complete and that he had severed his connection with his natural family to all outward appearance. Jangi Mal, the natural father of Shiv Dev, died whereupon Shiv Dev instituted the present suit to claim his share in the property left by the deceased. His claim, as already stated, was successfully resisted by the defendants and both the Courts below have held that, in view of his adoption in the family of Kesho Ram, his maternal grandfather, the plaintiff could not succeed as an heir to his natural father, Jangi Mal.

In appeal before us some slight effort was made on behalf of the appellant to maintain that the adoption of the plaintiff was in the kritrima form and that therefore he retained his right of succession in the family of his birth. This contention was given up in the early stages of the arguments for the obvious reason that the Kritrima form of adoption is not known in this part of India and, for all practical purposes, is confined to Behar and the West Coast of India: vide ***Kirpa* v. *Rabi Datt*** (1). The main argument on behalf of the appellant was that, though the parties were governed by the Mi-

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1. A I R 1924 Lah 457=78 I C 74=5 Lah 134.

takshara law, that law did not, in all its purity, apply to cases of adoption and therefore the plaintiff, in spite of his adoption by his maternal grandfather continued to have such interest in his family as entitled him to claim his share by way of succession. This argument does not appeal to me. The only form of adoption that is known among the Hindus of the Punjab, who are governed by the Hindu Law, is dattaka, but by a custom which prevails among the Khatris of Amritsar a slight inroad has been made upon the Mitakshara law on this subject. Under the Mitakshara law a Hindu cannot adopt his own daughter's son, but, according to the well-recognised custom prevailing among the Khatris of Amritsar such adoptions are allowed, although they are generally governed by the rules of Mitakshara law: vide *Parma Nand* v. *Shiv Charan Das* (2). As has been rightly pointed out in the precedent, a man cannot be a coparcener in two seperate and distinct families and yet, if the contention of the learned counsel for the appellant were to prevail, the inevitable result would be that the plaintiff would be a coparcener and entitled to a right of succession both in the family of his adoptive father as well as his natural father. This position is impossible. There are at last two instances in the family of the plaintiff himself where persons had been adopted by their maternal grandfathers and it has not been shown that they inherited after the adoption in the families of their birth.

The result therefore is that the adoption of Shiv Dev, according to the dattaka form as understood under the Mitakshara law with the slight variation which enables a daughter's son to be adopted according to the local custom prevailing among the Khatris of Amritsar does not affect the general rules governing such adoption. Consequently the plaintiff is debarred from claiming any share in the family of his natural father. The appeal on behalf of Lilawati is not pressed. I would therefore affirm the judgment and decree of the lower appellate Court dated 1st August 1928, and dismiss this appeal with costs.

Addison, J.—I agree.

K.S. *Appeal dismissed.*

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2. A I R 1921 Lah 147=59 I C 256=2 Lah 69

B. N. DAR, B. A. LL. B.
Vakil High Court,
SRINAGAR (Kashmir)

A. I. R. 1933 Lahore 1051

TEK CHAND AND AGHA HAIDAR, JJ.

Abdul Haq—Plaintiff—Appellant.

v.

Shankar Das and *another*—Defendant—Respondents.

First Appeal No. 604 of 1930, Decided on 12th October 1933, from decree of Senior Sub-Judge, Gurdaspur, D/-29th November 1929.

Civil P. C. (1908), S. 47 — Suit for declaration that decree is satisfied and incapable of execution is barred by S. 47 — *A I R* 1925 *Lah* 54, *held incorrect*.

A suit for a declaration that a decree had been fully satisfied and is incapable of execution is barred by S. 47: *A I R* 1922 *Lah.* 428 (*F B*), *Foll.*; 16 *P R* 1910=5 *I C* 814; 42 *P R* 1914=25 *I C* 642=*A I R* 1914 *Lah* 427, *Held overruled*, *A I R* 1925 *Lah* 54, *Held incorrect and not Foll.* [P 1051 C 2]

Mohsin Shah—for Appellant.

Fakir Chand, *Charanjiva Lal* and *Chandra Gupta*—for Respondents.

Tek Chand, J. — The plaintiff brought a suit for a declaration to the effect that a decree for Rupees 1,350 passed in favour of defendant 1 against the plaintiff by the Court of Syed Shaukat Hussain, Subordinate Judge, Second Class, was not capable of execution as it had been satisfied, and for issue of a perpetual injunction to defendant 1 directing him not to execute the said decree. The suit has been dismissed by the learned Senior Subordinate Judge on the ground that it was not maintainable under S. 47, Civil P. C. The plaintiff appeals.

The provisions of S. 47 are clear on the point and specifically lay down that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction, shall be determined by the Court executing the decree and not by a separate suit. There were some decisions of the Punjab Chief Court in which it had been laid down that, under certain circumstances, a suit to have it declared that a decree had been satisfied was maintainable: see *Bewan Singh* v. *Amir Singh* (1) and *Jamun Ram* v. *Kishen Ram* (2). These decisions were considered and overruled by a Full Bench of the High Court in *Ram Labhaya* v. *Mukanda Mal Kapur Chand* (3). In that case it was expressly ruled that a suit for a declara-

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1. (1910) 16 P R 1910=5 I C 814.
2. A I R 1914 Lah 427=25 I C 642=42 P R 1914.
3. A I R 1922 Lah 428=67 I C 593=8 Lah 319 (F B).

tion that a decree had been fully satisfied and was incapable of execution is barred by S. 47, Civil P. C. Mr. Mohsin Shah is unable to distinguish the present case from that decided in the Full Bench, and concedes that if the Full Bench case was correctly decided, the present suit is barred. He has however drawn our attention to a later Single Bench decision, *Bishen Singh* v. *Mahindar Singh, A. I. R.* 1925 *Lah.* 54, in which the contrary view was taken. A reference to the judgment in that case shows that the question was not discussed at any length, and the learned Judge based his decision on the rulings of the Chief Court reported as *Bewan Singh* v. *Amir Singh* (1) and *Jamun Ram* v. *Kishen Ram* (2). It appears that the attention of the learned Judge was not drawn to the Full Bench decision in *Ram Labhaya* v. *Mukanda Mal Kapur Chand* (3), which, as stated already, had expressly overruled the earlier rulings of the Chief Court. There is no doubt that *A. I. R.* 1925 *Lah.* 54 does not lay down the law correctly and cannot be accepted as an authority in view of the explicit provisions of S. 47 as interterpreted in the Full Bench judgment above referred to.

I hold therefore that the suit has been rightly dismissed. The appeal fails and is dismissed with costs.

Agha Haidar, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Lahore 1052

BHIDE, J.

Ziada—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 679 of 1933, Decided on 7th October 1933, from order of Sess. Judge, Jhelum, D/- 13th May 1933.

Penal Code (1860), S. 304, Part 1 — Altercation with regard to branches and leaves lopped off — Tree apparently belonging to accused—Accused hitting deceased with iron bound stick resulting in death — Sentence of two years' rigorous imprisonment considered sufficient.

The accused was an occupancy tenant of a field adjoining the field of the deceased. There was a kikar tree near the boundary of two fields about which there was a dispute between the parties. An altercation took place, in connexion with the collecting of leaves and branches of the tree lopped off by the deceased and his maternal uncle, in the course of which the accused gave a blow with an iron bound stick on the head of the deceased which proved fatal. Prima facie the accused was the owner of the tree and was entitled to the branches and leaves. The accused was convicted under S. 304, part 1 and sentenced to rigorous imprisonment for eight years.

Held: that the accused had exceeded his righ of private defence, but since the offence was committed in the course of sudden quarrel and in the heat of the moment the sentence was excessive and the sentence of two years' rigorous imprisonment was sufficient to meet ends of justice. [P 1053 C 1]

Ghulam Mohy-ud-din—for Appellant.

Partab Singh—for the Crown.

Judgment.—The appellant Ziada has been convicted in this case under S. 304, part I, of the Indian Penal Code and sentenced to rigorous imprisonment for eight years.

The appellant is an occupancy tenant of a field adjoining the field of the deceased Shera. There is a kikar tree near the boundary of the two fields about which there was a dispute between the parties. On the 21st of January last at about mid-day Shera and his maternal uncle Fateh Din went to the field and lopped off branches from the kikar tree and were collecting the leaves and branches when the appellant Ziada arrived. He objected to the deceased and Fateh Din taking away the branches and leaves as he claimed to be the owner of the kikar tree. The deceased and Fateh Din, however, said that they were the owners and were entitled to take the branches and leaves. This led to an altercation in the course of which Ziada gave a lathi blow on the head of Shera. The injury proved fatal. Ziada was alleged to have been accompanied by three other persons who were said to have taken part in the assault. The learned Sessions Judge however found that the prosecution evidence against these three persons was not reliable. He, therefore, gave them the benefit of doubt and convicted the appellant only. The appellant admitted that there was a dispute about the kikar tree and that an altercation took place in connection with the collecting of the branches and leaves. He alleged, however, that he had been himself assaulted with a hatchet by the deceased and that he had given him a blow with a lathi in the exercise of the right of private defence. In support of this allegation, two witnesses were produced, but the evidence of these witnesses was not considered by the learned Sessions Judge to be worthy of credit.

After going through the evidence on the record, I find myself in agreement with the opinion of the learned Sessions Judge. The majority of the assessors also expressed a similar opinion. The story of the assault with a hatchet

S. N. DAR, B. A. LL. B.,
Vakil High Court.

seems to be an invention. It was the appellant who had a grievance on account of the branches having been cut. The village Patwari has deposed that the kikar tree stands in the land of the appellant and prima facie he appears to be entitled to it. He had no doubt a right to prevent the deceased from taking away the branches and leaves of the tree, but the evidence does not show that he had any justification for going to the length of hitting the deceased on the head with an iron bound stick as he did. He was, therefore, rightly held to have exceeded his right of private defence. The sentence of eight years passed on him, however, appears to be excessive. There is no doubt that the offence was committed in the course of a sudden quarrel and and in the heat of the moment only one blow was given. The fact that the appellant was apparently the owner of the kikar tree must also be taken into consideration. In view of all the circumstances, I think that a sentence of rigorous imprisonment for two years will be sufficient to meet the ends of justice. I, therefore, accept the appeal to the extent of reducing the sentence to that period.

V.B. *Sentence reduced.*

A. I. R. 1933 Lahore 1053

ADDISON AND AGHA HAIDAR, JJ.

Wazir—Convict—Appellant.

v.

Emperor—Oppcsite Party.

Criminal Appeal No. 239 of 1933, Decided on 17th May 1933, from order of Sess. Judge, Lahore, D/- 9th January 1933.

Penal Code (1860), Ss. 100 and 302 — Deceased and another armed with ballam and barchhi coming forward bent upon attacking accused and his people—Accused giving blow to deceased under apprehension of death to himself and his people — Accused is justified in protecting and is not guilty under S. 302.

The deceased and another who had already attacked a cousin of accused came forward armed with ballam and barchhi bent upon attacking the accused and his people. The accused gave the deceased a blow in his stomach as a result of which he fell down:

Held: that the accused was justified in protecting himself and his people as he was under apprehension of a further attack on himself and his people and consequent death and that he was not guilty under S. 802. [P 1053 C 1]

Mohsin Shah—for Appellant.

Des Raj Sawhney—for Opposite Party.

Agha Haidar, J.—Wazir a tali of the village Bhoptain in the district of Lahore, has been convicted by the Sessions Judge, Lahore, of an offence under S. 302 of the Indian Penal Code, and has been sentenced to suffer the extreme penalty of law. He has appealed to this Court through the jail authorities and the record of the case is also before the Court, under S. 374 of the Criminal Procedure Code, for confirmation of the capital sentence.

Wazir, accused, Gajjan Singh deceased, and Ujagar Singh, P. W. 6, are all natives of the village Bhoptain. Ujagar Singh, who is aged about 32 years, contracted an illicit intimacy with Mt. Dani sister of the accused, about two years ago. The accused naturally resented it and by way of retaliation, molested Mt. Devo, the niece of Ujagar Singh. This brought matters to a head and there was a panchayat. The upshot of the Panchayat was a curious one. Wazir and his sister Mt. Dani were expelled from the village and the latter went to live with her husband's parents. Two or three weeks before the occurrence Wazir accused returned to his native village, Bhoptian. We have the evidence of Mt. Sulakhi, P. W. 7, a cousin of the accused, that five or six days before the occurrence Ujagar Singh jumped over the wall of their house with the object of visiting Mt. Dani, but the wife of Khushia, a cousin of the accused, and Mt. Sulakhi herself, raised an alarm, with the result that Ujagar Singh had to run away.

On the morning of the 24th June 1932, Khushia, his sister Mt. Sulakhi and their mother were digging earth from the village pond not far from Ujagar Singh's field. Ujagar Singh, who happened to be present there, took exception to this and abused Khushia for digging earth from the pond. Khushia remonstrated and said that he had every right to take away the earth. Thereupon Ujagar Singh, who was carrying a dang, gave a blow to Khushia and also struck the girl Mt. Sulakhi, the sister of Khushia, with it. Khushia, raised an outcry whereupon the accused, who is related as a cousin to Khushia and his sister, came armed with a ballam. Apparently his object was to protect his womenfolk and Khushia against the possibility of any further attack by Ujagar Singh. Ujagar Singh, on seeing the accused coming ran away to his house which was not very far and returned with a ballam. There is not an iota of evidence to show that the accused, pursued Ujagar Singh while he was running away towards his house and had only a dang with him, while the accused had a much more dangerous weapon, namely, a ballam. Ujagar Singh emerged from his house armed with a barchi and was joined by Gajjan Singh deceased. Both of them came running to the spot where the accused and his cousins with their mother were present. Gajjan Singh was running a little ahead of Ujagar Singh and, according to the evidence of the three eye-witnesses, namely, Prem Singh, P. W. 3, Ishar Singh, P. W. 4, and Mohammad Rafiq, P. W. 5, the accused gave him a blow with the ballam in his stomach. Gajjan Singh fell down and Ujagar Singh resumed his attack upon Khushia and inflicted two more injuries upon him with his barchhi. The injuries given to Khushia were not serious, but the fact shows the state of Ujagar Singh's mind and clearly indicates that he was bent upon attacking Khushia and his people.

The evidence given by Mt. Sulakhi, P. W. 7, is different from the rest of the witnesses for the prosecution on this piont. She, says that Wazir accused gave a blow to Gajjan Singh only after Ujagar Singh had attacked Khushia for the second time This may or may not be true; but, even on the evidence of the three eye-witnesses already mentioned. Ujagar Singh had no justification whatsoever for using violence towards Khushia and his womenfolk. The accused was perfectly within his right when, on hearing the alarm, he came armed with a spear to protect Khushia and his mother and sister. He had not done any mischief until Ujagar Singh and Gajjan came care-ering along and naturally he must have apprehended that they would attack him and probably kill him. Under these circumstances he was under the law justified in protecting himself and those in whom he was interested, namely, Khushia and the two women by attacking Gajjan Singh as he was coming ahead of Ujagar Singh. I refuse to believe the evidence of the witnesses for the prosecution when they say that Gajjan Singh spoke to the accused and told him not to fight. Such a remark, in view of the circumstances enumerated above, would be singularly out of place. Having regard to the series of provocations received by the accused from time to time at the hands of Ujagar Singh and also to the attack which had been made earlier upon Khushia and Mt. Sulakhi, P. W. 7 and the further attack by Ujagar Singh and Gajjan Singh which was apprehended, he was, in my judgment, fully justified in protecting himself and his relations in the manner in which he did. This being so, the conviction of the accused under S. 302 of the Indian Penal Code cannot be maintained.

I would, therefore, allow the appeal of Wazir and, setting aside his conviction and sentence, order that he be released forthwith.

Addison, J.—I concur.

K.S. *Appeal allowed.*

A. I. R. 1933 Lahore 1054

ADDISON AND AGHA HAIDAR, JJ.

Dewa Singh and *others* — Plaintiffs — Appellants.

v.

Mt. Kishno and *others*—Defendants—Respondents.

Second Appeal No. 1922 of 1928, Decided on 17th November 1932, from Dist. Judge, Ludhiana, D/- 23rd June 1928.

Custom (Punjab) — Ancestral property — Mere mention of name of common ancestor is insufficient to raise presumption that property is descended from him.

The mere mention of the name of the common ancestor in the settlement pedigree table is insufficient to raise a presumption that the property had descended from him: *A I R* 1927 *Lah* 477, *Rel. on.* [P 1054 C 2]

Lal Chand Mehra—for Appellants.

T. D. Khanna for *Bishan Nath* and *Balwant Rai*—for Respondents.

Judgment.—The only question arising in this second appeal is whether the land in suit was ancestral qua the plaintiffs. Both the Courts below have held that it was not ancestral and prima facie this is a finding of fact. Some attempt was made before us to argue that the evidence supplied by the remarks in the Kaifiyat deh attached to the pedigree-table had been misread, but this does not appear to be the case. The mere mention of the name of the common ancestor in the settlement pedigree-table has frequently been held to be insufficient to raise a presumption that the property has descended from him; see *Chanda Singh* v. *Mt. Bhonto* (1) while the Kaifiyat deh does not establish, that the common ancestor ever occupied the land. The case was properly decided and the appeal is also concluded by a finding of fact.

The appeal must, therefore, be dismissed with costs.

K.S. *Appeal dismissed.*

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1. A I R 1927 Lah 477=102 I C 818=8 Lah 684.

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